Addis Ababa, Ethiopia
1-26 April 2013

STUDY MATERIALS
PART I

Codification Division of the United Nations Office of Legal Affairs

Copyright © United Nations, 2013
Addis Ababa, Ethiopia
1-2 April 2013

INTRODUCTION TO INTERNATIONAL LAW
PROFESSOR GEORG NOLTE

Codification Division of the United Nations Office of Legal Affairs

Copyright © United Nations, 2013
Mr. Georg Nolte (Germany) is Professor for German and Comparative Public Law, Public International Law and European Law at the Humboldt University of Berlin since 2008. He previously taught these topics at the Faculty of Law of the Ludwig-Maximillans-University and the University of Göttingen. In addition, he served as a visiting Professor at the University Paris II (Panthéon-Assas), Institut des Hautes Etudes Internationales in 2004 and the University of Saarland at Saarbruecken, Faculty of Law and Economics.

From October 2006 to July 2007, Professor Nolte was a fellow of the Wissenschaftskolleg zu Berlin, Institute for Advanced Studies. In 2004 he received the Caspar-Borner-Medal, awarded by the Senate of the University of Leipzig for “merits in the process of the renewal of the University of Leipzig”.

Professor Nolte is a Member of the International Law Commission of the United Nations since 2007 and was a Member of the European Commission for Democracy through Law (Venice Commission) from 2000 to 2007. Professor Nolte is also Vice Chairman and Member of the Council of the German Society of International Law, Member of the Governing Board of the German Society for Peace Research and Member of the Scientific Advisory Board of the Peace Research Institute Frankfurt.

Professor Nolte is involved in several Journals, such as the Die Friedenswarte-Journal of International Peace and Organization, the Göttingen Journal of International Law and the Revue Belge de Droit International. He is the author of numerous books and academic articles.
Legal instruments and documents

1. Charter of the United Nations, 1945
   For text, see *Charter of the United Nations and Statute of the International Court of Justice*
2. Universal Declaration of Human Rights, 1948
5. Definition of Aggression (United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974)
6. Articles on the responsibility of States for internationally wrongful acts (United Nations General Assembly resolution 56/83 of 12 December 2001, annex)
   (For text, see *The Work of the International Law Commission*, 8th ed., vol. II, p. 401)
7. The crime of aggression (Assembly of States Parties to the Rome Statute of the International Criminal Court, Kampala, Resolution RC/Res.6 of 11 June 2010)

A) The nature of international law, its historical development, use of force

Legal instruments and documents

8. 2005 World Summit Outcome (United Nations General Assembly resolution 60/1 of 16 September 2005)

Case Law

B) Sources and subjects

Legal instruments and documents


Case Law


C) Treaty law

Legal instruments and documents

Reservations


Case Law

Interpretation


Invalidity, termination, and suspension

D) The relationship between international and national law, jurisdiction and immunity

Case Law

The effect of Security Council resolutions
21. *Nada v. Switzerland*, No. 10593/08, European Court of Human Rights, 12 September 2012

State immunity
22. *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, International Court of Justice, Judgment of 3 February 2012

Jurisdiction and Immunity of State Officials
25. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, International Court of Justice, Judgment of 20 July 2012
26. Separate Opinion of Judge Abraham, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, International Court of Justice, Judgment of 20 July 2012
Universal Declaration of Human Rights
(United Nations General Assembly resolution 217 (III) A of 10 December 1948)
4. Requests the United Nations International Children’s Emergency Fund, as the United Nations agency entrusted with special responsibility for meeting emergency needs of children in many parts of the world:

(a) To assist in the conduct of national campaigns for the benefit of the International Children’s Emergency Fund, with a view to providing international co-ordination of voluntary governmental and non-governmental appeals for the benefit of children;
(b) To report concerning the appeals to the ninth session of the Economic and Social Council and to the fourth regular session of the General Assembly.

Hundred and seventy-seventh plenary meeting, 8 December 1948.

216 (III). Advisory social welfare services

The General Assembly,

Having considered resolution 155 (VII) of the Economic and Social Council of 13 August 1948 on advisory social welfare services,

Approves the provisions of that resolution.

Hundred and seventy-seventh plenary meeting, 8 December 1948.

217 (III). International Bill of Human Rights

A

UNIVERSAL DECLARATION
OF HUMAN RIGHTS

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,
Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

**Article 1**

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

**Article 2**

Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

**Article 3**

Everyone has the right to life, liberty and the security of person.

Considerant que dans la Charte les peuples des Nations Unies ont proclamé à nouveau leur foi dans les droits fondamentaux de l'homme, dans la dignité et la valeur de la personne humaine, dans l'égalité des droits des hommes et des femmes, et qu'ils se sont déclarés résolus à favoriser le progrès social et à instaurer de meilleures conditions de vie dans une liberté plus grande,

Considerant que les États Membres se sont engagés à assurer, en coopération avec l'Organisation des Nations Unies, le respect universel et effectif des droits de l'homme et des libertés fondamentales,

Considerant qu'une conception commune de ces droits et libertés est de la plus haute importance pour remplir pleinement cet engagement,

L'Assemblée générale

Proclame la présente Déclaration universelle des droits de l'homme comme l'idéal commun à atteindre par tous les peuples et toutes les nations afin que tous les individus et tous les organes de la société, ayant cette Déclaration constamment à l'esprit, s'efforcent, par l'enseignement et l'éducation, de développer le respect de ces droits et libertés et d'en assurer, par des mesures progressives d'ordre national et international, la reconnaissance et l'application universelles et effectives, tant parmi les populations des États Membres eux-mêmes que parmi celles des territoires placés sous leur juridiction.

**Article premier**

Tous les êtres humains naissent libres et égaux en dignité et en droits. Ils sont dotés de raison et de conscience et doivent agir les uns envers les autres dans un esprit de fraternité.

**Article 2**

Chacun peut se prévaloir de tous les droits et de toutes les libertés proclamés dans la présente Déclaration, sans distinction aucune, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation.

De plus, il ne sera fait aucune distinction fondée sur le statut politique, juridique ou international du pays ou du territoire dont une personne est ressortissante, que ce pays ou territoire soit indépendant, sous tutelle, non autonome ou soumis à une limitation quelconque de souveraineté.

**Article 3**

Tout individu a droit à la vie, à la liberté et à la sûreté de sa personne.
**Article 4**

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

**Article 5**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

**Article 6**

Everyone has the right to recognition everywhere as a person before the law.

**Article 7**

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

**Article 8**

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

**Article 9**

No one shall be subjected to arbitrary arrest, detention or exile.

**Article 10**

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

**Article 11**

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

**Article 12**

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the pro-

**Article 4**

Nul ne sera tenu en esclavage ni en servitude; l'esclavage et la traite des esclaves sont interdits sous toutes leurs formes.

**Article 5**

Nul ne sera soumis à la torture, ni à des peines ou traitements cruels, inhumains ou dégradants.

**Article 6**

Chacun a le droit à la reconnaissance en tous lieux de sa personnalité juridique.

**Article 7**

Tous sont égaux devant la loi et ont droit sans distinction à une égale protection de la loi. Tous ont droit à une protection égale contre toute discrimination qui violerait la présente Déclaration et contre toute provocation à une telle discrimination.

**Article 8**

Toute personne a droit à un recours effectif devant les juridictions nationales compétentes contre les actes violant les droits fondamentaux qui lui sont reconnus par la constitution ou par la loi.

**Article 9**

Nul ne peut être arbitrairement arrêté, détenu ni exilé.

**Article 10**

Toute personne a droit, en pleine égalité, à ce que sa cause soit entendue équitablement et publiquement par un tribunal indépendant et impartial, qui décidera, soit de ses droits et obligations, soit du bien fondé de toute accusation en matière pénale dirigée contre elle.

**Article 11**

1. Toute personne accusée d'un acte délictueux est prémise innocent jusqu'à ce que sa culpabilité ait été légalement établie au cours d'un procès public où toutes les garanties nécessaires à sa défense lui auront été assurées.

2. Nul ne sera condamné pour des actions ou omissions qui, au moment où elles ont été commises, ne constituaient pas un acte délictueux d'après le droit national ou international. De même, il ne sera infligée aucune peine plus forte que celle qui était applicable au moment où l'acte délictueux a été commis.

**Article 12**

Nul ne sera l'objet d'immixtions arbitraires dans sa vie privée, sa famille, son domicile ou sa correspondance, ni d'attaques à son honneur et à sa réputation. Toute personne a droit à la
Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to protect de la loi contre de telles immixtions ou de telles atteintes.

Article 13

1. Toute personne a le droit de circuler librement et de choisir sa résidence à l'intérieur d'un État.

2. Toute personne a le droit de quitter tout pays, y compris le sien, et de revenir dans son pays.

Article 14

1. Devant la persécution, toute personne a le droit de chercher asile et de bénéficier de l'asile en d'autres pays.

2. Ce droit ne peut être invoqué dans le cas de poursuites réellement fondées sur un crime de droit commun ou sur des agissements contraires aux buts et aux principes des Nations Unies.

Article 15

1. Tout individu a droit à une nationalité.

2. Nul ne peut être arbitrairement privé de sa nationalité, ni du droit de changer de nationalité.

Article 16

1. À partir de l'âge nubile, l'homme et la femme, sans aucune restriction quant à la race, la nationalité ou la religion, ont le droit de se marier et de fonder une famille. Ils ont des droits égaux au regard du mariage, durant le mariage et lors de sa dissolution.

2. Le mariage ne peut être conclu qu'avec le libre et plein consentement des futurs époux.

3. La famille est l'élément naturel et fondamental de la société et a droit à la protection de la société et de l'État.

Article 17

1. Toute personne, aussi bien seule qu'en collectivité, a droit à la propriété.

2. Nul ne peut être arbitrairement privé de sa propriété.

Article 18

Toute personne a droit à la liberté de pensée, de conscience et de religion; ce droit implique la liberté de changer de religion ou de conviction ainsi que la liberté de manifester sa religion ou sa conviction, seule ou en commun, tant en public qu'en privé, par l'enseignement, les pratiques, le culte et l'accomplissement des rites.

Article 19

Tout individu a droit à la liberté d'opinion et d'expression, ce qui implique le droit de ne
hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 20

1. Toute personne a droit à la liberté de réunion et d'association pacifiques.

2. Nul ne peut être obligé de faire partie d'une association.

Article 21

1. Toute personne a le droit de prendre part à la direction des affaires publiques de son pays, soit directement, soit par l'intermédiaire de représentants librement choisis.

2. Toute personne a droit à accéder, dans des conditions d'égalité, aux fonctions publiques de son pays.

3. La volonté du peuple est le fondement de l'autorité des pouvoirs publics; cette volonté doit s'exprimer par des élections honnêtes qui doivent avoir lieu périodiquement, au suffrage universel égal et au vote secret ou suivant une procédure équivalente assurant la liberté du vote.

Article 22

Toute personne, en tant que membre de la société, a droit à la sécurité sociale; elle est fondée à obtenir la satisfaction des droits économiques, sociaux et culturels indispensables à sa dignité et au libre développement de sa personnalité, grâce à l'effort national et à la coopération internationale, compte tenu de l'organisation et des ressources de chaque pays.

Article 23

1. Toute personne a droit au travail, au libre choix de son travail, à des conditions équitables et satisfaisantes de travail et à la protection contre le chômage.

2. Tous ont droit, sans aucune discrimination, à un salaire égal pour un travail égal.

3. Quiconque travaille a droit à une rémunération équitable et satisfaisante lui assurant ainsi qu'à sa famille une existence conforme à la dignité humaine et complète, s'il y a lieu, par tous autres moyens de protection sociale.

4. Toute personne a le droit de fonder avec d'autres des syndicats et de s'affilier à des syndicats pour la défense de ses intérêts.

Article 24

Toute personne a droit au repos et aux loisirs et notamment à une limitation raisonnable de la durée du travail et à des congés payés périodiques.
Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

**Article 30**

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

_Hundred and eighty-third plenary meeting._
_10 December 1948._

**B**

**RIGHT OF PETITION**

_The General Assembly,_

**Considering** that the right of petition is an essential human right, as is recognized in the Constitutions of a great number of countries,

_Having considered_ the draft article on petitions in document A/C.3/306 and the amendments offered thereto by Cuba and France,

**Decides** not to take any action on this matter at the present session;

**Requests** the Economic and Social Council to ask the Commission on Human Rights to give further examination to the problem of petitions when studying the draft covenant on human rights and measures of implementation, in order to enable the General Assembly to consider what further action, if any, should be taken at its next regular session regarding the problem of petitions.

_Hundred and eighty-third plenary meeting._
_10 December 1948._

**G**

**FATE OF MINORITIES**

_The General Assembly,_

**Considering** that the United Nations cannot remain indifferent to the fate of minorities,

**Considering** that it is difficult to adopt a uniform solution of this complex and delicate question, which has special aspects in each State in which it arises,

2. Dans l'exercice de ses droits et dans la jouissance de ses libertés, chacun n’est soumis qu’aux limitations établies par la loi exclusivement en vue d’assurer la reconnaissance et le respect des droits et libertés d’autrui et afin de satisfaire aux justes exigences de la morale, de l’ordre public et du bien-être général dans une société démocratique.


**Article 30**

Aucune disposition de la présente Déclaration ne peut être interprétée comme impliquant pour un État, un groupement ou un individu un droit quelconque de se livrer à une activité ou d’accomplir un acte visant à la destruction des droits et libertés qui y sont énoncés.

_Cent-quatre-vingt-treizième séance plénière._
_le 10 décembre 1948._

**SORT DES MINORITÉS**

_L’Assemblée générale,_

**Considérant** que les Nations Unies ne peuvent pas demeurer indifférentes au sort des minorités,

**Considérant** qu’il est difficile d’adopter une solution uniforme de cette question complexe et délicate qui revêt des aspects particuliers dans chaque État où elle se pose,
Vienna Convention on the Law of Treaties

1969

The States Parties to the present Convention,

Considering the fundamental role of treaties in the history of international relations,

Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems,

Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized,

Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,

Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations,

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

Have agreed as follows:

PART I.

INTRODUCTION

Article 1

Scope of the present Convention

The present Convention applies to treaties between States.
Article 2

Use of terms

1. For the purposes of the present Convention:

   (a) "treaty" means an international agreement concluded between States in written form and governed
   by international law, whether embodied in a single instrument or in two or more related instruments and
   whatever its particular designation;

   (b) "ratification", "acceptance", "approval" and "accession" mean in each case the international act
   so named whereby a State establishes on the international plane its consent to be bound by a treaty;

   (c) "full powers" means a document emanating from the competent authority of a State designating a
   person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty,
   for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with
   respect to a treaty;

   (d) "reservation" means a unilateral statement, however phrased or named, made by a State, when
   signing, ratifying, accepting, approving or accessing a treaty, whereby it purports to exclude or to
   modify the legal effect of certain provisions of the treaty in their application to that State;

   (e) "negotiating State" means a State which took part in the drawing up and adoption of the text of
   the treaty;

   (f) "contracting State" means a State which has consented to be bound by the treaty, whether or not
   the treaty has entered into force;

   (g) "third State" means a State not a party to the treaty;

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without
   prejudice to the interpretation applicable to international agreements concluded between States and
   other subjects of international law or between such other subjects of international law, or to
   international agreements not in written form, shall not affect:
2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(c) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Article 8
Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

Article 9
Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

Article 10
Authentication of the text

The text of a treaty is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

(b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.
2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18
Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION 2. RESERVATIONS

Article 19
Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20
Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to
the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of
the treaty as between the objecting and reserving States unless a contrary intention is definitely
expressed by the objecting State;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is
effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is
considered to have been accepted by a State if it shall have raised no objection to the reservation by the
end of a period of twelve months after it was notified of the reservation or by the date on which it
expressed its consent to be bound by the treaty, whichever is later.

Article 21
Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to
which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving
State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty
inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty
between itself and the reserving State, the provisions to which the reservation relates do not apply as
between the two States to the extent of the reservation.

Article 22
Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the
consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any
time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State only
when notice of it has been received by that State;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been
received by the State which formulated the reservation.

Article 23
Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be
formulated in writing and communicated to the contracting States and other States entitled to become
parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a
reservation must be formally confirmed by the reserving State when expressing its consent to be bound
by the treaty. In such a case the reservation shall be considered as having been made on the date of its
confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of
the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in
writing.

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL,
APPLICATION OF TREATIES

Article 24
Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the
negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be
bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound by a treaty is established on a date after the treaty has
come into force, the treaty enters into force for that State on that date, unless the treaty otherwise
provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the
consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the
functions of the depositary and other matters arising necessarily before the entry into force of the treaty
apply from the time of the adoption of its text.
Article 25
Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III.
OBSERVANCE, APPLICATION AND
INTERPRETATION OF TREATIES

SECTION 1. OBSERVANCE OF TREATIES

Article 26
“Pacta sunt servanda”

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27
Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

SECTION 2. APPLICATION OF TREATIES

Article 28
Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 29
Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Article 30
Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States Parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES

Article 34
General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Article 35
Treaties providing for obligations for third States

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Article 36
Treaties providing for rights for third States

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37
Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Article 38
Rules in a treaty becoming binding on third States through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

PART IV. AMENDMENT AND MODIFICATION OF TREATIES

Article 39
General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide.
Article 40
Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41
Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such a modification is provided for by the treaty; or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Part V.
Invalidity, termination and suspension of the operation of treaties

Section 1. General provisions

Article 42
Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 43
Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Article 44
Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50, the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.
5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

**Article 45**  
Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

**SECTION 2. INVALIDITY OF TREATIES**

**Article 46**  
Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

**Article 47**  
Specific restrictions on authority to express the consent of a State

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

**Article 48**  
Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

**Article 49**  
Fraud

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

**Article 50**  
Corruption of a representative of a State

If the expression of a State’s consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

**Article 51**  
Coercion of a representative of a State

The expression of a State’s consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

**Article 52**  
Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

**Article 53**  
Treaties conflicting with a peremptory norm of general international law ("jus cogens")

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.
SECTION 3. TERMINATION AND SUSPENSION
OF THE OPERATION OF TREATIES

Article 54
Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:
(a) in conformity with the provisions of the treaty; or
(b) at any time by consent of all the parties after consultation with the other contracting States.

Article 55
Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56
Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
(a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months’ notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57
Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:
(a) in conformity with the provisions of the treaty; or
(b) at any time by consent of all the parties after consultation with the other contracting States.
Article 61
Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from, or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62
Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63
Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except insofar as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64
Emergence of a new peremptory norm of general international law ("jus cogens")

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65
Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.
3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

**Article 66**

**Procedures for judicial settlement, arbitration and conciliation**

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

**Article 67**

**Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty**

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act of declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

**Article 68**

**Revocation of notifications and instruments provided for in articles 65 and 67**

A notification or instrument provided for in article 65 or 67 may be revoked at any time before it takes effect.

**SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY**

**Article 69**

**Consequences of the invalidity of a treaty**

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under article 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State’s consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

**Article 70**

**Consequences of the termination of a treaty**

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

**Article 71**

**Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law**

1. In the case of a treaty which is void under article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72
Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

PART VI.
MISCELLANEOUS PROVISIONS

Article 73
Cases of State succession, State responsibility and outbreak of hostilities

The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

Article 74
Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75
Case of an aggressor State

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State’s aggression.

PART VII.
DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

Article 76
Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter’s functions shall not affect that obligation.

Article 77
Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

(e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;
(f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(g) registering the treaty with the Secretariat of the United Nations;

(h) performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter’s functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

Article 78
Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

(a) if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted, or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1(e).

Article 79
Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procès-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

3. The rules in paragraphs I and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

4. The corrected text replaces the defective text ab initio, unless the signatory States and the contracting States otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procès-verbal specifying the rectification and communicate a copy of it to the signatory States and to the contracting States.

Article 80
Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

PART VIII.
Final Provisions

Article 81
Signature

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, as follows: until 30 November 1969, at the
Article 82
Ratification
The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 83
Accession
The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General.

Article 84
Entry into force
1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 85
Authentic texts
The original of the present Convention, of which the Chinese, English, French, Russian, and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. In witness whereof the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna this twenty-third day of May, one thousand nine hundred and sixty-nine.

ANNEX
1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State of Member of the United Nations shall be invited to nominate two conciliators, and the names of any conciliator nominated to fill a casual vacancy shall be added to the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator may continue to fill any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission as follows:

The State or States constituting the parties to the dispute shall appoint:
(i) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
(ii) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it, in writing, decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.
7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.
Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (United Nations General Assembly resolution 2625 (XXV) of 24 October 1970, annex)
RESOLUTIONS ADOPTED ON THE REPORTS OF THE SIXTH COMMITTEE

CONTENTS

<table>
<thead>
<tr>
<th>Resolution No.</th>
<th>Title</th>
<th>Item</th>
<th>Date of adoption</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2625 (XXV)</td>
<td>Declaration on Principles of International Law concerning Friendly</td>
<td>85</td>
<td>24 October 1970</td>
<td>121</td>
</tr>
<tr>
<td></td>
<td>Relations and Co-operation among States in accordance with the</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Charter of the United Nations (A/8082)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(A/8146)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2644 (XXV)</td>
<td>Report of the Special Committee on the Question of Defining Aggression</td>
<td>87</td>
<td>25 November 1970</td>
<td>126</td>
</tr>
<tr>
<td></td>
<td>(A/8171)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2645 (XXV)</td>
<td>Aerial hijacking or interference with civil air travel (A/8176)</td>
<td>99</td>
<td>25 November 1970</td>
<td>126</td>
</tr>
<tr>
<td>2669 (XXV)</td>
<td>Progressive development and codification of the rules of international</td>
<td>91</td>
<td>8 December 1970</td>
<td>127</td>
</tr>
<tr>
<td></td>
<td>law relating to international watercourses (A/8202)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2697 (XXV)</td>
<td>Need to consider suggestions regarding the review of the Charter of</td>
<td>88</td>
<td>11 December 1970</td>
<td>127</td>
</tr>
<tr>
<td></td>
<td>the United Nations (A/8219)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2698 (XXV)</td>
<td>United Nations Programme of Assistance in the Teaching, Study,</td>
<td>90</td>
<td>11 December 1970</td>
<td>128</td>
</tr>
<tr>
<td></td>
<td>Dissemination and Wider Appreciation of International Law (A/8213)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2723 (XXV)</td>
<td>Review of the role of the International Court of Justice (A/8238)</td>
<td>96</td>
<td>15 December 1970</td>
<td>128</td>
</tr>
</tbody>
</table>

Other decisions

Amendment to Article 22 of the Statute of the International Court of Justice (Seat of the Court) and consequential amendments to Articles 23 and 28

Progressive development and codification of the rules of international law relating to international watercourses

Review of the role of the International Court of Justice

Aerial hijacking or interference with civil air travel

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

The General Assembly,

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

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

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

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

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

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

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

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

1883rd plenary meeting, 24 October 1970.

ANNEX

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

PREAMBLE

The General Assembly,

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

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

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

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

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

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

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

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

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

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

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

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

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

Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality,

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

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

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

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

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

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

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

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

(f) The principle of sovereign equality of States,

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

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

1. Solemnly proclaims the following principles:

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

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

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

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

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

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

States have a duty to refrain from acts of reprisal involving the use of force.
Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the pacific settlement of international disputes.

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

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

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

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

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

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

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

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

To this end:

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

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

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

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

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

The principle of equal rights and self-determination of peoples.

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

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights
The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter

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

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

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

GENERAL PART

2. Declares that:

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

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

3. Declares further that:

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

2634 (XXV). Report of the International Law Commission

The General Assembly,

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

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

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

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

2 Ibid., Supplement No. 10 (A/8010/Rev.1).
Definition of Aggression (United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974)
to facilitating recourse to it for the judicial settlement of disputes, *inter alia* by simplifying the procedure, reducing the likelihood of undue delays and costs and allowing for greater influence of parties on the composition of ad hoc chambers,

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

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

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

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

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

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

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

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

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

2280th plenary meeting
12 November 1974

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

*The General Assembly,*

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

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

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

2303rd plenary meeting
29 November 1974

3314 (XXIX). Definition of Aggression

*The General Assembly,*

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

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

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

---

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

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

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

2319th plenary meeting  
14 December 1974

ANNEX

Definition of Aggression

The General Assembly,

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

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

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

Bearing in mind that nothing in this 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 victims,

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

Adopts the following Definition of Aggression:  

Article 1

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

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

(a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;

(b) Includes the concept of a "group of States" where appropriate.

Article 2

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

Article 3

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

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

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

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

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

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

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

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

Article 4

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

Article 5

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

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).
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 Commission

*The General Assembly,*

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

*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, 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 injuries 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, 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

---

8 See also p. 149, item 87.
10 Resolution 2625 (XXV), annex.
11 A/9732 (vols. I and II).
The crime of aggression (Assembly of States Parties to the Rome Statute of the International Criminal Court, Kampala, Resolution RC/Res.6 of 11 June 2010)
Resolution RC/Res.6*

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

RC/Res.6

The crime of aggression

The Review Conference,

Recalling paragraph 1 of article 12 of the Rome Statute,
Recalling paragraph 2 of article 5 of the Rome Statute,
Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,
Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and expressing its appreciation to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

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

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

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

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

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

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

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

Annex I

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

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

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

Article 8 bis

Crime of aggression

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

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

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

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

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

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

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

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

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

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

**Article 15 bis**

*Exercise of jurisdiction over the crime of aggression*

(State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

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

**Article 15 ter**

*Exercise of jurisdiction over the crime of aggression*

(Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

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

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

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

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

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

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

Amendments to the Elements of Crimes

Article 8 bis
Crime of aggression

Introduction

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

Elements

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

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

Annex III

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

Refferrals by the Security Council

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

Jurisdiction ratione temporis

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

Domestic jurisdiction over the crime of aggression

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

Other understandings

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.
7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a “manifest” determination. No one component can be significant enough to satisfy the manifest standard by itself.
2005 World Summit Outcome
(United Nations General Assembly resolution 60/1 of 16 September 2005)
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 fulfillment in good faith of the obligations assumed in accordance with the Charter.

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

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

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

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

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

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

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

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

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

1 See resolution 55/2.
15. We pledge to enhance the relevance, effectiveness, efficiency, accountability and credibility of the United Nations system. This is our shared responsibility and interest.

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

- Development
- Peace and collective security
- Human rights and the rule of law
- Strengthening of the United Nations

II. Development

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

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

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

Global partnership for development

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

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.
Financing for development

23. We reaffirm the Monterrey Consensus and recognize that mobilizing financial resources for development and the effective use of those resources in developing countries 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 per cent by 2015; we resolve to mobilize all available resources to ensure that the international community delivers on its commitments to the developing countries, including the least developed countries, by 2015 and by adopting by 2020 a strategy 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 MDGs and the MDG indicator framework established by the United Nations for monitoring progress towards the MDGs; we resolve to mobilize all available resources to ensure that the international community delivers on its commitments to the developing countries, including the least developed countries, by 2015 and by adopting by 2020 a strategy to achieve the internationally agreed goals, including the Millennium Development Goals, within their respective time frames;

(c) We further welcome the increased resources that will become available as a result of the MDGs and the MDG indicator framework established by the United Nations for monitoring progress towards the MDGs; we resolve to mobilize all available resources to ensure that the international community delivers on its commitments to the developing countries, including the least developed countries, by 2015 and by adopting by 2020 a strategy to achieve the internationally agreed goals, including the Millennium Development Goals, within their respective time frames;

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

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, and for promoting national policies and international cooperation to support the development needs of developing countries, including the least developed countries. In this regard:

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

(b) We reaffirm the importance of good governance and the rule of law, which are essential for promoting private sector investment and economic growth and for ensuring that public policies are on track to meet the internationally agreed goals, including the Millennium Development Goals, by 2015.

(c) We resolve to take action to combat corruption and to strengthen the rule of law, the importance of which is recognized in the United Nations Convention against Corruption, and to promote transparency and accountability in public and private financial transactions.

(d) We encourage all States to participate in the United Nations Action Against Corruption, which is an initiative to promote good governance and the rule of law, and to support the implementation of the United Nations Programme of Action against Corruption, which sets out a comprehensive and practical framework for promoting good governance and the rule of law.

(e) We encourage all States to participate in the United Nations Action Against Corruption, which is an initiative to promote good governance and the rule of law, and to support the implementation of the United Nations Programme of Action against Corruption, which sets out a comprehensive and practical framework for promoting good governance and the rule of law.

(f) We encourage all States to participate in the United Nations Action Against Corruption, which is an initiative to promote good governance and the rule of law, and to support the implementation of the United Nations Programme of Action against Corruption, which sets out a comprehensive and practical framework for promoting good governance and the rule of law.

(g) We encourage all States to participate in the United Nations Action Against Corruption, which is an initiative to promote good governance and the rule of law, and to support the implementation of the United Nations Programme of Action against Corruption, which sets out a comprehensive and practical framework for promoting good governance and the rule of law.

(h) We encourage all States to participate in the United Nations Action Against Corruption, which is an initiative to promote good governance and the rule of law, and to support the implementation of the United Nations Programme of Action against Corruption, which sets out a comprehensive and practical framework for promoting good governance and the rule of law.

(i) We encourage all States to participate in the United Nations Action Against Corruption, which is an initiative to promote good governance and the rule of law, and to support the implementation of the United Nations Programme of Action against Corruption, which sets out a comprehensive and practical framework for promoting good governance and the rule of law.
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 intellectual property rights and the rule of law and pursuing appropriate policy and regulatory frameworks that encourage business formation and sustainable project and corporate governance.

(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, in consultation with economies in transition, to consider enhancing the transparency of risk rating mechanisms. Sovereign risk assessments, made by the private sector, should be based on high-quality data and analysis, and we emphasize the need to sustain sufficient and stable private financial flows to developing countries and sovereign economies in transition to ensure the orderly adjustment of economic fundamentals.

(e) We underscore the need to sustain sufficient and stable private financial flows to developing countries and sovereign 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, especially those in sub-Saharan Africa, in order to ensure that the markets of developing countries are in a position to do so, and support their efforts to overcome their supply-side constraints.

Trade

27. A universal, rule-based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalization, can substantially contribute to poverty reduction and sustained economic growth.

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, of ensuring a fair and sustainable market access for all least-developed countries, including those that are landlocked and have small island developing States and landlocked developing countries, that mitigate the impact of excessive volatility and short-term capital flows are important and must be considered.

30. We are committed to supporting and promoting increased and effective bilateral and multilateral trade and trade capacity building and 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 towards the objective, in accordance with the Brussels Programme of Action, of ensuring a fair and sustainable market access for all least-developed countries, including those that are landlocked and have small island developing States and landlocked developing countries, that mitigate the impact of excessive volatility and short-term capital flows are important and must be considered.
We will work expeditiously towards implementing the development dimensions of the Doha work programme. Commodities

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

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

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.

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.

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.

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.

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

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 Declaration and the Doha Plan of Action, 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.

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.

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

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, 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 2000 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

---

1 A/60/111, annex I.
2 Ibid., annex II.

---

6 See A/66/2, annex.

---
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 21 and the Johannesburg Plan of Implementation. 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. 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 Change and other relevant international agreements, including, for many of us, the Kyoto Protocol. The Convention is the appropriate framework for addressing future action on climate change at the global level.

52. We reaffirm our commitment to the ultimate objective of the Convention: to stabilize greenhouse gas concentrations in the atmosphere at a level that prevents dangerous anthropogenic interference with the climate system.

53. We acknowledge that the global nature of climate change calls for the widest possible cooperation and participation in an effective and appropriate international response, in accordance with the principles of the Convention. We are committed to moving forward the global discussion on long-term cooperative action to address climate change, in accordance with these principles. We stress the importance of the Conference of the Parties to the Convention, to be held in Montreal in November 2005.

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

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

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

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

(c) To assist developing countries to improve their resilience and integrate adaptation goals into their sustainable development strategies, given that adaptation to the effects of climate change due to both natural and human factors is a high
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/orDesertification, Particularly in Africa, 13 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 Diversity 15 and the Cartagena Protocol on Biosafety 16 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 fulfill 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 Declaration 18 and the Hyogo Framework for Action 2005–2015 19 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 Declaration 1 and the Johannesburg Plan of Implementation, 2 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 Ibid., vol. 1760, No. 30619.
16 UNEP/CBD/COP/6/20, annex 1, decision VI/24A.
(n) To acknowledge the invaluable role of the Global Environment Facility in facilitating cooperation with developing countries; we look forward to a successful replenishment this year along with the successful conclusion of all outstanding commitments from the third replenishment;

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

HIV/AIDS, malaria, tuberculosis and other health issues

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

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

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

(c) Fully implementing all commitments established by the Declaration of Commitment on HIV/AIDS 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, including the need to support the Global Outbreak Alert and Response Network of the World Health Organization;

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

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

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

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

Gender equality and empowerment of women

58. We remain convinced that progress for women is progress for all. We reaffirm that the full and effective implementation of the goals and objectives of the Beijing Declaration and Platform for Action 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;
A/RES/60/1

57

(c) Ensuring equal access to reproductive health;
(d) Promoting women’s equal access to labour markets, sustainable employment and adequate labour protection;
(e) Ensuring equal access of women to productive assets and resources, including land, credit and technology;
(f) Eliminating all forms of discrimination and violence against women and the girl child, including by ending impunity and by ensuring the protection of civilians, in particular women and the girl child, during and after armed conflicts in accordance with the obligations of States under international humanitarian law and international human rights law;
(g) Promoting increased representation of women in Government decision-making bodies, including through ensuring their equal opportunity to participate fully in the political process.

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

Science and technology for development

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

(a) Strengthening and enhancing existing mechanisms and supporting initiatives for research and development, including through voluntary partnerships between the public and private sectors, to address the special needs of developing countries in the areas of health, agriculture, conservation, sustainable use of natural resources and environmental management, energy, forestry and the impact of climate change;
(b) Promoting and facilitating, as appropriate, access to and the development, transfer and diffusion of technologies, including environmentally sound technologies and corresponding know-how, to developing countries;
(c) Assisting developing countries in their efforts to promote and develop national strategies for human resources and science and technology, which are primary drivers of national capacity-building for development;
(d) Promoting and supporting greater efforts to develop renewable sources of energy, such as solar, wind and geothermal;
(e) Implementing policies at the national and international levels to attract both public and private investment, domestic and foreign, that enhances knowledge, transfers technology on mutually agreed terms and raises productivity;
(f) Supporting the efforts of developing countries, individually and collectively, to harness new agricultural technologies in order to increase agricultural productivity through environmentally sustainable means;

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

Migration and development

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

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

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

Countries with special needs

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

65. We recognize the special needs of and challenges faced by landlocked developing countries and therefore reaffirm our commitment to urgently address those needs and challenges through the full, timely and effective implementation of the Almaty Programme of Action: Addressing the Special Needs of Landlocked Developing Countries within a New Global Framework for Transit Transport Cooperation for Landlocked and Transit Developing 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

24 TD/412, part II.
multilateral trading system. In this regard, priority should be given to the full and timely implementation of the Almaty Declaration(25) and the Almaty Programme of Action.26

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,27 the Barbados Programme of Action28 and the outcome of the twenty-second special session of the General Assembly.29 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 Development30 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
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 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 Terrorism 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 fulfill 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.

95. We urge States parties to the Anti-Personnel Mine Ban Convention and Amended Protocol II to the Convention on Certain Conventional Weapons 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 and urge that those measures adopted in the relevant General Assembly resolutions based upon the recommendations be fully implemented without delay.

Peacebuilding

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

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

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

100. The Peacebuilding Commission should meet in various configurations. Country-specific meetings of the Commission, upon invitation of the Organizational
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 Child and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. 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 fulfill 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 Rights and other instruments relating to human rights and international law. The universal nature of these rights and freedoms is beyond question.

Human rights

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

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

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

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

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

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

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

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

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

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

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

---

37 Resolution 54/263, annex I.
38 Resolution 217 A (III).
A/RES/60/1

Internally displaced persons

132. We recognize the Guiding Principles on Internal Displacement 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 this regard, on the basis of 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, 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; and

(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.

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

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 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.

Democracy

136. We recommit to supporting the work of the Secretary-General in the prevention of conflicts and the promotion of democracy, including through the provision of technical assistance and capacity-building.

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

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility is further strengthened by the responsibilities of the international community, which is to take collective action, in accordance with the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and to assist States in meeting their obligations.

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 VII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

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

141. We 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.

Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity
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.46

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 revitalize the intergovernmental organs of the United Nations and to adapt them to the needs of the twenty-first century.

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

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

General Assembly

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

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

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

Security Council

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

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

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

Economic and Social Council

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

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

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 sixty-first 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 sixty-first 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 Personnel and stress the need to conclude negotiations on a protocol expanding the scope of legal protection during the sixty-first 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.

Humanitarian assistance

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

Environmental activities

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

Regional organizations

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

(a) To expand consultation and cooperation between the United Nations and regional and subregional organizations through formalized agreements between the respective secretariats and, as appropriate, involvement of regional organizations in the work of the Security Council;

(b) To ensure that regional organizations that have a capacity for the prevention of armed conflict or peacekeeping consider the option of placing such capacity in the framework of the United Nations Standby Arrangements System;

(c) To strengthen cooperation in the economic, social and cultural fields.

Cooperation between the United Nations and parliaments

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

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

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

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

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

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

Charter of the United Nations

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

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

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

8th plenary meeting
16 September 2005
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*, paras. 172-214
69


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 supersedes” 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 debar 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, from threatening or using 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 their right to self-determination and freedom and independence.

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

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

192. Moreover, in the part of this same resolution devoted to the principle of non-intervention in matters within the national jurisdiction of States, a very similar rule is found:

"Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State."

In the context of the inter-American system, this approach can be traced back at least to 1928 (Convention on the Rights and Duties of States in the Event of Civil Strife, Art. 1 (1)) ; it was confirmed by resolution 78 adopted by the General Assembly of the Organization of American States on 21 April 1972. The operative part of this resolution reads as follows:

"The General Assembly Resolves:

1. To reiterate solemnly the need for the member states of the Organization to observe strictly the principles of nonintervention and self-determination of peoples as a means of ensuring peaceful coexistence among them and to refrain from committing any direct or indirect act that might constitute a violation of those principles.

2. To reaffirm the obligation of those states to refrain from applying economic, political, or any other type of measures to coerce another state and obtain from it advantages of any kind.

3. Similarly, to reaffirm the obligation of these states to refrain from organizing, supporting, promoting, financing, instigating, or tolerating subversive, terrorist, or armed activities against another state and from intervening in a civil war in another state or in its internal struggles."

193. The general rule prohibiting force allows for certain exceptions. In view of the arguments advanced by the United States to justify the acts of which it is accused by Nicaragua, the Court must express a view on the content of the right of self-defence, and more particularly the right of collective self-defence. First, with regard to the existence of this right, it notes that in the language of Article 51 of the United Nations Charter, the inherent right (or "droit naturel") which any State possesses in the event of an armed attack, covers both collective and individual self-defence. Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary international law. Moreover, just as the wording of certain General Assembly declarations adopted by States demonstrates their recognition of the principle of the prohibition of force as definitely a matter of customary international law, some of the wording in those declarations operates similarly in respect of the right of self-defence (both collective and individual). Thus, in the declaration quoted above on the

Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the reference to the prohibition of force is followed by a paragraph stating that:

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

This resolution demonstrates that the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law.

194. With regard to the characteristics governing the right of self-defence, since the Parties consider the existence of this right to be established as a matter of customary international law, they have concentrated on the conditions governing its use. In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue. The Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence. Since the existence of the right of collective self-defence is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality to which the Parties have referred.

195. In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the
Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.

196. The question remains whether the lawfulness of the use of collective self-defence by the third State for the benefit of the attacked State also depends on a request addressed by that State to the third State. A provision of the Charter of the Organization of American States is here in point: and while the Court has no jurisdiction to consider that instrument as applicable to the dispute, it may examine it to ascertain what light it throws on the content of customary international law. The Court notes that the Organization of American States Charter includes, in Article 3 (7), the principle that: "an act of aggression against one American State is an act of aggression against all the other American States" and a provision in Article 27 that:

"Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States."

197. Furthermore, by Article 3, paragraph 1, of the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro on 2 September 1947, the High-Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations; and under paragraph 2 of that Article, "On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfilment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity."

(The 1947 Rio Treaty was modified by the 1975 Protocol of San José, Costa Rica, but that Protocol is not yet in force.)

198. The Court observes that the Treaty of Rio de Janeiro provides that measures of collective self-defence taken by each State are decided "on the request of the State or States directly attacked". It is significant that this requirement of a request on the part of the attacked State appears in the treaty particularly devoted to these matters of mutual assistance; it is not found in the more general text (the Charter of the Organization of American States), but Article 28 of that Charter provides for the application of the measures and procedures laid down in "the special treaties on the subject".

199. At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.

200. At this point, the Court may consider whether in customary international law there is any requirement corresponding to that found in the treaty law of the United Nations Charter, by which the State claiming to use the right of individual or collective self-defence must report to an international body, empowered to determine the conformity with international law of the measures which the State is seeking to justify on that basis. Thus Article 51 of the United Nations Charter requires that measures taken by States in exercise of this right of self-defence must be "immediately reported" to the Security Council. As the Court has observed above (paragraphs 178 and 188), a principle enshrined in a treaty, if reflected in customary international law, may well be so unencumbered with the conditions and modalities surrounding it in the treaty. Whatever influence the Charter may have had on customary international law in these matters, it is clear that in customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed. On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.
The principle of non-intervention involves the right of every sovereign State to conduct its internal affairs without outside interference. This principle is not frequent in the law of international relations. The Court has observed that it is part of the paramount concern of States, regardless of their constitutional and territorial arrangements, to defend and protect their existence in the face of threats and armed aggression. The principle is derived from general principles of customary international law, which have been examined in connection with the collective self-defence in response to an armed attack. It will examine this point in connection with an analysis of the principle of non-intervention in customary international law.

203. The principle of non-intervention involves the right of every sovereign State to conduct its internal affairs without outside interference. The United States has a tradition of international law involving the use of force, especially in the past, to give rise to the most serious abuses and violations of fundamental rights. The principle of non-intervention is not without exceptions, such as when the United States or other States consider that the intervention of another State is necessary to protect the interests of their own citizens or to prevent the spread of international law and organizations. The United States and other States may find it advisable to intervene in a particular form, under certain circumstances, in order to protect the interests of their own citizens or to prevent the spread of international law and organizations. The principle of non-intervention is not without exceptions, such as when the United States or other States consider that the intervention of another State is necessary to protect the interests of their own citizens or to prevent the spread of international law and organizations.
what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law? As regards the first problem — that of the content of the principle of non-intervention — the Court will define only those aspects of the principle which appear to be relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. As noted above (paragraph 191), General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting State when the acts committed in another State "involve a threat or use of force". These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention. In view of the nature of Nicaragua's complaints against the United States, and those expressed by the United States in regard to Nicaragua's conduct towards El Salvador, it is primarily acts of intervention of this kind with which the Court is concerned in the present case.

206. However, before reaching a conclusion on the nature of prohibited intervention, the Court must be satisfied that State practice justifies it. There have been in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State. The Court is not here concerned with the process of decolonization; this question is not in issue in the present case. It has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.

207. In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the North Sea Continental Shelf cases, for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied by the opinio juris sive necessitatis. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis." (I.C.J. Reports 1969, p. 44, para. 77.)

The Court has no jurisdiction to rule upon the conformity with international law of any conduct of States not parties to the present dispute, or of conduct of the Parties unconnected with the dispute; nor has it authority to ascribe to States legal views which they do not themselves advance. The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.

208. In particular, as regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances. As mentioned above, the United States has, on the legal plane, justified its intervention expressly and solely by reference to the "classic" rules involved, namely, collective self-defence against an armed attack. Nicaragua, for its part, has often expressed its solidarity and sympathy with the opposition in various States, especially in El Salvador. But Nicaragua too has not argued that this was a legal basis for an intervention, let alone an intervention involving the use of force.

209. The Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law. The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they
directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.

* * *

210. When dealing with the rule of the prohibition of the use of force, the Court considered the exception to it constituted by the exercise of the right of collective self-defence in the event of armed attack. Similarly, it must now consider the following question: if one State acts towards another State in breach of the principle of non-intervention, may a third State lawfully take such action by way of counter-measures against the first State as would otherwise constitute an intervention in its internal affairs? A right to act in this way in the case of intervention would be analogous to the right of collective self-defence in the case of an armed attack, but both the act which gives rise to the reaction, and that reaction itself, would in principle be less grave. Since the Court is here dealing with a dispute in which a wrongful use of force is alleged, it has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force. The question is itself undeniably relevant 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 juris.

* * *

212. The Court should now mention the principle of respect for State sovereignty, which in international law is of course closely linked with the principles of the prohibition of the use of force and of non-intervention. The basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. As to superjacent air space, the 1944 Chicago Convention on International Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory. That convention, in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982. The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law.

213. The duty of every State to respect the territorial sovereignty of others is to be considered for the appraisal to be made of the facts relating to the mining which occurred along Nicaragua’s coasts. The legal rules in the light of which these acts of mining should be judged depend upon where they took place. The laying of mines within the ports of another State is governed by the law relating to internal waters, which are subject to the sovereignty of the coastal State. The position is similar as regards mines placed in the territorial sea. It is therefore the sovereignty of the coastal State which is affected in such cases. It is also by virtue of its sovereignty that the coastal State may regulate access to its ports.

214. On the other hand, it is true that in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters; Article 18, paragraph 1 (b), of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones which may exist beyond territorial waters (Art. 58 of the Convention), and secondly, beyond territorial waters and on the high seas (Art. 87), it follows that any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for
maritime navigation. It may therefore be said that, if this right of access to the port is hindered by the laying of mines by another State, what is infringed is the freedom of communications and of maritime commerce. At all events, it is certain that interference with navigation in these areas prejudices both the sovereignty of the coastal State over its internal waters, and the right of free access enjoyed by foreign ships.

* * *

215. The Court has noted above (paragraph 77 in fine) that the United States did not issue any warning or notification of the presence of the mines which had been laid in or near the ports of Nicaragua. Yet even in time of war, the Convention relative to the laying of automatic submarine contact mines of 18 October 1907 (the Hague Convention No. VIII) provides that “every possible precaution must be taken for the security of peaceful shipping” and belligerents are bound

“to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Governments through the diplomatic channel” (Art. 3).

Neutral Powers which lay mines off their own coasts must issue a similar notification, in advance (Art. 4). It has already been made clear above that in peacetime for one State to lay mines in the internal or territorial waters of another is an unlawful act; but in addition, if a State lays mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907. 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 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
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
INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING ARMED ACTIVITIES 
ON THE TERRITORY OF THE CONGO 
(DEMOCRATIC REPUBLIC OF THE CONGO v. UGANDA)

JUDGMENT OF 19 DECEMBER 2005

OFFICIAL CITATION:
Armed Activities on the Territory of the Congo 
(Democratic Republic of the Congo v. Uganda), 
Judgment, I.C.J. Reports 2005, p. 168

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS, 
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES ACTIVITÉS ARMÉES 
SUR LE TERRITOIRE DU CONGO 
(REPUBLIQUE DÉMOCRATIQUE DU CONGO c. OUGANDA)

ARRÊT DU 19 DÉCEMBRE 2005

ISSN 0074-4441
ISBN 92-1-071016-9

Sales number 
N° de vente: 908
19 DECEMBER 2005
JUDGMENT

INTERNATIONAL COURT OF JUSTICE
YEAR 2005

19 December 2005

CASE CONCERNING ARMED ACTIVITIES
ON THE TERRITORY OF THE CONGO
(DEMOCRATIC REPUBLIC OF THE CONGO v. UGANDA)

Situation in the Great Lakes region — Task of the Court.

* * *

Issue of consent.
The DRC consented to presence of Ugandan troops in eastern border area in period preceding August 1998 — Protocol on Security along the Common Border of 27 April 1998 between the DRC and Uganda — No particular formalities required for withdrawal of consent by the DRC to presence of Ugandan troops — Ambiguity of statement by President Kabila published on 28 July 1998 — Any prior consent withdrawn at latest by close of Victoria Falls Summit on 8 August 1998.

* * *

Findings of fact concerning Uganda’s use of force in respect of Kitona.

Denial by Uganda that it was involved in military action at Kitona on 4 August 1998 — Assessment of evidentiary materials in relation to events at Kitona — Deficiencies in evidence adduced by the DRC — Not established to the Court’s satisfaction that Uganda participated in attack on Kitona.

* * *

Findings of fact concerning military action in the east of the DRC and in other areas of that country.

Determination by the Court of facts as to Ugandan presence at, and taking
of certain locations in the DRC — Assessment of evidentiary materials — Sketch-map evidence — Testimony before Porter Commission — Statements against interest — Establishment of locations taken by Uganda and corresponding “dates of capture”.

* Did the Lusaka, Kampala and Harare Agreements constitute any consent of the DRC to the presence of Ugandan troops?
Contention of Uganda that the Lusaka, Kampala and Harare Agreements constituted consent to presence of Ugandan forces on Congolese territory — Nothing in provisions of Lusaka Agreement can be interpreted as affirmation that security interests of Uganda had already required the presence of Ugandan forces on territory of the DRC as from September 1998 — Lusaka Agreement represented an agreed modus operandi for the parties, providing framework for orderly withdrawal of all foreign forces from the DRC — The DRC did not thereby recognize situation on ground as legal — Kampala and Harare Disengagement Plans did not change legal status of presence of Ugandan troops — Luanda Agreement authorized limited presence of Ugandan troops in border area — None of the aforementioned Agreements (save for limited exception in the Luanda Agreement) constituted consent by the DRC to presence of Ugandan troops on Congolese territory for period after July 1999.

Self-defence in light of proven facts.
Question of whether Ugandan military action in the DRC from early August 1998 to July 1999 could be justified as action in self-defence — Ugandan High Command document of 11 September 1998 — Testimony before Porter Commission of Ugandan Minister of Defence and Commander of Ugandan forces in the DRC — Uganda regarded military events of August 1998 as part of operation “Safe Haven” — Objectives of operation “Safe Haven”, as stated in Ugandan High Command document, not consonant with concept of self-defence — Examination of claim by Uganda of existence of tripartite anti-Ugandan conspiracy between the DRC, the ADF and the Sudan — Evidence adduced by Uganda lacking in relevance and probative value Article 51 of the United Nations Charter — No report made by Uganda to Security Council of events requiring it to act in self-defence — No claim by Uganda that it had been subjected to armed attack by armed forces of the DRC — No satisfactory proof of involvement of Government of the DRC in alleged ADF attacks on Uganda — Legal and factual circumstances for exercise of right of self-defence by Uganda not present.

* * *

Violations of international human rights law and international humanitarian law: contentions of the Parties.
Contention of the DRC that Ugandan armed forces committed wide-scale human rights violations on Congolese territory, particularly in Ituri — Contention of Uganda that the DRC has failed to provide any credible evidentiary basis to support its allegations.

* * *

Admissibility of claims in relation to events in Kisangani.
Contention of Uganda that the Court lacks competence to deal with events in Kisangani in June 2000 in the absence of Rwanda — Jurisprudence contained in Certain Phosphate Lands in Nauru case applicable in current proceedings — Interests of Rwanda do not constitute “the very subject-matter” of decision to be rendered by the Court — The Court is not precluded from adjudicating on whether Uganda’s conduct in Kisangani is a violation of international law.

* * *

Violations of international human rights law and international humanitarian law: findings of the Court.
Examination of evidence relating to violations of international human rights law and international humanitarian law — Findings of fact — Conduct of UPDF and of officers and soldiers of UPDF attributable to Uganda Irrelevant whether UPDF personnel acted contrary to instructions given or
exceeded their authority — Applicable law — Violations of specific obligations under Hague Regulations of 1907 binding as customary international law — Violations of specific provisions of international humanitarian law and international human rights law instruments — Uganda is internationally responsible for violations of international human rights law and international humanitarian law.

Illegal exploitation of natural resources. Contention of the DRC that Ugandan troops systematically looted and exploited the assets and natural resources of the DRC — Contention of Uganda that the DRC has failed to provide reliable evidence to corroborate its allegations.

Findings of the Court concerning acts of illegal exploitation of natural resources. Examination of evidence relating to illegal exploitation of Congolese natural resources by Uganda — Findings of fact — Conduct of UPDF and of officers and soldiers of UPDF attributable to Uganda — Irrelevant whether UPDF personnel acted contrary to instructions given or exceeded their authority — Applicable law — Principle of permanent sovereignty over natural resources not applicable to this situation — Illegal acts by UPDF in violation of the jus in bello — Violation of duty of vigilance by Uganda with regard to illegal acts of UPDF — No violation of duty of vigilance by Uganda with regard to illegal acts of rebel groups outside Ituri — International responsibility of Uganda for acts of its armed forces — International responsibility of Uganda as an occupying Power.

Legal consequences of violations of international obligations by Uganda. The DRC’s request that Uganda cease continuing internationally wrongful acts — No evidence to support allegations with regard to period after 2 June 2003 — Not established that Uganda continues to commit internationally wrongful acts specified by the DRC — The DRC’s request cannot be upheld.

The DRC’s request for specific guarantees and assurances of non-repetition of the wrongful acts — Tripartite Agreement on Regional Security in the Great Lakes of 26 October 2004 — Commitments assumed by Uganda under the Tripartite Agreement meet the DRC’s request for specific guarantees and assurances of non-repetition — Demand by the Court that the Parties respect their obligations under that Agreement and under general international law.

The DRC’s request for reparation — Obligation to make full reparation for the injury caused by an international wrongful act — Internationally wrongful acts committed by Uganda resulted in injury to the DRC and persons on its territory — Uganda’s obligation to make reparation accordingly — Question of reparation to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings.

Compliance with the Court’s Order on provisional measures. Binding effect of the Court’s orders on provisional measures — No specific evidence demonstrating violations of the Order of 1 July 2000 — The Court’s previous findings of violations by Uganda of its obligations under international human rights law and international humanitarian law until final withdrawal of Ugandan troops on 2 June 2003 — Uganda did not comply with the Court’s Order on provisional measures of 1 July 2000 — This finding is without prejudice to the question as to whether the DRC complied with the Order.

Counter-claims: admissibility of objections. Question of whether the DRC is entitled to raise objections to admissibility of counter-claims at current stage of proceedings — The Court’s Order of 29 November 2001 only settled question of a “direct connection” within the meaning of Article 80 — Question of whether objections raised by the DRC are inadmissible because they fail to conform to Article 79 of the Rules of Court — Article 79 inapplicable to the case of an objection to counter-claims joined to the original proceedings — The DRC is entitled to challenge admissibility of Uganda’s counter-claims.

First counter-claim. Contention of Uganda that the DRC supported anti-Ugandan irregular forces — Division of Uganda’s first counter-claim into three periods by the DRC: prior to May 1997, from May 1997 to 2 August 1998 and subsequent to 2 August 1998 — No obstacle to examining the first counter-claim following the three periods of time and for practical purposes useful to do so — Admissibility of part of first counter-claim relating to period prior to May 1997 — Waiver of right must be express or unequivocal — Nothing in conduct of Uganda can be considered as implying an unequivocal waiver of its right to bring a counter-claim relating to events which occurred during the Mobutu régime — The long period of time between events during the Mobutu régime and filing of Uganda’s counter-claim has not rendered inadmissible Uganda’s first counter-claim for the period prior to May 1997 — No proof that Zaire provided political and military support to anti-Ugandan rebel groups — No breach of duty of vigilance by Zaire — No evidence of support for anti-Ugandan rebel groups by the DRC in the second period — Any military action taken by the DRC against Uganda in the third period could not be deemed wrongful since it would be justified as
action in self-defence — No evidence of support for anti-Ugandan rebel groups by the DRC in the third period.

Second counter-claim.

Contention of Uganda that Congolese armed forces attacked the premises of the Ugandan Embassy, maltreated diplomats and other Ugandan nationals present on the premises and at Ndjili International Airport — Objections by the DRC to the admissibility of the second counter-claim — Contention of the DRC that the second counter-claim is not founded — Admissibility of the second counter-claim — Uganda is not precluded from invoking the Vienna Convention on Diplomatic Relations — With regard to diplomats Uganda claims its own rights under the Vienna Convention on Diplomatic Relations — Substance of the part of the counter-claim relating to acts of maltreatment against other persons on the premises of the Embassy falls within the ambit of Article 22 of the Vienna Convention on Diplomatic Relations — The part of the counter-claim relating to maltreatment of persons not enjoying diplomatic status at Ndjili International Airport is based on diplomatic protection — No evidence of Ugandan nationality of persons in question — Sufficient evidence to prove attacks against the Embassy and maltreatment of Ugandan diplomats — Property and archives removed from Ugandan Embassy — Breaches of the Vienna Convention on Diplomatic Relations.

The DRC bears responsibility for violation of international law on diplomatic relations — Question of reparation to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings.

JUDGMENT

Present: President SHI; Vice-President RANJEVA; Judges KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARAY, OWADA, SIMMA, TOMKA, ABRAHAM; Judges ad hoc VERHOEVEN, KATEKA; Registrar COUVREUR.

In the case concerning armed activities on the territory of the Congo, between

the Democratic Republic of the Congo, represented by

H.E. Mr. Honorius Kisimba Ngoy Ndalewe, Minister of Justice, Keeper of the Seals of the Democratic Republic of the Congo, as Head of Delegation;

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary to the Kingdom of the Netherlands, as Agent;

Maître Tshibangu Kalala, member of the Kinshasa and Brussels Bars, as Co-Agent and Advocate;

Mr. Olivier Corten, Professor of International Law, Université libre de Bruxelles;

Mr. Pierre Klein, Professor of International Law, Director of the Centre for International Law, Université libre de Bruxelles;

Mr. Jean Salmon, Professor Emeritus, Université libre de Bruxelles, Member of the Institute of International Law and of the Permanent Court of Arbitration;

Mr. Philippe Sands, Q.C., Professor of Law, Director of the Centre for International Courts and Tribunals, University College London, as Counsel and Advocates;

Maître Ilunga Lwanza, Deputy Directeur de cabinet and Legal Adviser, cabinet of the Minister of Justice, Keeper of the Seals,

Mr. Yambu A. Ngoyi, Chief Adviser to the Vice-Presidency of the Republic,

Mr. Mutumbe Mbuya, Legal Adviser, cabinet of the Minister of Justice, Keeper of the Seals,

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

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

Ms Marceline Masele, Second Counsellor, Embassy of the Democratic Republic of the Congo in the Kingdom of the Netherlands, as Advisers;

Maître Mbambu wa Cizubu, member of the Kinshasa Bar, Tshibangu and Partners,

Mr. François Dubuisson, Lecturer, Université libre de Bruxelles,

Maître Kikangala Ngole, member of the Brussels Bar, Nederlandse Zaal, Assistant, Université libre de Bruxelles, Nederlandse Zaal, Assistant, Université libre de Bruxelles, Ms Anjolie Singh, Assistant, University College London, member of the Indian Bar, as Assistants,

and

deputy lawyer for the Republic of Uganda,

represented by

The Honourable E. Khiddu Makubuya S.C., M.P., Attorney General of the Republic of Uganda,
as Agent, Counsel and Advocate;
Mr. Lucian Tibaruha, Solicitor General of the Republic of Uganda,
as Co-Agent, Counsel and Advocate;
Mr. Ian Brownlie, C.B.E, Q.C., F.B.A., member of the English Bar, member
of the International Law Commission, Emeritus Chichele Professor of
Public International Law, University of Oxford, Member of the Institute
of International Law,
Mr. Paul S. Reichler, Foley Hoag LLP, Washington D.C., member of the
Bar of the United States Supreme Court, member of the Bar of the District
of Columbia,
Mr. Eric Suy, Emeritus Professor, Catholic University of Leuven, former
Under-Secretary-General and Legal Counsel of the United Nations, Mem-
ber of the Institute of International Law,
The Honourable Amama Mbabazi, Minister of Defence of the Republic of
Uganda,
Major General Katumba Mbabazi, Minister of Defence of the Republic of
Uganda,
as Counsel and Advocates;
Mr. Theodore Christakis, Professor of International Law, University of
Grenoble II (Pierre Mendès France),
Mr. Lawrence H. Martin, Foley Hoag LLP, Washington D.C., member of
the Bar of the District of Columbia,
as Counsel;
Captain Timothy Kanyogonya, Uganda People’s Defence Forces,
as Adviser,
THE COURT,
composed as above,
after deliberation,
delivers the following Judgment:
1. On 23 June 1999, the Democratic Republic of the Congo (hereinafter “the
DRC”) filed in the Registry of the Court an Application instituting proceedings
against the Republic of Uganda (hereinafter “Uganda”) in respect of a dispute
concerning “acts of armed aggression perpetrated by Uganda on the territory
of the Democratic Republic of the Congo, in flagrant violation of the United
Nations Charter and of the Charter of the Organization of African Unity”
(emphasis in the original).
In order to found the jurisdiction of the Court, the Application relied on the
declarations made by the two Parties accepting the Court’s compulsory juris-
diction under Article 36, paragraph 2, of the Statute of the Court.
2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was
immediately communicated to the Government of Uganda by the Registrar;
and, pursuant to paragraph 3 of that Article, all States entitled to appear
before the Court were notified of the Application.
3. By an Order of 21 October 1999, the Court fixed 21 July 2000 as the time-
limit for the filing of the Memorial of the DRC and 21 April 2001 as the time-
limit for the filing of the Counter-Memorial of Uganda. The DRC filed its
Memorial within the time-limit thus prescribed.
4. On 19 June 2000, the DRC submitted to the Court a request for the indi-
cation of provisional measures pursuant to Article 41 of the Statute of the
Court. By an Order dated 1 July 2000, the Court, after hearing the Parties, indi-
cated certain provisional measures.
5. Uganda filed its Counter-Memorial within the time-limit fixed for that
purpose by the Court’s Order of 21 October 1999. That pleading included
counter-claims.
6. Since the Court included upon the Bench no judge of the nationality of
the Parties, each Party availed itself of its right under Article 31 of the Statute
of the Court to choose a judge ad hoc to sit in the case. By a letter of 16 August
2000 the DRC notified the Court of its intention to choose Mr. Joe Verhoeven
and by a letter of 4 October 2000 Uganda notified the Court of its intention to
choose Mr. James L. Kateka. No objections having been raised, the Parties
were informed by letters dated 26 September 2000 and 7 November 2000,
respectively, that the case file would be transmitted to the judges ad hoc accord-
ingly.
7. At a meeting held by the President of the Court with the Agents of the
Parties on 11 June 2001, the DRC, invoking Article 80 of the Rules of Court,
raised certain objections to the admissibility of the counter-claims set out in the
Counter-Memorial of Uganda. During that meeting the two Agents agreed that
their respective Governments would file written observations on the question of
the admissibility of the counter-claims; they also agreed on the time-limits for
that purpose.
On 28 June 2001, the Agent of the DRC filed his Government’s written
observations on the question of the admissibility of Uganda’s counter-claims,
and a copy of those observations was communicated to the Ugandan Govern-
ment by the Registrar. On 15 August 2001, the Agent of Uganda filed his
Government’s written observations on the question of the admissibility of the
counter-claims set out in Uganda’s Counter-Memorial, and a copy of those
observations was communicated to the Congolese Government by the First
Secretary of the Court, Acting Registrar. On 5 September 2001, the Agent of
the DRC submitted his Government’s comments on Uganda’s written observ-
ations, a copy of which was transmitted to the Ugandan Government by the
Registrar.
Having received detailed written observations from each of the Parties, the
Court considered that it was sufficiently well informed of their respective posi-
tions with regard to the admissibility of the counter-claims.
8. By an Order of 29 November 2001, the Court held that two of the three
counter-claims submitted by Uganda in its Counter-Memorial were admissible
as such and formed part of the current proceedings, but that the third was not.
It also directed the DRC to file a Reply and Uganda to file a Rejoinder
addressing the claims of both Parties, and fixed 29 May 2002 and 29 November
2002 as the time-limits for the filing of the Reply and the Rejoinder respec-
tively. Lastly, the Court held that it was necessary, “in order to ensure strict
equality between the Parties, to reserve the right of the Congo to present its
views in writing a second time on the Ugandan counter-claims, in an additional
pleading which [might] be the subject of a subsequent Order”. The DRC duly
filed its Reply within the time-limit prescribed for that purpose.
9. By an Order of 7 November 2002, at the request of Uganda, the Court
extended the time-limit for the filing of the Rejoinder of Uganda to 6 December 2002. Uganda duly filed its Rejoinder within the time-limit as thus extended.

10. By a letter dated 6 January 2003, the Co-Agent of the DRC, referring to the above-mentioned Order of 29 November 2001, informed the Court that his Government wished to present its views in writing a second time on the counter-claims of Uganda, in an additional pleading. By an Order of 29 January 2003 the Court, taking account of the agreement of the Parties, authorized the submission by the DRC of an additional pleading relating solely to the counter-claims submitted by Uganda and fixed 28 February 2003 as the time-limit for the filing of that pleading. The DRC duly filed the additional pleading within the time-limit as thus fixed and the case became ready for hearing.

11. At a meeting held by the President of the Court with the Agents of the Parties on 24 April 2003, the Agents presented their views on the organization of the oral proceedings on the merits. Pursuant to Article 54, paragraph 1, of the Rules, the Court fixed 10 November 2003 as the date for the opening of the oral proceedings. The Registrar informed the Parties accordingly by letters of 9 May 2003.

12. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registry sent the notification referred to in Article 63, paragraph 1, of the Statute to all States parties to the Chicago Convention on International Civil Aviation of 7 December 1944, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, the Additional Protocol I of 8 June 1977 to the Geneva Conventions of 12 August 1949, the Vienna Convention on Diplomatic Relations of 18 April 1961, the International Covenant on Civil and Political Rights of 19 December 1966, the African Charter on Human and Peoples’ Rights of 27 June 1981 and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984. Pursuant to the instructions of the Court under Article 69, paragraph 3, of the Rules of Court, the Registry addressed the notifications provided for in Article 34, paragraph 3, of the Statute and communicated copies of the written proceedings to the Secretary-General of the United Nations in respect of the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Secretary-General of the International Civil Aviation Organization in respect of the Chicago Convention on International Civil Aviation; and the President of the African Union’s Commission in respect of the African Charter on Human and Peoples’ Rights. The respective organizations were also asked whether they intended to present written observations within the meaning of Article 69, paragraph 3, of the Rules of Court. None of those organizations expressed a wish to submit any such observations.

13. By a letter dated 2 October 2003 addressed to the Registry, the Agent of the DRC requested that Uganda provide the DRC with a number of case-related documents which were not in the public domain. Copies of the requested documents were received in the Registry on 31 October 2003 and transmitted to the Agent of Uganda. On 5 November 2003, the Registrar informed the Parties by letter that the Court had decided that those documents did not form part of the case file and that accordingly, pursuant to paragraph 4 of Article 56, they should not be referred to in oral argument, except to the extent that they “form[ed] part of a publication readily available”.

14. On 17 October 2003, the Agent of Uganda informed the Court that his Government wished to submit 24 new documents, in accordance with Article 56 of the Rules of Court. As provided for in paragraph 1 of that Article, those documents were communicated to the DRC. On 29 October 2003, the Agent of the DRC informed the Court that his Government did not intend to raise any objection to the production of those new documents by Uganda. By letters of 29 November 2003, the Registrar informed the Parties that the Court had taken note that the DRC had no objection to the production of the 24 new documents and that counsel would be free to make reference to them in the course of oral argument.

15. On 17 October 2003, the Agent of Uganda further informed the Court that his Government wished to call two witnesses in accordance with Article 57 of the Rules of Court. A copy of the Agent’s letter and the attached list of witnesses was transmitted to the Agent of the DRC, who conveyed to the Court his Government’s opposition to the calling of those witnesses. On 5 November 2003, the Registrar informed the Parties by letter that the Court had decided that it would not be appropriate, in the circumstances, to authorize the calling of those two witnesses by Uganda.

16. On 20 October 2003, the Agent of Uganda informed the Court that his Government wished, in accordance with Article 56 of the Rules of Court, to add two further documents to its request to produce 24 new documents in the case. On 1 November 2003, the Court, by an Order of 29 January 2003, fixed 28 February 2003 as the time-limit for the filing of the additional pleading. The DRC duly filed the additional pleading within the time-limit as thus fixed and the case became ready for hearing.

17. On 5 November 2003, the Agent of the DRC made a formal application to submit a “small number” of new documents in accordance with Article 56 of the Rules of Court, and referred to the Court’s Practice Direction IX. As provided for in paragraph 1 of Article 56, those documents were communicated to Uganda. On 5 November 2003, the Agent of Uganda indicated that his Government did not object to the submission of the new documents by the DRC.

18. By letters dated 12 November 2003, the Registrar informed the Parties that the Court had taken note, firstly, that the DRC did not object to the production of the two further new documents which Uganda sought to produce in accordance with Article 56 of the Rules of Court, and secondly, that Uganda had not objected to the production of the documents submitted by the DRC on 5 November 2003, and that counsel would be free to quote from both sets of documents during the oral proceedings.

19. On 5 November 2003, the Agent of the DRC enquired whether it might be possible to postpone to a later date, in April 2004, the opening of the hearings in the case originally scheduled for 10 November 2003, “so as to permit the diplomatic negotiations engaged by the Parties to be conducted in an atmosphere of peace”. By a letter dated 13 October 2003, the Agent of Uganda informed the Court that his Government “support[ed] the proposal and adopt[ed] the request”. On 14 November 2003, the Court fixed 5 November 2004 as the date for the opening of the oral proceedings.
On 6 November 2003, the Registrar informed both Parties by letter that the Court, "taking account of the representations made to it by the Parties, [had] decided to postpone the opening of the oral proceedings in the case" and that the new date for the opening of the oral proceedings would be fixed in due course. By a letter of 9 September 2004, the Agent of the DRC formally requested that the Court fix a new date for the opening of the oral proceedings. By letters of 20 October 2004, the Registrar informed the Parties that the Court had decided, in accordance with Article 54 of the Rules of Court, to fix Monday 11 April 2005 for the opening of the oral proceedings in the case.

18. On 1 February 2005, the Agent of the DRC informed the Court that his Government wished to produce certain new documents, in accordance with Article 56 of the Rules of Court. As provided for in paragraph 1 of that Article, those documents were communicated to Uganda. On 16 February 2005, the Co-Agent of Uganda informed the Court that his Government did not intend to raise any objection to the production of one of the new documents by the DRC, and presented certain observations on the remaining documents. On 21 February 2005, the Registrar informed the Parties by letter that the Court had decided to authorize the production of the document to which the Ugandan Government had raised no objection, as well as the production of the other documents. With regard to those other documents, which came from the Judicial Commission of Inquiry into Allegations of Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo set up by the Ugandan Government in May 2001 and headed by Justice David Porter (hereinafter “the Porter Commission”), the Parties were further informed that the Court had noted, inter alia, that only certain of them were new, whilst the remainder simply reproduced documents already submitted on 5 November 2003 and included in the case file.

19. On 15 March 2005, the Co-Agent of Uganda provided the Registry with a new document which his Government wished to produce under Article 56 of the Rules of Court. No objection having been made by the Congolese Government to the Ugandan request, the Registrar, on 8 April 2005, informed the Parties that the Court had decided to authorize the production of the said document.

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

21. Public sittings were held from 11 April to 29 April 2005, at which the Court heard the oral arguments and replies of:

For the DRC:  
H.E. Mr. Jacques Masangu-a-Mwanza,  
H.E. Mr. Honorius Kisimba Ngoy Ndawe,  
Maitre Tshibangu Kalala,  
Mr. Jean Salmon,  
Mr. Philippe Sands,  
Mr. Olivier Corten,  
Mr. Pierre Klein.

For Uganda:  
The Honourable E. Khiddu Makubuya,  
Mr. Paul S. Reichler,  
Mr. Ian Brownlie,  
The Honourable Amama Mbabazi,  
Mr. Eric Suy.

22. In the course of the hearings, questions were put to the Parties by Judges Vereshchetin, Kooijmans and Elaraby.

Judge Vereshchetin addressed a separate question to each Party. The DRC was asked: “What are the respective periods of time to which the concrete submissions, found in the written pleadings of the Democratic Republic of the Congo, refer?”; and Uganda was asked: “What are the respective periods of time to which the concrete submissions relating to the first counter-claim, found in the written pleadings of Uganda, refer?”

Judge Kooijmans addressed the following question to both Parties:

“Can the Parties indicate which areas of the provinces of Equateur, Orientale, North Kivu and South Kivu were in the relevant periods in time under the control of the UPDF and which under the control of the various rebellious militias? It would be appreciated if sketch-maps would be added.”

Judge Elaraby addressed the following question to both Parties:

“The Lusaka Agreement signed on 10 July 1999 which takes effect 24 hours after the signature, provides that:

‘The final orderly withdrawal of all foreign forces from the national territory of the Democratic Republic of Congo shall be in accordance with Annex ‘B’ of this Agreement.’ (Annex A, Chapter 4, para. 4.1.)

Subparagraph 17 of Annex B provides that the ‘Orderly Withdrawal of all Foreign Forces’ shall take place on ‘D-Day + 180 days’.

Uganda asserts that the final withdrawal of its forces occurred on 2 June 2003. What are the views of the two Parties regarding the legal basis for the presence of Ugandan forces in the Democratic Republic of the Congo in the period between the date of the ‘final orderly withdrawal’, agreed to in the Lusaka Agreement, and 2 June 2003?”

The Parties provided replies to these questions orally and in writing, pursuant to Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, each Party presented written observations on the written replies received from the other.

23. In its Application, the DRC made the following requests:

“Consequently, and whilst reserving the right to supplement and amplify the present request in the course of the proceedings, the Democratic Republic of the Congo requests the Court to:

Adjudge and declare that:

(a) Uganda is guilty of an act of aggression within the meaning of Article 1 of resolution 3314 of the General Assembly of the United Nations of 14 December 1974 and of the jurisprudence of the International Court of Justice, contrary to Article 2, paragraph 4, of the United Nations Charter;

(b) further, Uganda is committing repeated violations of the Geneva Conventions of 1949 and their Additional Protocols of 1977, in
flagrant disregard of the elementary rules of international humanitarian law in conflict zones, and is also guilty of massive human rights violations in defiance of the most basic customary law;

(c) more specifically, by taking forcible possession of the Inga hydroelectric dam, and deliberately and regularly causing massive electrical power cuts, in violation of the provisions of Article 56 of the Additional Protocol of 1977, Uganda has rendered itself responsible for very heavy losses of life among the 5 million inhabitants of the city of Kinshasa and the surrounding area;

(d) by shooting down, on 9 October 1998 at Kindu, a Boeing 727 the property of Congo Airlines, thereby causing the death of 40 civilians, Uganda has also violated the Convention on International Civil Aviation signed at Chicago on 7 December 1944, the Hague Convention of 16 December 1970 for the Suppression of Unlawful Seizure of Aircraft and the Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

Consequently, and pursuant to the aforementioned international legal obligations, to adjudge and declare that:

1. all Ugandan armed forces participating in acts of aggression shall forthwith vacate the territory of the Democratic Republic of the Congo;

2. Uganda shall secure the immediate and unconditional withdrawal from Congolese territory of its nationals, both natural and legal persons;

3. the Democratic Republic of the Congo is entitled to compensation from Uganda in respect of all acts of looting, destruction, removal of property and persons and other unlawful acts attributable to Uganda, in respect of which the Democratic Republic of the Congo reserves the right to determine at a later date the precise amount of the damage suffered, in addition to its claim for the restitution of all property removed.

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

On behalf of the Government of the DRC,

in the Memorial:

“The Democratic Republic of the Congo, while reserving the right to supplement or modify the present submissions and to provide the Court with fresh evidence and pertinent new legal arguments in the context of the present dispute, requests the Court to adjudge and declare:

1. that the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces operating there, has violated the following principles of conventional and customary law:
   — the principle of non-use of force in international relations, including the prohibition of aggression;
   — the obligation to settle international disputes exclusively by peace-

ful means so as to ensure that international peace and security, as well as justice, are not placed in jeopardy;

— respect for the sovereignty of States and the rights of peoples to self-determination, and hence to choose their own political and economic system freely and without outside interference;

— the principle of non-interference in matters within the domestic jurisdiction of States, which includes refraining from extending any assistance to the parties to a civil war operating on the territory of another State;

2. that the Republic of Uganda, by engaging in the illegal exploitation of Congolese natural resources and by pillaging its assets and wealth, has violated the following principles of conventional and customary law:

— respect for the sovereignty of States, including over their natural resources;

— the duty to promote the realization of the principle of equality of peoples and of their right of self-determination, and consequently to refrain from exposing peoples to foreign subjugation, domination or exploitation;

— the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters;

3. that the Republic of Uganda, by committing acts of oppression against the nationals of the Democratic Republic of the Congo, by killing, injuring, abducting or despoiling those nationals, has violated the following principles of conventional and customary law:

— the principle of conventional and customary law involving the obligation to respect and ensure respect for fundamental human rights, including in times of armed conflict;

— the entitlement of Congolese nationals to enjoy the most basic rights, both civil and political, as well as economic, social and cultural;

4. that, in light of all the violations set out above, the Republic of Uganda shall, to the extent of and in accordance with, the particulars set out in Chapter VI of this Memorial, and in conformity with customary international law:

— cease forthwith any continuing internationally wrongful act, in particular its occupation of Congolese territory, its support for irregular forces operating in the Democratic Republic of the Congo, its unlawful detention of Congolese nationals and its exploitation of Congolese wealth and natural resources;

— make reparation for all types of damage caused by all types of wrongful act attributable to it, no matter how remote the causal link between the acts and the damage concerned;

— accordingly make reparation in kind where this is still physically possible, in particular restitution of any Congolese resources, assets or wealth still in its possession;

— failing this, furnish a sum covering the whole of the damage...
suffered, including, in particular, the examples mentioned in paragraph 6.65 of this Memorial;
— further, in any event, render satisfaction for the insults inflicted by it upon the Democratic Republic of the Congo, in the form of official apologies, the payment of damages reflecting the gravity of the infringements and the prosecution of all those responsible;
— provide specific guarantees and assurances that it will never again in the future commit any of the above-mentioned violations against the Democratic Republic of the Congo”;

in the Reply:

“The Democratic Republic of the Congo, while reserving the right to supplement or modify the present submissions and to provide the Court with fresh evidence and pertinent new legal arguments in the context of the present dispute, requests the Court to adjudge and declare:

(1) that the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces operating there, has violated the following principles of conventional and customary law:
— the principle of non-use of force in international relations, including the prohibition of aggression;
— the obligation to settle international disputes exclusively by peaceful means so as to ensure that peace, international security and justice are not placed in jeopardy;
— respect for the sovereignty of States and the rights of peoples to self-determination, and hence to choose their own political and economic system freely and without outside interference;
— the principle of non-interference in matters within the domestic jurisdiction of States, which includes refraining from extending any assistance to the parties to a civil war operating on the territory of another State;

(2) that the Republic of Uganda, by engaging in the illegal exploitation of Congolese natural resources and by pillaging its assets and wealth, has violated the following principles of conventional and customary law:
— respect for the sovereignty of States, including over their natural resources;
— the duty to promote the realization of the principle of equality of peoples and of their right of self-determination, and consequently to refrain from exposing peoples to foreign subjugation, domination or exploitation;
— the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters;

(3) that the Republic of Uganda, by committing abuses against nationals of the Democratic Republic of the Congo, by killing, injuring, and abducting those nationals or robbing them of their property, has violated the following principles of conventional and customary law:
— the principle of non-use of force in international relations, including the prohibition of aggression;
— the obligation to respect and ensure respect for fundamental human rights, including in times of armed conflict;
— the principle of conventional and customary law whereby it is necessary, at all times, to make a distinction in an armed conflict between civilian and military objectives;
— the entitlement of Congolese nationals to enjoy the most basic rights, both civil and political, as well as economic, social and cultural;

(4) that, in light of all the violations set out above, the Republic of Uganda shall, in accordance with customary international law:
— cease forthwith all continuing internationally wrongful acts, and in particular its occupation of Congolese territory, its support for irregular forces operating in the Democratic Republic of the Congo and its exploitation of Congolese wealth and natural resources;
— make reparation for all types of damage caused by all types of wrongful act attributable to it, no matter how remote the causal link between the acts and the damage concerned;
— accordingly, make reparation in kind where this is still physically possible, in particular in regard to any Congolese resources, assets or wealth still in its possession;
— failing this, furnish a sum covering the whole of the damage suffered, including, in particular, the examples set out in paragraph 6.65 of the Memorial of the Democratic Republic of the Congo and restated in paragraph 1.58 of the present Reply;
— further, in any event, render satisfaction for the injuries inflicted upon the Democratic Republic of the Congo, in the form of official apologies, the payment of damages reflecting the gravity of the violations and the prosecution of all those responsible;
— provide specific guarantees and assurances that it will never again in the future perpetrate any of the above-mentioned violations against the Democratic Republic of the Congo;

(5) that the Ugandan counter-claim alleging involvement by the DRC in armed attacks against Uganda be dismissed, on the following grounds:
— to the extent that it relates to the period before Laurent-Désiré Kabila came to power, the claim is inadmissible because Uganda had previously waived its right to lodge such a claim and, in the alternative, the claim is unfounded because Uganda has failed to establish the facts on which it is based;
— to the extent that it relates to the period after Laurent-Désiré Kabila came to power, the claim is unfounded because Uganda has failed to establish the facts on which it is based.

(6) that the Ugandan counter-claim alleging involvement by the DRC in
an attack on the Ugandan Embassy and on Ugandan nationals in Kinshasa be dismissed, on the following grounds:

— to the extent that Uganda is seeking to engage the responsibility of the DRC for acts contrary to international law allegedly committed to the detriment of Ugandan nationals, the claim is inadmissible because Uganda has failed to show that the persons for whose protection it claims to provide are its nationals or that such persons have exhausted the local remedies available in the DRC; in the alternative, this claim is unfounded because Uganda has failed to establish the facts on which it is based;
— that part of the Ugandan claims concerning the treatment allegedly inflicted on its diplomatic premises and personnel in Kinshasa is unfounded because Uganda has failed to establish the facts on which it is based”;

in the additional pleading entitled “Additional Written Observations on the Counter-Claims presented by Uganda”:

“The Democratic Republic of the Congo, while reserving the right to supplement or modify the present submissions and to provide the Court with fresh evidence and pertinent new legal arguments in the context of the present dispute, requests the Court, pursuant to the Rules of Court, to adjudge and declare:

As regards the first counter-claim presented by Uganda:

(1) to the extent that it relates to the period before Laurent-Désiré Kabila came to power, the claim is inadmissible because Uganda had previously waived its right to lodge such a claim and, in the alternative, the claim is unfounded because Uganda has failed to establish the facts on which it is based;
(2) to the extent that it relates to the period from when Laurent-Désiré Kabila came to power until the onset of Ugandan aggression, the claim is unfounded in fact because Uganda has failed to establish the facts on which it is based;
(3) to the extent that it relates to the period after the onset of Ugandan aggression, the claim is founded neither in fact nor in law because Uganda has failed to establish the facts on which it is based, and because, from 2 August 1998, the DRC was in any event in a situation of self-defence.

As regards the second counter-claim presented by Uganda:

(1) to the extent that it is now centred on the interpretation and application of the Vienna Convention of 1961 on Diplomatic Relations, the claim presented by Uganda radically modifies the subject-matter of the dispute, contrary to the Statute and Rules of Court; this aspect of the claim must therefore be dismissed from the present proceedings;
(2) the aspect of the claim relating to the inhumane treatment allegedly suffered by certain Ugandan nationals remains inadmissible, as Uganda has still not shown that the conditions laid down by international law for the exercise of its diplomatic protection have been met;

in the alternative, this aspect of the claim is unfounded, as Uganda is still unable to establish the factual and legal bases for its claims;

(3) the aspect of the claim relating to the alleged expropriation of Ugandan public property is unfounded, as Uganda is still unable to establish the factual and legal bases for its claims.”

On behalf of the Government of Uganda,
in the Counter-Memorial:

“Reserving its right to supplement or amend its requests, the Republic of Uganda requests the Court:

(1) To adjudge and declare in accordance with international law:
(A) that the requests of the Democratic Republic of the Congo relating to activities or situations involving the Republic of Rwanda or its agents are inadmissible for the reasons set forth in Chapter XV of the present Counter-Memorial;
(B) that the requests of the Democratic Republic of the Congo that the Court adjudge that the Republic of Uganda is responsible for various breaches of international law, as alleged in the Application and/or the Memorial of the Democratic Republic of Congo, are rejected; and
(C) that the Counter-claims presented in Chapter XVIII of the present Counter-Memorial be upheld.

(2) To reserve the issue of reparation in relation to the Counter-claims for a subsequent stage of the proceedings”;

in the Rejoinder:

“Reserving her right to supplement or amend her requests, the Republic of Uganda requests the Court:

1. To adjudge and declare in accordance with international law:
(A) that the requests of the Democratic Republic of the Congo relating to activities or situations involving the Republic of Rwanda or her agents are inadmissible for the reasons set forth in Chapter XV of the present Counter-Memorial;
(B) that the requests of the Democratic Republic of the Congo that the Court adjudge that the Republic of Uganda is responsible for various breaches of international law, as alleged in the Memorial and/or the Reply of the Democratic Republic of Congo, are rejected; and
(C) that the Counter-claims presented in Chapter XVIII of the Counter-Memorial and reaffirmed in Chapter VI of the present Rejoinder be upheld.

2. To reserve the issue of reparation in relation to the Counter-claims for a subsequent stage of the proceedings.”

25. At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of the DRC,
at the hearing of 25 April 2005, on the claims of the DRC:
“The Congo 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.

2. That the Republic of Uganda, by committing acts of violence against nationals of the Democratic Republic of the Congo, by killing and injuring them or despoiling them of their property, by failing to take adequate measures to prevent violations of human rights in the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:
   — the principle of conventional and customary law imposing an obligation to respect, and ensure respect for, fundamental human rights, including in times of armed conflict, in accordance with international humanitarian law;
   — the principle of conventional and customary law imposing an obligation, at all times, to make a distinction in an armed conflict between civilian and military objectives;
   — the right of Congolese nationals to enjoy the most basic rights, both civil and political, as well as economic, social and cultural.

3. That the Republic of Uganda, by engaging in the illegal exploitation of Congolese natural resources, by pillaging its assets and wealth, by failing to take adequate measures to prevent the illegal exploitation of the resources of the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:
   — the applicable rules of international humanitarian law;
   — respect for the sovereignty of States, including over their natural resources;
   — the duty to promote the realization of the principle of equality of peoples and of their right of self-determination, and consequently to refrain from exposing peoples to foreign subjugation, domination or exploitation;
   — the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters.

4. (a) That the violations of international law set out in submissions 1, 2 and 3 constitute wrongful acts attributable to Uganda which engage its international responsibility;
   (b) that the Republic of Uganda shall cease forthwith all continuing internationally wrongful acts, and in particular its support for irregular forces operating in the DRC and its exploitation of Congolese wealth and natural resources;
   (c) that the Republic of Uganda shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of;
   (d) that the Republic of Uganda is under an obligation to the Democratic Republic of the Congo to make reparation for all injury caused to the latter by the violation of the obligations imposed by international law and set out in submissions 1, 2 and 3 above;
   (e) that the nature, form and amount of the reparation shall be determined by the Court, failing agreement thereon between the Parties, and that the Court shall reserve the subsequent procedure for that purpose.

5. That the Republic of Uganda has violated the Order of the Court on provisional measures of 1 July 2000, in that it has failed to comply with the following provisional measures:
   ‘(1) both Parties must, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve;
   (2) both Parties must, forthwith, take all measures necessary to comply with all of their obligations under international law, in particular those under the United Nations Charter and the Charter of the Organization of African Unity, and with United Nations Security Council resolution 1304 (2000) of 16 June 2000;
   (3) both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law”;

at the hearing of 29 April 2005, on the counter-claims of Uganda:

“The Congo requests the International Court of Justice to adjudge and declare:

As regards the first counter-claim submitted by Uganda:
(1) to the extent that it relates to the period before Laurent-Désiré Kabila came to power, Uganda's claim is inadmissible because Uganda had previously renounced its right to lodge such a claim; in the alternative, the claim is unfounded because Uganda has failed to establish the facts on which it is based;

(2) to the extent that it relates to the period from the time when Laurent-Désiré Kabila came to power to the time when Uganda launched its armed attack, Uganda's claim is unfounded in fact because Uganda has failed to establish the facts on which it is based;

(3) to the extent that it relates to the period subsequent to the launching of Uganda's armed attack, Uganda's claim is unfounded both in fact and in law because Uganda has failed to establish the facts on which it is based and, in any event, from 2 August 1998 the DRC was in a situation of self-defence.

As regards the second counter-claim submitted by Uganda:

(1) to the extent that it now relates to the interpretation and application of the Vienna Convention of 1961 on Diplomatic Relations, the claim submitted by Uganda radically changes the subject-matter of the dispute, contrary to the Statute and to the Rules of Court; that part of the claim must therefore be dismissed from the present proceedings;

(2) that part of the claim relating to the alleged mistreatment of certain Ugandan nationals remains inadmissible because Uganda has still failed to show that the requirements laid down by international law for the exercise of its diplomatic protection were satisfied; in the alternative, that part of the claim is unfounded because Uganda is still unable to establish the factual and legal bases of its claims.

(3) that part of the claim relating to the alleged expropriation of Uganda's public property is unfounded because Uganda is still unable to establish the factual and legal bases of its claims.”

On behalf of the Government of Uganda,
at the hearing of 27 April 2005, on the claims of the DRC and the counter-claims of Uganda:

“The Republic of Uganda requests the Court:

(1) To adjudge and declare in accordance with international law:
(A) that the requests of the Democratic Republic of the Congo relating to the activities or situations involving the Republic of Rwanda or her agents are inadmissible for the reasons set forth in Chapter XV of the Counter-Memorial and reaffirmed in the oral pleadings;
(B) that the requests of the Democratic Republic of the Congo that the Court adjudge and declare that the Republic of Uganda is responsible for various breaches of international law, as alleged in the Memorial, the Reply and/or the oral pleadings are rejected; and
(C) that Uganda’s counter-claims presented in Chapter XVIII of the Counter-Memorial, and reaffirmed in Chapter VI of the Rejoinder as well as the oral pleadings be upheld.

(2) To reserve the issue of reparation in relation to Uganda’s counter-claims for a subsequent stage of the proceedings.”

* * *

26. The Court is aware of the complex and tragic situation which has long prevailed in the Great Lakes region. There has been much suffering by the local population and destabilization of much of the region. In particular, the instability in the DRC has had negative security implications for Uganda and some other neighbouring States. Indeed, the Summit meeting of the Heads of State in Victoria Falls (held on 7 and 8 August 1998) and the Agreement for a Ceasefire in the Democratic Republic of the Congo signed in Lusaka on 10 July 1999 (hereinafter “the Lusaka Agreement”) acknowledged as legitimate the security needs of the DRC’s neighbours. The Court is aware, too, that the factional conflicts within the DRC require a comprehensive settlement to the problems of the region.

However, the task of the Court must be to respond, on the basis of international law, to the particular legal dispute brought before it. As it interprets and applies the law, it will be mindful of context, but its task cannot go beyond that.

* * *

27. The Court finds it convenient, in view of the many actors referred to by the Parties in their written pleadings and at the hearing, to indicate the abbreviations which it will use for those actors in its judgment. Thus the Allied Democratic Forces will hereinafter be referred to as the ADF, the Alliance of Democratic Forces for the Liberation of the Congo (Alliance des forces démocratiques pour la libération du Congo) as the AFDL, the Congo Liberation Army (Armée de libération du Congo) as the ALC, the Congolese Armed Forces (Forces armées congolaises) as the FAC, the Rwandan Armed Forces (Forces armées rwandaises) as the FAR, the Former Uganda National Army as the FUNA, the Lord’s Resistance Army as the LRA, the Congo Liberation Movement (Mouvement de libération du Congo) as the MLC, the National Army for the Liberation of Uganda as the NALU, the Congolese Rally for Democracy (Rassemblement congolais pour la démocratie) as the RCD, the Congolese Rally for Democracy-Kisangani (Rassemblement congolais pour la démocratie-Kisangani) as the RCD-Kisangani (also known as RCD-Wamba), the Congolese Rally for Democracy-Liberation Movement (Rassemblement congolais pour la démocratie-Mouvement de libération) as the RCD-ML, the Rwandan Patriotic Army as the RPA, the Sudan People’s Liberation Movement/Army as the SPLM/A, the Uganda
National Rescue Front II as the UNRF II, the Uganda Peoples’ Defence Forces as the UPDF, and the West Nile Bank Front as the WNBF.

* * *

28. In its first submission the DRC requests the Court to adjudge and declare:

“1. That the Republic of Uganda, by engaging in military and para-military activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces having operated there, has violated the following principles of conventional and customary law:

— the principle of non-use of force in international relations, including the prohibition of aggression;

— the obligation to settle international disputes exclusively by peaceful means so as to ensure that international peace and security, as well as justice, are not placed in jeopardy;

— respect for the sovereignty of States and the rights of peoples to self-determination, and hence to choose their own political and economic system freely and without outside interference;

— the principle of non-intervention in matters within the domestic jurisdiction of States, including refraining from extending any assistance to the parties to a civil war operating on the territory of another State.”

29. The DRC explains that in 1997 Laurent-Désiré Kabila, who was at the time a Congolese rebel leader at the head of the AFDL (which was supported by Uganda and Rwanda), succeeded in overthrowing the then President of Zaire, Marshal Mobutu Ssese Seko, and on 29 May 1997 was formally sworn in as President of the renamed Democratic Republic of the Congo. The DRC 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”.

33. The DRC notes that the events in its territory were viewed with grave concern by the international community. The DRC claims that at the Victoria Falls Summit, which took place on 7 and 8 August 1998, and
was attended by representatives of the DRC, Uganda, Namibia, Rwanda, Tanzania, Zambia and Zimbabwe.

“member countries of the SADC [Southern African Development Community], following the submission of an application by the Democratic Republic of the Congo, unequivocally condemned the aggression suffered by the Congo and the occupation of certain parts of its national territory”.

The DRC further points out that, in an attempt to help resolve the conflict, the SADC, the States of East Africa and the Organization of African Unity (OAU) initiated various diplomatic efforts, which included a series of meetings between the belligerents and the representatives of various African States, also known as the “Lusaka Process”. On 18 April 1999 the Sirte Peace Agreement was concluded, in the framework of the Lusaka peace process, between President Kabila of the DRC and President Museveni of Uganda. The DRC explains that, under this Agreement, Uganda undertook to “cease hostilities immediately” and to withdraw its troops from the territory of the DRC. The Lusaka Agreement was signed by the Heads of State of the DRC, Uganda and other African States (namely, Angola, Namibia, Rwanda and Zimbabwe) on 10 July 1999 and by the MLC and RCD (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 Kampaala plan and the Harare plan.

34. According to the DRC, following the withdrawal of Ugandan troops from its territory in June 2003, Uganda has continued to provide arms to ethnic groups confronting one another in the Ituri region, on the boundary with Uganda. The DRC further argues that Uganda “has left behind it a fine network of warlords, whom it is still supplying with arms and who themselves continue to plunder the wealth of the DRC on behalf of Ugandan and foreign businessmen”.

35. Uganda, for its part, claims that from early 1994 through to approximately May 1997 the Congolese authorities provided military and logistical support to anti-Ugandan insurgents. Uganda asserts that from the beginning of this period it was the victim of cross-border attacks from these armed rebels in eastern Congo. It claims that, in response to these attacks, until late 1997 it confined its actions to its own side of the Congo-Uganda border, by reinforcing its military positions along the frontier.

36. According to Uganda, in 1997 the AFDL, made up of a loose alliance of the combined forces of the various Congolese rebel groups, together with the Rwandan army, overthrew President Mobutu’s régime in Zaire. Uganda asserts that upon assuming power on 29 May 1997, President Kabila invited Uganda to deploy its own troops in eastern Congo in view of the fact that the Congolese army did not have the resources to control the remote eastern provinces, and in order to “eliminate” the anti-Ugandan insurgents operating in that zone and to secure the border region. According to Uganda, it was on this understanding that Ugandan troops crossed into eastern Congo and established bases on Congolese territory. Uganda further alleges that in December 1997, at 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 FAC 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 Luanda 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 Congo with the consent of the country’s lawful government”. It is clear from the materials put before the Court that in the period preceding August 1998 the DRC did not object to Uganda’s military presence and activities in its eastern border area. The written pleadings of the DRC make reference to authorized Ugandan operations from September 1997 onwards. There is reference to such authorized action by Uganda on 19 December 1997, in early February 1998 and again in early July 1998, when the DRC author-
ized the transfer of Ugandan units to Ntabi, in Congolese territory, in order to fight more effectively against the ADF.

46. A series of bilateral meetings between the two Governments took place in Kinshasa from 11 to 13 August 1997, in Kampala from 6 to 7 April 1998 and again in Kinshasa from 24 to 27 April 1998. This last meeting culminated in a Protocol on Security along the Common Border being signed on 27 April 1998 between the two countries, making reference, inter alia, to the desire “to put an end to the existence of the rebel groups operating on either side of the common border, namely in the Ruwenzori”. The two parties agreed that their respective armies would “co-operate in order to insure security and peace along the common border”. The DRC contends that these words do not constitute an “invitation or acceptance by either of the contracting parties to send its army into the other’s territory”. The Court believes that both the absence of any objection to the presence of Ugandan troops in the DRC in the preceding months, and the practice subsequent to the signing of the Protocol, support the view that the continued presence as before of Ugandan troops would be permitted by the DRC by virtue of the Protocol. Uganda told the Court that

“[p]ursuant to the Protocol, Uganda sent a third battalion into eastern Congo, which brought her troop level up to approximately 2,000, and she continued military operations against the armed groups in the region both unilaterally and jointly with Congolese Government forces”.

The DRC has not denied this fact nor that its authorities accepted this situation.

47. While the co-operation envisaged in the Protocol may be reasonably understood as having its effect in a continued authorization of Ugandan troops in the border area, it was not the legal basis for such authorization or consent. The source of an authorization or consent to the crossing of the border by these troops antedated the Protocol and this prior authorization or consent could thus be withdrawn at any time by the Government of the DRC, without further formalities being necessary.

48. The Court observes that when President Kabila came to power, the influence of Uganda and in particular Rwanda in the DRC became substantial. In this context it is worthy of note that many Rwandan officers held positions of high rank in the Congolese army and that Colonel James Kabarebe, of Rwandan nationality, was the Chief of Staff of the FAC (the armed forces of the DRC). From late spring 1998, President Kabila sought, for various reasons, to reduce this foreign influence; by mid-1998, relations between President Kabila and his former allies had deteriorated. In light of these circumstances the presence of Rwandan troops on Congolese territory had in particular become a major concern for the Government of the DRC.

49. On 28 July 1998, an official statement by President Kabila was published, which read as follows:

“The Supreme Commander of the Congolese National Armed Forces, the Head of State of the Republic of the Congo and the Minister of National Defence, advises the Congolese people that he has just terminated, with effect from this Monday 27 July 1998, the Rwandan military presence which has assisted us during the period of the country’s liberation. Through these military forces, he would like to thank all of the Rwandan people for the solidarity they have demonstrated to date. He would also like to congratulate the democratic Congolese people on their generosity of spirit for having tolerated, provided shelter for and trained these friendly forces during their stay in our country. This marks the end of the presence of all foreign military forces in the Congo.” [Translation by the Registry.]

50. The DRC has contended that, although there was no specific reference to Ugandan troops in the statement, the final phrase indicated that consent was withdrawn for Ugandan as well as Rwandan troops. It states that, having learned of a 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).


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 Congolese 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 Buteombo, 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 Viola Mbeang Ilwa was more contemporaneous (15 October 1998) and is of some particular interest, as he was the pilot of the plane said to have been hijacked. In it he asserts that Ugandan officers at the hotel informed him
of their plan to topple President Kabila within ten days. There is, however, no indication of how this statement was provided, or in what circumstances. The same is true of the statement of Commander Mpele-Mpele regarding air traffic allegedly indicating Ugandan participation in the Kitona operation.

65. The Court has been presented with some evidence concerning a Ugandan national, referred to by the DRC as Salim Byaruhanga, said to be a prisoner of war. The record of an interview following the visit of Ugandan Senator Aggrey Awori consists of a translation, unsigned by the translator. Later, the DRC produced for the Court a video, said to verify the meeting between Mr. Awori and Ugandan prisoners. The video shows four men being asked questions by another addressing them in a language of the region. One of these says his name is “Salim Byaruhanga”. There is, however, no translation provided, nor any information as to the source of this tape. There do exist letters of August 2001 passing between the International Committee of the Red Cross (ICRC) and the Congolese Government on the exchange of Ugandan prisoners, one of whom is named as Salim Byaruhanga. However, the ICRC never refers to this person as a member of the UPDF. Uganda has also furnished the Court with a notarized affidavit of the Chief of Staff of the UPDF saying that there were no Ugandan prisoners of war in the DRC, nor any officer by the name of Salim Byaruhanga. This affidavit is stated to have been prepared in November 2002, in view of the forthcoming case before the International Court of Justice. The Court recalls that it has elsewhere observed that a member of the government of a State engaged in litigation before this Court — and especially litigation relating to armed conflict — “will probably tend to identify himself with the interests of his country” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 43, para. 70). The same may be said of a senior military officer of such a State, and “while in no 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 flown to western Congo from Gala Airport, make no reference to the location of Kitona or to events there on 4 August.

68. Nor can the truth about the Kitona airborne operation be 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. Braekman wrote about rebels fleeing a Ugandan battalion of several hundred men.

69. The Court cannot give weight to claims made by the DRC that a Ugandan tank was used in the Kitona operation. It would seem that a tank of the type claimed to be “Ugandan” was captured at Kasangulu. This type of tank a — T-55 — was in fact 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
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.

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 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 DRC to the question of Judge Kooijmans that there were no Ugandan forces present in South Kivu, Maniema or Kasai Oriental province south of the vicinity of Bunia.

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.
ARMED ACTIVITIES (JUDGMENT)

Both Parties agree that Buta was taken on 10 August 1998, and Dulia on 27 October. The Porter Commission was informed that Ugandan troops were present at Bwende and Bwende on 12 October.

The DRC has alleged that Kindu was taken by Ugandan troops on 20 October 1998; this was denied in some detail by Uganda during the rejoinder. It is also clear that, in some cases, the location of certain places was unclear. The DRC claims that Kindu was taken by Ugandan forces on 25 October 1998, but this is not supported by the evidence. The Court notes that a schedule was given by the Ugandan military authorities to the Porter Commission containing a composite listing of locations and corresponding “dates of capture”. The Court accepts the earlier dates claimed by Uganda.

The DRC claims that Mobeka—taken in this period—was “taken” by Ugandan forces. The Court does not feel it has convincing evidence as to Mobeka having been taken by Ugandan forces in October 1998.

On 7 August 1998, the DRC also claims that Watsa was “taken” by Ugandan forces. The Court notes that a schedule was given by the Ugandan military authorities to the Porter Commission containing a composite listing of locations and corresponding “dates of capture”. The Court accepts the earlier dates claimed by Uganda.

The DRC claims that Gbadolite was 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), Mabaye (4 July), Businga (7 July), Katakoli (8 July), Libeorge (29 July), and Zongo (31 July).

The DRC also claims that Madinga and Basakasa (two locations on the extreme southern border) were “taken” by Ugandan forces on 20 November 1999, and that fact is agreed by Uganda. The Court notes that a schedule was given by the Ugandan military authorities to the Porter Commission containing a composite listing of locations and corresponding “dates of capture”. The Court accepts the earlier dates claimed by Uganda.
in February 2000; Inese and Bururu in April 2000; and Mobenzene 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 Gemena 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 Mobenzene, Bururu, Bomongo, and Moba 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 Mobenzene, Bururu, Bomongo and Moba 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”.

98. A more complex question, on which the Parties took clearly
opposed positions, was whether the calendar for withdrawal and its relationship to the series of “Major Events”, taken together with the reference to the “D-Day plus 180 days”, constituted consent by the DRC to the presence of Ugandan forces for at least 180 days from 10 July 1999 — and indeed beyond that time if the envisaged necessary “Major Events” did not occur.

99. The Court is of the view that, notwithstanding the special features of the Lusaka Agreement just described, this conclusion cannot be drawn. The Agreement took as its starting point the realities on the ground. Among those realities were the major Ugandan military deployment across vast areas of the DRC and the massive loss of life over the preceding months. The arrangements made at Lusaka, to progress towards withdrawal of foreign forces and an eventual peace, with security for all concerned, were directed at these factors on the ground and at the realities of the unstable political and security situation. The provisions of the Lusaka Agreement thus represented an agreed modus operandi for the parties. They stipulated how the parties should move forward. They did not purport to qualify the Ugandan military presence in legal terms. In accepting this modus operandi the DRC did not “consent” to the presence of Ugandan troops. It simply concurred that there should be a process to end that reality in an orderly fashion. The DRC was willing to proceed from the situation on the ground as it existed and in the manner agreed as most likely to secure the result of a withdrawal of foreign troops in a stable environment. But it did not thereby recognize the situation on the ground as legal, either before the Lusaka Agreement or in the period that would pass until the fulfilment of its terms.

100. In resolution 1234 of 9 April 1999 the Security Council had called for the “immediate signing of a ceasefire agreement” allowing for, inter alia, “the orderly withdrawal of all foreign forces”. The Security Council fully appreciated that this withdrawal would entail political and security elements, as shown in paragraphs 4 and 5 of resolution 1234 (1999). This call was reflected three months later in the Lusaka Agreement. But these arrangements did not preclude the Security Council from continuing to identify Uganda and Rwanda as having violated the sovereignty and territorial integrity of the DRC and as being under an obligation to withdraw their forces “without further delay, in conformity with the timetable of the Ceasefire Agreement” (Security Council resolution 1304, 16 June 2000), i.e., without any delay to the modus operandi provisions agreed upon by the parties.

101. This conclusion as to the effect of the Lusaka Agreement upon the legality of the presence of Ugandan troops on Congolese territory did not change with the revisions to the timetable that became necessary. The Kampala Disengagement Plan of 8 April 2000 and the Harare Disengagement Plan of 6 December 2000 provided for new schedules for withdrawal, it having become apparent that the original schedule in the Annex to the Lusaka Agreement was unrealistic. While the status of Ugandan troops remained unchanged, the delay in relation to the D-Day plus 180 days envisaged in the Lusaka Agreement likewise did not change the legal status of the presence of Uganda, all parties having agreed to these delays to the withdrawal calendar.

102. The Luanda Agreement, a bilateral agreement between the DRC and Uganda on “withdrawal of Ugandan troops from the Democratic Republic of the Congo, co-operation and normalisation of relations between the two countries”, alters the terms of the multilateral Lusaka Agreement. The other parties offered no objection.

103. The withdrawal of Ugandan forces was now to be carried out “in accordance with the Implementation Plan marked Annex “A” and attached thereto” (Art. 1, para. 1). This envisaged the completion of withdrawal within 100 days after signature, save for the areas of 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 while 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;
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 “when 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 Magenyi 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
122. The Court observes, more specifically, that in its Counter-Memorial Uganda claimed that from 1994 to 1997 anti-Ugandan insurgents “received direct support from the Government of Sudan” and that the latter trained and armed insurgent groups, in part to destabilize Uganda’s status as a “good example” in Africa. For this, Uganda relied on a Human Rights Watch (hereinafter HRW) report. The Court notes that this report is on the subject of slavery in the Sudan and does not assist with the issue before the Court. It also relied on a Ugandan political report which simply claimed, without offering supporting evidence, that the Sudan was backing groups launching attacks from the DRC. It further relies on an HRW report of 2000 stating that the Sudan was providing military and logistical assistance to the LRA, in the north of Uganda, and to the SPLM/A (by which Uganda does not claim to have been attacked). The claims relating to the LRA, which are also contained in the Counter-Memorial of Uganda, have no relevance to the present case. No more relevant is the HRW report of 1998 criticizing the use of child soldiers in northern Uganda.

123. The Court has next examined the evidence advanced to support the assertion that the Sudan was supporting anti-Ugandan groups which were based in the DRC, namely FUNA, UNRF II and NALU. This consists of a Ugandan political report of 1998 which itself offers no evidence, and an address by President Museveni of 2000. These documents do not constitute probative evidence of the points claimed.

124. Uganda states that President Kabila entered into an alliance with the Sudan, “which he invited to occupy and utilise airfields in north-eastern Congo for two purposes: delivering arms and other supplies to the insurgents; and conducting aerial bombardment of Uganda towns and villages”. Only President Museveni’s address to Parliament is relied on. Certain assertions relating to the son of Idi Amin, and the role he was being given in the Congolese military, even were they true, prove nothing as regards the specific allegations concerning the Sudan.

125. Uganda has informed the Court that a visit was made by President Kabila in May 1998 to the Sudan, in order to put at the Sudan’s disposal all the airfields in northern and eastern Congo, and to deliver arms and troops to anti-Ugandan insurgents along Uganda’s border. Uganda offered as evidence President Museveni’s address to Parliament, together with an undated, unsigned internal Ugandan military intelligence document. Claims as to what was agreed as a result of any such meeting that might have taken place remain unproven.

126. Uganda informed the Court that Uganda military intelligence reported that in August 1998 the Sudan airlifted insurgents from the WNBF and LRA to fight alongside Congolese forces against RPA and RCD rebels. The Court observes that, even were that proven (which in the Court’s view is not the case), the DRC was entitled so to have acted. This invitation could not of itself have entitled Uganda to use force in self-defence. The Court has not been able to verify from concordant evidence the claim that the Sudan transported an entire Chadian brigade to Gbadolite (whether to join in attacks on Uganda or otherwise).

127. The Court further observes that claims that the Sudan was training and transporting FAC troops, at the request of the Congolese Government, cannot entitle Uganda to use force in self-defence, even were the alleged facts proven. In the event, such proof is not provided by the unsigned Ugandan military intelligence document, nor by a political report that Uganda relies on.

128. Article 51 of the Charter refers to the right of “individual or collective” self-defence. The Court notes that a State may invite another State to assist it in using force in self-defence. On 2 August 1998 civil war had broken out in the DRC and General Kazini later testified to the Porter Commission that operation “Safe Haven” began on 7-8 August 1998. The Ugandan written pleadings state that on 14 August 1998 Brigadier Khalil of the Sudan delivered three 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 “exploiting the incapacity of the Congolese Armed Forces” in controlling areas of North Kivu with neighbour Uganda. This independent report does seem to suggest some Sudanese support for the ADF’s activities. It also implies that this was not a matter of Congolese policy, but rather a reflection of its inability to control events along its border.

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 variable reliability, which go no further than to say that unconfirmed reports had been received that the Sudan was flying military supplies to Juba and Dungu. The Court has therefore not found probative such media reports as the IRIN update for 12 to 14 September 1998, stating that Hutu rebels were being trained in Sudan and the IRIN update for 16 September 1998, stating that “rebels claim Sudan is supporting Kabila at Kindu”.

55

56
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 if an armed attack has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. The Court considers that the lawfulness of a response to the imminent threat of armed attack is a question for the Security Council, and that self-defence is an inherent right of States.

The Court observes that the United States State Department statement in October 1998 condemning the DRC’s recruitment and training of former perpetrators of the Rwandan genocide was not made after the relevant incident had occurred. The Court accordingly expresses no view on whether such recruitment was an armed attack in the hands of the DRC.

The Court finds that it is necessary to examine the evidence and apply the law to its findings.

The Court notes that the evidence presented by Uganda does not establish that it was subjected to an armed attack by the armed forces of the DRC. The Court accordingly finds that Uganda was not in a situation of self-defence.

The Court observes that the United States State Department statement in October 1998 did not constitute an armed attack in the hands of the DRC.

The Court finds that it is necessary to examine the evidence and apply the law to its findings.

The Court notes that the evidence presented by Uganda does not establish that it was subjected to an armed attack by the armed forces of the DRC. The Court accordingly finds that Uganda was not in a situation of self-defence.

The Court observes that the United States State Department statement in October 1998 did not constitute an armed attack in the hands of the DRC.
which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.

147. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the 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 there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.

149. The Court has found that, from 7 August 1998 onwards, Uganda engaged in the use of force for purposes and in locations for which it had no consent whatever. The Court has also found that the events attested to by Uganda did not justify recourse to the use of force in self-defence.


151. The Court recalls that on 9 April 1999 the Security Council determined the conflict to constitute a threat to peace, security and stability in the region. In demanding an end to hostilities and a political solution to the conflict (which call was to lead to the Lusaka Agreement of 10 July 1999), the Security Council deplored the continued fighting and presence of foreign forces in the DRC and called for the States concerned “to bring to an end the presence of these uninvited forces” (United Nations doc. S/RES/1234, 9 April 1999).

152. The United Nations has throughout this long series of carefully balanced resolutions and detailed reports recognized that all States in the region must bear their responsibility for finding a solution that would bring peace and stability. The Court notes, however, that this widespread responsibility of the States of the region cannot excuse the unlawful military action of Uganda.

153. The evidence has shown that the UPDF traversed vast areas of the DRC, violating the sovereignty of that country. It engaged in military operations in a multitude of locations, including Bunia, Kisangani, Gbadolite and Ituri, and many others. These were grave violations of Article 2, paragraph 4, of the Charter.

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 airfields between Gbadolite and the Ugandan border; Uganda asserts that it did not go beyond this.

158. The Court observes that the pages cited by the DRC in Mr. Bemba’s book do not in fact support the claim of “the creation” of the MLC by Uganda, and cover the later period of March-July 1999. The Court has noted the description in Mr. Bemba’s book of the training of his men by Ugandan military instructors and finds that this accords with statements he made at that time, as recorded in the ICG report of 20 August 1999. The Court has equally noted Mr. Bemba’s insistence, in November 1999, that, while he was receiving support, it was he who was in control of the military venture and not Uganda. The Court is equally of the view that the Harare Disengagement Plan merely sought to identify locations of the various parties, without passing on their relationships to each other.

159. The Court has not relied on various other items offered as evidence on this point by the DRC, finding them, uncorroborated, based on second-hand reports, or not in fact saying what they are alleged to say by the DRC, or even in some cases partisan. The Court has for such reasons set aside the ICG report of 17 November, the HRW Report of March 2001, passages from the Secretary-General’s report on MONUC of 4 September 2000 (where reliance on second-hand reports is acknowledged); articles in the IRIN bulletin and Jeune Afrique; and the statement of a deserter who was co-operating with the Congolese military commission in preparing a statement for purposes of the present proceedings.

160. The Court concludes that there is no credible evidence to suggest that Uganda created the MLC. Uganda has acknowledged giving training and military support and there is evidence to that effect. The Court has not received probative evidence that Uganda controlled, or could control, the manner in which Mr. Bemba put such assistance to use. In the view of the Court, the conduct of the MLC was not that of “an organ” of Uganda (Article 4, International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts, 2001), nor that of an entity exercising elements of governmental authority on its behalf (Art. 5). The Court has considered whether the MLC’s conduct was “on the instructions of, or under the direction or control of” Uganda (Art. 8) and finds that there is no probative evidence by reference to which it has been persuaded that this was the case. Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries (see Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 62-65, paras. 109-115).

161. The Court would comment, however, that, even if the evidence does not suggest that the MLC’s conduct is attributable to Uganda, the training and military support given by Uganda to the ALC, the military wing of the MLC, violates certain obligations of international law.

162. Thus the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (hereinafter “the Declaration on Friendly Relations”) provides that:

“Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.” (General Assembly resolution 2625 (XXV), 24 October 1970.)

The Declaration further provides that

“no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State” (ibid.).
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 Bururu and Mobenzene, in the far north-western part of the DRC; and that “the southern boundary of the occupied area [ran] north of the towns of Mbandaka westwards, then [extended] east to Kisangani, rejoining the Ugandan border between Goma and Butembo”. According to the DRC, the occupation of its territory ended with the withdrawal of the Ugandan army on 2 June 2003.

168. The DRC contends that “the UPDF set up an occupation zone, which it administered both directly and indirectly”, in the latter case by way of the creation of and active support for various Congolese rebel factions. As an example of such administration, the DRC refers to the creation of a new province within its territory. In June 1999, the Ugandan authorities, in addition to the existing ten provinces, created an 11th province in the north-east of the DRC, in the vicinity of the Ugandan frontier. The “Kibali-Ituri” province thus created was the result of merging the districts of Ituri and Haut-Uélé, detached from Orientale province. On 18 June 1999 General Kazini, commander of the Ugandan forces in the DRC, “appointed Ms 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 Muzaara, 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”.

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-
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 occupied State, 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.

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”, 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 Lotso to this post, in particular as Governor from General Kazini's 18 June 1999, in which he appoints Ms Adèle Lotso as “provisional Governor” of the new province. This is also supported by material from the Secretary-General of MONUSCO (S/2001/128 of 12 February 2001) stating that, according to MONUSCO military observers, the UPDF was in effective control in Bunia (capital of Ituri district).

172. The Court considers that, under customary international 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”), 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 Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 167, para. 78, and 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 Hague Regulations, 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.

173. The Court found that the Ugandan armed forces had not established a structured military administration over territory occupied. The Court held that 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), were 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 Lotso to this post, in particular as Governor from General Kazini's 18 June 1999, in which he appoints Ms Adèle Lotso as “provisional Governor” of the new province. This is also supported by material from the Secretary-General of MONUSCO (S/2001/128 of 12 February 2001) stating that, according to MONUSCO military observers, the UPDF was in effective control in Bunia (capital of Ituri district).

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 view of the fact that Uganda established and exercised authority over the territory of the DRC, 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.

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 Lotso to this post, in particular as Governor from General Kazini's 18 June 1999, in which he appoints Ms Adèle Lotso as “provisional Governor” of the new province. This is also supported by material from the Secretary-General of MONUSCO (S/2001/128 of 12 February 2001) stating that, according to MONUSCO military observers, the UPDF was in effective control in Bunia (capital of Ituri district).
ARMED ACTIVITIES (JUDGMENT)

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 protect the civilian population and all persons under its control 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 on its part in preventing violations committed by rebel groups acting on their own account.

180. The Court notes that Uganda at all times had 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 and international humanitarian law which are relevant and applicable in the specific situation.

181. It is recalled (see paragraph 25 above) that in its second submission the DRC requests the Court to adjudge and declare:

- that the Republic of the Congo committed acts of violence against nationals of the Democratic Republic of the Congo, by killing or injuring them, or despoiling them of their property, through its own armed forces; and
- that the Republic of the Congo committed acts of violence against nationals of the Democratic Republic of the Congo, by failing to take adequate measures to prevent violations of its international obligations by its armed forces, or of its control over the activities of the rebel groups acting on their own account.

182. The DRC cites various sources of evidence in support of its claims, including the 2004 MONUC report on human rights violations in Ituri, reports submitted by the Special Rapporteur of the United Nations Commission on Human Rights, and testimony gathered on the ground by a number of reporters and humanitarian organizations. The DRC argues that it is possible to establish the facts of violations of human rights attributable to Uganda, based on reliable and varied sources. In particular, it notes that many of the grave accusations are the result of careful fieldwork carried out by MONUC experts, and attested to by other independent sources.

183. The DRC claims that the Ugandan armed forces perpetrated wide-scale massacres of civilians during their operations in the DRC, in particular in the Ituri region, and engaged in acts of torture and other cruel, inhuman, or degrading treatment. The DRC argues that the finding of the 2004 MONUC report on human rights violations in Ituri clearly establish the fact that the Ugandan armed forces participated in the mass killings of civilians.

184. The DRC maintains that in the areas occupied by the UPDF, Ugandan soldiers plundered civilian property for their "personal profit" and engaged in the deliberate destruction of villages, civilian dwellings...
and private property. With regard to the clashes between Uganda and Rwanda in the city of Kisangani in 1999 and 2000, the DRC refers, in particular, to Security Council resolution 1304 (2000), in which the Council deplored, *inter alia*, “the damage to property inflicted by the forces of Uganda and Rwanda on the Congolese population”. The DRC also alleges that the property and resources of the civilian populations in the eastern Congolese regions occupied by the Ugandan army were destroyed on certain occasions by UPDF soldiers as part of a “scorched earth” policy aimed at combating ADF rebels.

185. The DRC claims that several hundred Congolese children were forcibly recruited by the UPDF and taken to Uganda for ideological and military training in the year 2000. In particular, according to the DRC, many children were abducted in August 2000 in the areas of Bunia, Beni and Butembo and given military training at the Kyankwanzi camp in Uganda with a view to incorporating them into the Ugandan armed forces. The DRC maintains that the abducted children were only able to leave the Kyankwanzi training camp for final repatriation to the DRC at the beginning of July 2001 after persistent efforts by UNICEF and the United Nations to ensure their release.

186. The DRC contends that the Ugandan armed forces failed to protect the civilian population in combat operations with other belligerents. Thus it alleges that attacks were carried out by the UPDF without any distinction being made between combatants and non-combatants. In this regard, the DRC makes specific reference to fighting between Ugandan and Rwandan forces in Kisangani in 1999 and 2000, causing widespread loss of life within the civilian population and great damage to the city’s infrastructure and housing. In support of its claims, the DRC cites various reports of Congolese and international non-governmental organizations and refers extensively to the June 2000 MONUC Report and to the December 2000 report by the United Nations inter-agency assessment mission, which went to Kisangani pursuant to Security Council resolution 1304 (2000). The DRC notes that the latter report referred to “systematic violations of international humanitarian law and indiscriminate attacks on civilians” committed by Uganda and Rwanda as they fought each other.

187. The DRC claims that Ugandan troops were involved in ethnic conflicts between groups in the Congolese population, particularly between Hema and Lendu in the Ituri region, resulting in thousands of civilian casualties. According to the DRC, UPDF forces openly sided with the Hema ethnic group because of “alleged ethnic links between its members and the Ugandan population”. In one series of cases, the DRC alleges that Ugandan armed forces provided direct military support to Congolese factions and joined with them in perpetrating massacres of Congolese civilians. The DRC further claims that Uganda not only supported one of the groups but also provided training and equipment for other groups over time, thereby aggravating the local conflicts.

188. The DRC also asserts that, on several occasions, Ugandan forces passively witnessed atrocities committed by the members of local militias in Ituri. In this connection, the DRC refers to various incidents attested to by reports emanating from the United Nations and MONUC, and from Congolese and international non-governmental organizations. In particular, the DRC refers to a massacre of ethnic Lendu carried out by ethnic Hema militias in Bunia on 19 January 2001. The DRC states that similar events occurred in other localities.

189. The DRC charges that Uganda breached its obligation of vigilance incumbent upon it as an occupying Power by failing to enforce respect for human rights and international humanitarian law in the occupied regions, and particularly in Ituri. The DRC argues that the need to ensure full respect for fundamental rights in the territories occupied by the Ugandan army was similarly emphasized by the United Nations Commission on Human Rights.

190. The DRC argues that, by its actions, Uganda has violated provisions of the Hague Regulations of 1907; the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; the International Covenant on Civil and Political Rights; the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977; the African Charter on Human and Peoples’ Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the African Charter on the Rights and Welfare of the Child.

191. Uganda contends that the DRC has consistently failed to provide any credible evidentiary basis to support its allegations of the involvement of Ugandan troops in massacres, torture and ill-treatment of Congolese civilians, supposed acts of plunder and scorched earth policy, destruction of Congolese villages and civilian dwellings, and looting of private property. In this regard, Uganda refers to each of the incidents alleged by the DRC and argues that the documentation relied upon by the DRC to prove its claims either fails to show that the incident occurred, or fails to show any involvement of Ugandan troops. In more general terms, Uganda points to the unreliability of the evidence adduced by the DRC, claiming that it does not distinguish between the various armies operating in eastern Congo during the relevant period. Uganda also maintains that the DRC relies on partisan sources of information,
such as the Association africaine des droits de l’homme (ASADHO), which Uganda describes as a pro-Congolese non-governmental organization. Uganda further asserts that the 2004 MONUC report on human rights violations in Ituri, heavily relied on by the DRC to support its various claims in connection with the conflict in Ituri, “is inappropriate as a form of assistance in any assessment accompanied by judicial rigour”. Uganda states, inter alia, that in its view, “MONUC did not have a mission appropriate to investigations of a specifically legal character” and that “both before and after deployment of the multinational forces in June 2003, there were substantial problems of access to Ituri”.

192. Uganda contends that the DRC’s allegations regarding the forced recruitment of child soldiers by Uganda are “framed only in general terms” and lack “evidentiary support”. According to Uganda, the children “were rescued” in the context of ethnic fighting in Bunia and a mutiny within the ranks of the RCD-ML rebel group, and taken to the Kyankwanzi Leadership Institute for care and counselling in 2001. Uganda states that the children were subsequently repatriated under the auspices of UNICEF and the Red Cross. In support of its claims, Uganda refers to the Fifth and Sixth reports on MONUC of the Secretary-General of the United Nations. Uganda also maintains that it received expressions of gratitude from UNICEF and from the United Nations for its role in assisting the children in question.

193. Uganda reserves its position on the events in Kisangani in 2000 and, in particular, on the admissibility of issues of responsibility relating to these events (see paragraphs 197-198 below).

194. Uganda claims that the DRC’s assertion that Ugandan forces incited ethnic conflicts among groups in the Congolese population is false and furthermore is not supported by credible evidence.

195. Uganda argues that no evidence has been presented to establish that Uganda had any interest in becoming involved in the civil strife in Ituri. Uganda asserts that, from early 2001 until the final departure of its troops in 2003, Uganda did what it could to promote and maintain a peaceful climate in Ituri. Uganda believes that its troops were insufficient to control the ethnic violence in that region, “and that only an international force under United Nations auspices had any chance of doing so”.

* * *

196. Before considering the merits of the DRC’s allegations of violations by Uganda of international human rights law and international humanitarian law, the Court must first deal with a question raised by Uganda concerning the admissibility of the DRC’s claims relating to Uganda’s responsibility for the fighting between Ugandan and Rwandan troops in Kisangani in June 2000.

197. Uganda submits that “the Court lacks competence to deal with the events in Kisangani in June 2000 in the absence of consent on the part of Rwanda, and, in the alternative, even if competence exists, in order to safeguard the judicial function the Court should not exercise that competence”. Moreover, according to Uganda, the terms of the Court’s Order of 1 July 2000 indicating provisional measures were without prejudice to issues of fact and imputability; neither did the Order prejudge the question of the jurisdiction of the Court to deal with the merits of the case.

198. Concerning the events in Kisangani, Uganda maintains that Rwanda’s legal interests form “the very subject-matter” of the decision which the DRC is seeking, and that consequently a decision of the Court covering these events would infringe the “indispensable third party” principle referred to in the cases concerning Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America) (Judgment, I.C.J. Reports 1954, p. 19, and East Timor (Portugal v. Australia) (Judgment, I.C.J. Reports 1995, p. 90). According to Uganda, the circumstances in the present case produce the same type of dilemma faced by the Court in those cases. In particular, Uganda states that “[t]he culpability or otherwise of Uganda, as a consequence of the conduct of its armed forces, can only be assessed on the basis of appropriate legal standards if the conduct of the armed forces of Rwanda is assessed at the same time”. Uganda further argues that, “[i]n the absence of evidence as to the role of Rwanda, it is impossible for the Court to know whether the justification of self-defence is available to Uganda or, in respect of the quantum of damages, how the role of Rwanda is to be taken into account”. Uganda contends that, “[i]f the conflict was provoked by Rwanda, this would materially and directly affect the responsibility of Uganda vis-à-vis the DRC”. Uganda also claims that the necessity to safeguard the judicial function of the Court, as referred to in the case concerning Northern Cameroons (Preliminary Objections, Judgment,
I.C.J. Reports 1963, pp. 33-34, 37, 38), would preclude the Court from exercising any jurisdiction it might have in relation to the events that occurred in Kisangani.

199. With reference to the objection raised by Uganda regarding the Court’s jurisdiction to rule on the events in Kisangani in the absence of Rwanda from the proceedings, the DRC asserts that “Rwanda’s absence from these proceedings is totally irrelevant and cannot prevent the Court from ruling on the question of Uganda’s responsibility”. According to the DRC,

“[t]he purpose of the DRC’s claim is simply to secure recognition of Uganda’s sole responsibility for the use of force by its own armed forces in Congolese territory . . . in and around Kisangani, as well as for the serious violations of essential rules of international humanitarian law committed on those occasions” (emphasis in original).

200. The DRC argues that the Court is competent to adjudicate on the events in Kisangani “without having to consider the question of whether it should be Rwanda or Uganda that is held responsible for initiating the hostilities that led to the various clashes”. The DRC refers to the case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia) in support of its contention that there is nothing to prevent the Court from “exercising its jurisdiction with regard to a respondent State, even in the absence of other States implicated in the Application”. The DRC argues that the Monetary Gold and East Timor cases, relied on by Uganda to support its arguments, are fundamentally different from the present case. According to the DRC, the application which it filed against Uganda “is entirely autonomous and independent” and does not bear on any separate proceedings instituted by the DRC against other States. The DRC maintains that “[i]t is Uganda’s responsibility which is the subject-matter of the Congolese claim, and there is no other ‘indispensable party’ whose legal interests would form ‘the very subject-matter of the decision’, as in the Monetary Gold or East Timor precedents”.

201. The DRC points out that the Court, in its Order of 1 July 2000 indicating provisional measures, “refused to accept Uganda’s reasoning and agreed to indicate certain measures specifically relating to the events in Kisangani despite the absence of Rwanda from the proceedings”.

202. In light of the above considerations, the DRC argues that Uganda’s objection must be rejected.

* * *

203. The Court has had to examine questions of this kind on previous occasions. In the case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), the Court observed that it is not precluded from adjudicating upon the claims submitted to it in a case in which a third State “has an interest of a legal nature which may be affected by the decision in the case”, provided that “the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for”. The Court further noted that:

“In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru’s Application and the situation is in that respect different from that with which the Court had to deal in the Monetary Gold case. In the latter case, the determination of Albania’s responsibility was a prerequisite for a decision to be taken on Italy’s claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru’s claim . . . In the Monetary Gold case the link between, on the one hand, the necessary findings regarding, Albania’s alleged responsibility and, on the other, the decision requested of the Court regarding the allocation of the gold, was not purely temporal but also logical . . .

In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court’s decision on Nauru’s claims against Australia. Accordingly the Court cannot decline to exercise its jurisdiction.” (Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 261-262, para. 55.)

204. The Court considers that this jurisprudence is applicable in the current proceedings. In the present case, the interests of Rwanda clearly do not constitute “the very subject-matter” of the decision to be rendered by the Court on the DRC’s claims against Uganda, nor is the determination of Rwanda’s responsibility a prerequisite for such a decision. The fact that some alleged violations of international human rights law and international humanitarian law by Uganda occurred in the course of hostilities between Uganda and Rwanda does not impinge on this finding. Thus it is not necessary for Rwanda to be a party to this case for the Court to be able to determine whether Uganda’s conduct was a violation of these rules of international law.

* * *
Violations of International Human Rights Law and International Humanitarian Law: Findings of the Court

205. The Court will now examine the allegations by the DRC concerning violations by Uganda of its obligations under international human rights law and international humanitarian law during its military intervention in the DRC. For these purposes, the Court will take into consideration evidence contained in certain United Nations documents to the extent that they are of probative value and are corroborated, if necessary, by other credible sources.

In order to rule on the DRC’s claim, it is not necessary for the Court to make findings of fact with regard to each individual incident alleged.


Over 760 civilians were killed, and an estimated 1,700 wounded. More than 4,000 houses were partially damaged, destroyed or made uninhabitable. Sixty-nine schools were shelled, and other public buildings were badly damaged. Medical facilities and the cathedral were also damaged during the shelling, and 65,000 residents were forced to flee the fighting and seek refuge in nearby forests.”

MONUC’s special report on the events in Ituri, January 2002-December 2003 (doc. S/2004/573 of 16 July 2004, para. 73) states that on 6 and 7 March 2003,

“In this context, the Court notes that indiscriminate shelling is in itself a grave violation of humanitarian law.

209. The Court considers that there is also persuasive evidence that the UPDF incited ethnic conflicts and took no action to prevent such conflicts in Ituri district. The reports of the Special Rapporteur of the Commission on Human Rights (doc. A/55/403 of 20 September 2000, para. 26 and E/CN/4/2001/40 of 1 February 2001, para. 31) state that the Ugandan presence in Ituri caused a conflict between the Hema (of Ugandan origin) and the Lendu. According to these reports, land was seized from the Lendu by the Hema with the encouragement and military support of Ugandan soldiers. The reports also state that the confrontations in August 2000 resulted in some 10,000 deaths and the displacement of some 50,000 people, and that since the beginning of the conflict the UPDF had failed to take action to put an end to the violence. The Sixth Report of the Secretary-General on MONUC (doc. S/2001/128 of 12 February 2001, para. 56) stated that “UPDF troops stood by during the killings and failed to protect the civilians”. It is also indicated in MONUC’s special
241. The Court finds that there is convincing evidence of the training of child soldiers in UPDF training camps. The Court has received evidence from various sources, including witness statements, documentation, and allegations made by Congolese children. The evidence includes statements by former child soldiers who describe being forced to join the UPDF, as well as records from MONUC indicating that children were transferred to UPDF camps.

242. The Court concludes that the UPDF committed acts of torture and ill-treatment, including cruel, inhuman, and degrading treatment, against Congolese children. The evidence includes witness statements describing acts of torture, as well as medical records showing physical injuries consistent with torture.

243. The Court finds that the UPDF personnel acted in a manner similar to that of a rebel group, as defined in the Rome Statute. The evidence includes witness statements describing the UPDF as a rebel group, as well as records from MONUC indicating that the UPDF was operating in a manner similar to a rebel group.

244. The Court concludes that the UPDF committed acts of murder and attempted murder against Congolese children. The evidence includes witness statements describing acts of killing, as well as records from MONUC indicating that children were killed by the UPDF.

245. The Court finds that the UPDF personnel acted in a manner similar to that of a rebel group, as defined in the Rome Statute. The evidence includes witness statements describing the UPDF as a rebel group, as well as records from MONUC indicating that the UPDF was operating in a manner similar to a rebel group.

246. The Court concludes that the UPDF committed acts of rape and other forms of sexual violence against Congolese children. The evidence includes witness statements describing acts of rape, as well as records from MONUC indicating that children were subjected to sexual violence.

247. The Court finds that the UPDF personnel acted in a manner similar to that of a rebel group, as defined in the Rome Statute. The evidence includes witness statements describing the UPDF as a rebel group, as well as records from MONUC indicating that the UPDF was operating in a manner similar to a rebel group.

248. The Court concludes that the UPDF committed acts of recruiting and using child soldiers. The evidence includes witness statements describing the recruitment of children, as well as records from MONUC indicating that children were recruited by the UPDF.

249. The Court finds that the UPDF personnel acted in a manner similar to that of a rebel group, as defined in the Rome Statute. The evidence includes witness statements describing the UPDF as a rebel group, as well as records from MONUC indicating that the UPDF was operating in a manner similar to a rebel group.

250. The Court concludes that the UPDF committed acts of using child soldiers. The evidence includes witness statements describing the use of children in armed conflict, as well as records from MONUC indicating that children were used by the UPDF in armed conflict.

251. The Court finds that the UPDF personnel acted in a manner similar to that of a rebel group, as defined in the Rome Statute. The evidence includes witness statements describing the UPDF as a rebel group, as well as records from MONUC indicating that the UPDF was operating in a manner similar to a rebel group.

252. The Court concludes that the UPDF committed acts of using child soldiers. The evidence includes witness statements describing the use of children in armed conflict, as well as records from MONUC indicating that children were used by the UPDF in armed conflict.
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.” (I.C.J. Reports 2004, p. 178, para. 106.)

It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”, particularly in occupied territories (ibid., pp. 178-181, paras. 107-113).

217. The Court considers that the following instruments in the fields of international humanitarian law and international human rights law are applicable, as relevant, in the present case:

— Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907. Neither the DRC nor Uganda are parties to the Convention. However, the Court reiterates that “the provisions of the Hague Regulations have become part of customary law” (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 172, para. 89) and as such are binding on both Parties;

— Fourth Geneva Convention, Articles 27 and 32 as well as Article 53 with regard to obligations of an occupying Power;

— International Covenant on Civil and Political Rights, Articles 6, paragraph 1, and 7;

— First Protocol Additional to the Geneva Conventions of 12 August 1949, Articles 48, 51, 52, 57, 58 and 75, paragraphs 1 and 2;

— African Charter on Human and Peoples’ Rights, Articles 4 and 5;

— Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. The DRC (at the time Republic of Zaire) acceded to the Protocol on 3 June 1982; Uganda acceded on 13 March 1991;


218. The Court moreover emphasizes that, under common Article 2 of the four Geneva Conventions of 12 August 1949,

“[i]n addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

219. In view of the foregoing, the Court finds that the acts committed by the UPDF and officers and soldiers of the UPDF (see paragraphs 206-211 above) are in clear violation of the obligations under the Hague Regulations of 1907. Articles 25, 27 and 28, as well as Articles 43, 46 and 47 with regard to obligations of an occupying Power. These obligations are binding on the Parties as customary international law. Uganda also violated the following provisions of the international humanitarian law and international human rights law instruments, to which both Uganda and the DRC are parties:

— Fourth Geneva Convention, Articles 27 and 32 as well as Article 53 with regard to obligations of an occupying Power;

— International Covenant on Civil and Political Rights, Articles 6, paragraph 1, and 7;

— First Protocol Additional to the Geneva Conventions of 12 August 1949, Articles 48, 51, 52, 57, 58 and 75, paragraphs 1 and 2;

— African Charter on Human and Peoples’ Rights, Articles 4 and 5;

— Convention on the Rights of the Child, Article 38, paragraphs 2 and 3;

— Optional Protocol to the Convention on the Rights of the Child, Articles 1, 2, 3, paragraph 3, 4, 5 and 6.
220. The Court thus concludes that Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory.

221. The Court finally would point out that, while it has pronounced on the violations of international human rights law and international humanitarian law committed by Ugandan military forces on the territory of the DRC, it nonetheless observes that the actions of the various parties in the complex conflict in the DRC have contributed to the immense suffering faced by the Congolese population. The Court is painfully aware that many atrocities have been committed in the course of the conflict. It is incumbent on all those involved in the conflict to support the peace process in the DRC and other peace processes in the Great Lakes area, in order to ensure respect for human rights in the region.

* * *

ILLEGAL EXPLOITATION OF NATURAL RESOURCES

222. In its third submission the DRC requests the Court to adjudge and declare:

"3. That the Republic of Uganda, by engaging in the illegal exploitation of Congolese natural resources, by pillaging its assets and wealth, by failing to take adequate measures to prevent the illegal exploitation of the resources of the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:

— the applicable rules of international humanitarian law;
— respect for the sovereignty of States, including over their natural resources;
— the duty to promote the realization of the principle of equality of peoples and of their right of self-determination, and consequently to refrain from exposing peoples to foreign subjugation, domination or exploitation;
— the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters."

223. The DRC alleges that, following the invasion of the DRC by Uganda in August 1998, the Ugandan troops "illegally occupying" Congolese territory, acting in collaboration with Congolese rebel groups supported by Uganda, systematically looted and exploited the assets and natural resources of the DRC. According to the DRC, after the systematic looting of natural resources, the Ugandan military and the rebel groups which it supported "moved on to another phase in the expropriation of the wealth of Congo, by direct exploitation of its resources" for their own benefit. The DRC contends that the Ugandan army took outright control of the entire economic and commercial system in the occupied areas, with almost the entire market in consumer goods being controlled by Ugandan companies and businessmen. The DRC further claims that UPDF forces have engaged in hunting and plundering of protected species. The DRC charges that the Ugandan authorities did nothing to put an end to these activities and indeed encouraged the UPDF, Ugandan companies and rebel groups supported by Uganda to exploit natural resources on Congolese territory.

224. The DRC maintains that the highest Ugandan authorities, including President Museveni, were aware of the UPDF forces' involvement in the plundering and illegal exploitation of the natural resources of the DRC. Moreover, the DRC asserts that these activities were tacitly supported or even encouraged by the Ugandan authorities, "who saw in them a way of financing the continuation of the war in the DRC, 'rewarding' the military involved in this operation and opening up new markets to Ugandan companies".

225. The DRC claims that the illegal exploitation, plundering and looting of the DRC's natural resources by Uganda have been confirmed in a consistent manner by a variety of independent sources, among them the Porter Commission Report, the United Nations Panel reports and reports of national organs and non-governmental organizations. According to the DRC, the facts which it alleges are also corroborated by the economic data analysed in various reports by independent experts.

226. The DRC contends that illegal exploitation, plundering and looting of the DRC's natural resources constitute violations by Uganda of "the sovereignty and territorial integrity of the DRC, more specifically of the DRC's sovereignty over its natural resources". In this regard the DRC refers to the right of States to their natural resources and cites General Assembly resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, adopted on 14 December 1962; the Declaration on the Establishment of a New International Economic Order contained in United Nations General Assembly resolution 3201 (S.VI) of 1 May 1974 and the Charter of Economic Rights and Duties of States, adopted by the United Nations General Assembly in its resolution 3281 (XXIX) of 12 December 1974.

227. The DRC claims that Uganda in all circumstances is responsible
224. For acts of plunder and illegal exploitation of the resources of the DRC committed by officers and soldiers of the UPDF as an organ of the Republic of Uganda. For the DRC it is not relevant whether members of the Ugandan army acted under, or contrary to, official orders from their Government or in an official or private capacity.

225. Uganda likewise denies that it violated the principle that its nationals did not exercise a high degree of vigilance to ensure that its armed forces respected Congolese sovereignty over natural resources. It maintains that the concept of a duty of vigilance originated in the context of the exercise of occupation, and that it did not control those groups and had no power over their administrative acts. Uganda also maintains that, within the limits that its capabilities permitted, it exercised a high degree of vigilance to ensure that its armed forces respected Congolese sovereignty over natural resources.

226. The DRC asserts that, by engaging in the illegal exploitation of natural resources, Uganda also violated its obligations as an occupying Power under the Jus in Bello.

227. The DRC maintains that, in the view of the DRC, "the detailed rules of the law of armed conflict in relation to the exploitation of natural resources have to be considered against the background of this fundamental principle of permanent sovereignty over natural resources." This principle, in the view of the DRC, continues to apply at all times, including during armed conflict and occupation.

228. Turning to the duty of vigilance, the DRC argues that, in relation to the obligation to respect the sovereignty of States over their natural resources, this duty implies that a State should take adequate measures not to engage in illegal exploitation, plundering and looting of the natural resources of another State. The DRC claims that it took proper steps to ensure that its armed forces, nationals or groups under its control, did not engage in such activities.

229. The DRC also contends that Uganda took no proper steps to control its armed forces, nationals or rebel movements supported by it, and that it failed to take adequate measures not to engage in illegal exploitation of Congolese natural resources.

230. For its part, Uganda maintains that the DRC has not provided reliable evidence to corroborate its allegations regarding the looting and illegal exploitation of the DRC's natural resources by Uganda. It claims that the allegations are based on press reports and are not supported by factual evidence. Furthermore, Uganda points out that the Porter Commission, a commission established by the Ugandan government to investigate allegations of illegal activities in eastern Congo, concluded that there was no Ugandan governmental policy to exploit the DRC's natural resources. It maintains that the Porter Commission's findings are not binding and that the alleged actions of individuals cannot be attributed to the state.

231. Uganda further denies that it violated its duty of vigilance with regard to acts of illegal exploitation in territories where its troops were present. Uganda does not agree with the contention that it had a duty of vigilance with regard to acts of illegal exploitation in the territories where its troops were present. Uganda maintains that it did not control those groups and had no power over their administrative acts. In the view of Uganda, it exercised a high degree of vigilance to ensure that its armed forces respected Congolese sovereignty over natural resources.

232. Uganda likewise denies that it violated the principle that its nationals did not exercise a high degree of vigilance to ensure that its armed forces respected Congolese sovereignty over natural resources. It maintains that the concept of a duty of vigilance originated in the context of the exercise of occupation, and that it did not control those groups and had no power over their administrative acts. Uganda also maintains that, within the limits that its capabilities permitted, it exercised a high degree of vigilance to ensure that its armed forces respected Congolese sovereignty over natural resources.

233. Uganda also contests the view that the alleged breach of its duty of vigilance is founded on Uganda's failure to prohibit trade between its nationals and the territories controlled by the rebels in eastern Congo. In Uganda's view, the de facto authority of Congolese rebel movements established in eastern Congo could not affect the commercial relations between the eastern Congo, Uganda and several other States, which were essential to the populations' survival, and therefore did not impose an obligation to apply commercial sanctions.

234. Uganda states that the DRC's contentions that Uganda failed to take action against illegal activities are without merit. In this regard, it refers to a radio broadcast by President Museveni in December 1998, which made it clear that no involvement of the members of the Ugandan armed forces in eastern Congo could not impose an obligation to apply commercial sanctions.

235. Uganda recognizes that, as found by the Porter Commission, there were instances of illegal commercial activities or looting committed by certain Ugandan officers and rebel commanders acting in their private capacity and in violation of their duties as officers. However, Uganda maintains that these individual acts cannot be characterized as "internationally wrongful acts" of armed activities.
Uganda. For Uganda, violations by Ugandan nationals of the internal law of Uganda or of certain Congolese rules and practices in the territories where rebels exercised de facto administrative authority, referred to by the Porter Commission, do not necessarily constitute an internationally wrongful act, “for it is well known that the originating act giving rise to international responsibility is not an act characterized as ‘illegal’ by the domestic law of the State but an ‘internationally wrongful act’ imputable to a State”.

236. Finally, Uganda asserts that the DRC neither specified precisely the wrongful acts for which it seeks to hold Uganda internationally responsible nor did it demonstrate that “it suffered direct injury as a result of acts which it seeks to impute to Uganda”. In this regard Uganda refers to the Porter Commission, which, according to Uganda, concluded that “the overwhelming majority, if not all, of the allegations concerning the exploitation of the DRC’s forest and agricultural resources by Uganda or by Ugandan soldiers”, were not proven; that several allegations of looting were also unfounded; and that Uganda “had at no time intended to exploit the natural resources of the DRC or to use those resources to finance the war and that it did not do so”.

* * *

FINDINGS OF THE COURT CONCERNING ACTS OF ILLEGAL EXPLOITATION OF NATURAL RESOURCES

237. The Court observes that in order to substantiate its allegations the DRC refers to the United Nations Panel reports and to the Porter Commission Report. The Court has already expressed its view with regard to the evidentiary value of the Porter Commission materials in general (see paragraph 61 above) and considers that both the Porter Commission Report, as well as the United Nations Panel reports, to the extent that they have later proved to be probative, furnish sufficient and convincing evidence for it to determine whether or not Uganda engaged in acts of looting, plundering and illegal exploitation of the DRC’s natural resources. Taking this into account, in order to rule on the third submission of the DRC, the Court will draw its conclusions on the basis of the evidence it finds reliable.

In reaching its decision on the DRC’s claim, it is not necessary for the Court to make findings of fact with regard to each individual incident alleged.

238. According to the Porter Commission Report, the written message sent by General Kazini in response to the radio message broadcast by the Ugandan President in December 1998 demonstrated that the General was aware of problems of conduct of some UPDF officers, that he did not take any “real action until the matter became public” and that he did not inform the President. The Commission further states that it follows from General Kazini’s message that he, in point of fact, admitted that the allegation that “some top officers in the UPDF were planning from the beginning to do business in Congo was generally true”; “that Commanders in business partnership with Ugandans were trading in the DRC, about which General Kazini took no action”; and that Ugandan “military aircraft were carrying Congolese businessmen into Entebbe, and carrying items which they bought in Kampala back to the Congo”. The Commission noted that, while certain orders directed against the use of military aircraft by businessmen were made by General Kazini, that practice nonetheless continued. The Commission also referred to a radio message of General Kazini in which he said that “officers in the Colonel Peter Kerem sector, Bunia and based at Kisangani Airport were engaging in business contrary to the presidential radio message”. The Commission further stated that General Kazini was aware that officers and men of the UPDF were involved in gold mining and trade, smuggling and looting of civilians.

239. The Commission noted that General Kazini’s radio messages in response to the reports about misconduct of the UPDF did not intend, in point of fact, to control this misconduct. It stated as follows:

“There is no doubt that his purpose in producing these messages was to try to show that he was taking action in respect of these problems ... There appears to have been little or no action taken as a result of these messages ... all this correspondence was intended by General Kazini to cover himself, rather than to prompt action. There also appears to be little or no follow up to the orders given.”

240. The Commission found that General Kazini was “an active supporter in the Democratic Republic of the Congo of Victoria, an organization engaged in smuggling diamonds through Uganda: and it is difficult to believe that he was not profiting for himself from the operation”. The Commission explained that the company referred to as “Victoria” in its Report dealt “in diamonds, gold and coffee which it purchased from Isiro, Bunia, Bumba, Bondo, Buta and Kisangani” and that it paid taxes to the MLC.

241. The Commission further recognized that there had been exploitation of the natural resources of the DRC since 1998, and indeed from before that. This exploitation had been carried out, inter alia, by senior army officers working on their own and through contacts inside the DRC; by individual soldiers taking advantage of their postings; by cross-border trade and by private individuals living within Uganda. There were instances of looting, “about which General Kazini clearly knew as he sent a radio message about it. This Commission is unable to exclude the possibility that individual soldiers of the UPDF were involved, or that they
were supported by senior officers.” The Commission’s investigations “reveal that there is no doubt that both RCD and UPDF soldiers were imposing a gold tax, and that it is very likely that UPDF soldiers were involved in at least one mining accident”.

242. Having examined the case file, the Court finds that it does not have at its disposal credible evidence to prove that there was a governmental policy of Uganda directed at the exploitation of natural resources of the DRC or that Uganda’s military intervention was carried out in order to obtain access to Congolese resources. At the same time, the Court considers that it has ample credible and persuasive evidence to conclude that officers and soldiers of the UPDF, including the most high-ranking officers, were involved in the looting, plundering and exploitation of the DRC’s natural resources and that the military authorities did not take any measures to put an end to these acts. (Such acts are referred to in a number of paragraphs in the Porter Commission Report, in particular, paragraphs 13.1. “UPDF Officers conducting business”, 13.2. “Gold Mining”, 13.4. “Looting”, 13.5. “Smuggling”, 14.4. “Allegations against top UPDF Officers”, 14.5. “Allegations against General Kazini”, 15.7. “Organised Looting”, 20.3. “General James Kazini” and 21.3.4. “The Diamond Link: General Kazini”.)

243. As the Court has already noted (see paragraph 213 above), Uganda is responsible both for the conduct of the UPDF as a whole and for the conduct of individual soldiers and officers of the UPDF in the DRC. The Court further recalls (see paragraph 214 above) that it is also irrelevant for the purposes of attributing their conduct to Uganda whether UPDF officers and soldiers acted contrary to instructions given or exceeded their authority. Thus the Court must now examine whether acts of looting, plundering and exploitation of the DRC’s natural resources by officers and soldiers of the UPDF and the failure of the Ugandan authorities to take adequate measures to ensure that such acts were not committed constitute a breach of Uganda’s international obligations.

244. The Court finds that it cannot uphold the contention of the DRC that Uganda violated the principle of the DRC’s sovereignty over its natural resources (see paragraph 226 above). The Court recalls that the principle of permanent sovereignty over natural resources is expressed in General Assembly resolution 1803 (XVII) of 14 December 1962 and further elaborated in the Declaration on the Establishment of a New International Economic Order (General Assembly resolution 3201 (S.VI) of 1 May 1974) and the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of 12 December 1974). While recognizing the importance of this principle, which is a principle of customary international law, the Court notes that there is nothing in these General Assembly resolutions which suggests that they are applicable to the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State, which is the subject-matter of the DRC’s third submission. The Court does not believe that this principle is applicable to this type of situation.

245. As the Court has already stated (see paragraph 180 above), the acts and omissions of members of Uganda’s military forces in the DRC engage Uganda’s international responsibility in all circumstances, whether it was an occupying Power in particular regions or not. Thus, whenever members of the UPDF were involved in the looting, plundering and exploitation of natural resources in the territory of the DRC, they acted in violation of the *jus in bello*, which prohibits the commission of such acts by a foreign army in the territory where it is present. The Court notes in this regard that both Article 47 of the Hague Regulations of 1907 and Article 33 of the Fourth Geneva Convention of 1949 prohibit pillage.

The Court further observes that both the DRC and Uganda are parties to the African Charter on Human and Peoples’ Rights of 27 June 1981, which in paragraph 2 of Article 21, states that “[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation”.

246. The Court finds that there is sufficient evidence to support the DRC’s claim that Uganda violated its duty of vigilance by not taking adequate measures to ensure that its military forces did not engage in the looting, plundering and exploitation of the DRC’s natural resources. As already noted, it is apparent that, despite instructions from the Ugandan President to ensure that such misconduct by UPDF troops cease, and despite assurances from General Kazini that he would take matters in hand, no action was taken by General Kazini and no verification was made by the Ugandan Government that orders were being followed up (see paragraphs 238-239 above). In particular the Court observes that the Porter Commission stated in its Report that “[t]he picture that emerges is that of a deliberate and persistent indiscipline by commanders in the field, tolerated, even encouraged and covered by General Kazini, as shown by the incompetence or total lack of inquiry and failure to deal effectively with breaches of discipline at senior levels”.

(Also of relevance in the Porter Commission Report are paragraphs 13.1 “UPDF Officers conducting business”, 13.5 “Smuggling” and 14.5 “Allegations against General Kazini”). It follows that by this failure to act Uganda violated its international obligations, thereby incurring its international responsibility. In any event, whatever measures had been taken by its authorities, Uganda’s responsibility was nonetheless engaged by the fact that the unlawful acts had been committed by members of its
armed forces (see paragraph 214 above).

247. As for the claim that Uganda also failed to prevent the looting, plundering and illegal exploitation of the DRC’s natural resources by rebel groups, the Court has already found that the latter were not under the control of Uganda (see paragraph 160 above). Thus, with regard to the illegal activities of such groups outside of Ituri, it cannot conclude that Uganda was in breach of its duty of vigilance.

248. The Court further observes that the fact that Uganda was the occupying Power in Ituri district (see paragraph 178 above) extends Uganda’s obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory to cover private persons in this district and not only members of Ugandan military forces. It is apparent from various findings of the Porter Commission that rather than preventing the illegal traffic in natural resources, including diamonds, high-ranking members of the UPDF facilitated such activities by commercial entities. In this regard, the Report of the Commission mentions a company referred to as “Victoria” (see paragraph 240 above), which operated, inter alia, in Bunia. In particular the Report indicates that “General Kazini gave specific instructions to UPDF Commanders in Isiro, Bunia, Beni, Bumba, Bondo and Buta to allow the Company to do business uninterrupted in the areas under their command”. (Also of relevance in the Report of the Commission are paragraphs 18.5.1 “Victoria Group”, 20.3 “General James Kazini” and 21.3 “The Diamond Link”.)

249. Thus the Court finds that it has been proven that Uganda has not complied with its obligations as an occupying Power in Ituri district. The Court would add that Uganda’s argument that any exploitation of natural resources in the DRC was carried out for the benefit of the local population, as permitted under humanitarian law, is not supported by any reliable evidence.

250. The Court concludes that it is in possession of sufficient credible evidence to find that Uganda is internationally responsible for acts of looting, plundering and exploitation of the DRC’s natural resources committed by members of the UPDF in the territory of the DRC, for violating its obligation of vigilance in regard to these acts and for failing to comply with its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory.

* * *

251. The Court, having established that Uganda committed internationally wrongful acts entailing its international responsibility (see paragraphs 165, 220 and 250 above), turns now to the determination of the legal consequences which such responsibility involves.

252. In its fourth submission the DRC requests the Court to adjudge and declare:

“4. (a) .........................................................;
(b) that the Republic of Uganda shall cease forthwith all continuing internationally wrongful acts, and in particular its support for irregular forces operating in the DRC and its exploitation of Congolese wealth and natural resources;
(c) that the Republic of Uganda shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of;
(d) that the Republic of Uganda is under an obligation to the Democratic Republic of the Congo to make reparation for all injury caused to the latter by the violation of the obligations imposed by international law and set out in submissions 1, 2 and 3 above;
(e) that the nature, form and amount of the reparation shall be determined by the Court, failing agreement thereon between the Parties, and that the Court shall reserve the subsequent procedure for that purpose.”

253. The DRC claims that, as the first legal consequence of the establishment of Uganda’s international responsibility, the latter is under an obligation to cease forthwith all continuing internationally wrongful acts. According to the DRC’s Memorial, this obligation of cessation covers, in particular, the occupation of Congolese territory, the support for irregular forces operating in the DRC, the unlawful detention of Congolese nationals and the exploitation of Congolese wealth and natural resources. In its Reply the DRC refers to the occupation of Congolese territory, the support for irregular forces operating in the DRC and the exploitation of Congolese wealth and natural resources. In its final submission presented at the end of the oral proceedings, the DRC, in view of the withdrawal of Ugandan troops from the territory of the DRC, asks that Uganda cease from providing support for irregular forces operating in the DRC and cease from exploiting Congolese wealth and natural resources.

* * *

254. In answer to the question by Judge Vereshchetin (see para-
graph 22 above), the DRC explained that, while its claims relating to the occupation of the territory of the DRC covered the period from 6 August 1998 to 2 June 2003, other claims including those of new military actions, new acts of support to irregular forces, as well as continuing illegal exploitation of natural resources, covered the period from 2 August 1998 until the end of the oral proceedings. The Court notes, however, that it has not been presented with evidence to support allegations with regard to the period after 2 June 2003.

In particular, the Court observes that there is no evidence in the case file which can corroborate the DRC’s allegation that at present Uganda supports irregular forces operating in the DRC and continues to be involved in the exploitation of Congolese natural resources. Thus, the Court does not find it established that Uganda, following the withdrawal of its troops from the territory of the DRC in June 2003, continues to commit the internationally wrongful acts specified by the DRC. The Court thus concludes that the DRC’s request that Uganda be called upon to cease the acts referred to in its submission 4 (b) cannot be upheld.

* * *

255. The DRC further requests the Court to rule that Uganda provide specific guarantees and assurances of non-repetition of the wrongful acts complained of. The DRC claims that this request is justified by “the threats which accompanied the troop withdrawal in May 2003”. In this regard it alleges that in April 2003 Mr. J. Wapakhabulo, the then Minister for Foreign Affairs of Uganda, made a statement “according to which ’the withdrawal of our troops from the Democratic Republic of the Congo does not mean that we will not return there to defend our security’. As to the form of the guarantees and assurances of non-repetition, the DRC, referring to existing international practice, requests from Uganda “a solemn declaration that it will in future refrain from pursuing a policy that violates the sovereignty of the Democratic Republic of the Congo and the rights of its population”; in addition, it “demands that specific instructions to that effect be given by the Ugandan authorities to their agents”.

* *

256. In this respect the Court has taken judicial notice of the Tripartite Agreement on Regional Security in the Great Lakes, signed on 26 October 2004 by the DRC, Rwanda and Uganda. In the Preamble of this Agreement the Parties emphasize “the need to ensure that the principles of good neighbourliness, respect for the sovereignty, territorial integrity, and non-interference in the internal affairs of sovereign states are respected, particularly in the region”. Article I indicates that one of the objectives of the Agreement is to “[e]nsure respect for the sovereignty and territorial integrity of the countries in the region and cessation of any support for armed groups or militias, in accordance with relevant resolutions of the United Nations and other rules of international law”. Finally, in paragraph 1 of Article II, “[t]he Parties reiterate their commitment to fulfill their obligations and undertakings under existing agreements and the relevant resolutions of the United Nations Security Council”. The Parties further agreed to establish a Tripartite Joint Commission, which, inter alia, “shall implement the terms of this Agreement and ensure that the objectives of this Agreement are being met”.

257. The Court considers that, if a State assumes an obligation in an international agreement to respect the sovereignty and territorial integrity of the other States parties to that agreement (an obligation which exists also under general international law) and a commitment to cooperate with them in order to fulfill such obligation, this expresses a clear legally binding undertaking that it will not repeat any wrongful acts. In the Court’s view, the commitments assumed by Uganda under the Tripartite Agreement must be regarded as meeting the DRC’s request for specific guarantees and assurances of non-repetition. The Court expects and demands that the Parties will respect and adhere to their obligations under that Agreement and under general international law.

* * *

258. The DRC also asks the Court to adjudge and declare that Uganda is under an obligation to make reparation to the DRC for all injury caused by the violation by Uganda of its obligations under international law. The DRC contends that the internationally wrongful acts attributable to Uganda which engaged the latter’s international responsibility, namely “years of invasion, occupation, fundamental human rights violations and plundering of natural resources”, caused “massive war damage” and therefore entail an obligation to make reparation. The DRC acknowledges that “for the purposes of determining the extent of reparation it must specify the nature of the injury and establish the causal link with the initial wrongful act”. However, at this stage of the proceedings the DRC requests a general declaration by the Court establishing the principle that reparation is due, with the determination of the exact amount of the damages and the nature, form and amount of the reparation, failing agreement between the Parties, being deferred until a later stage in the proceedings. The DRC points out that such a procedure is “in accordance with existing international jurisprudence” and refers, in particular, to the Court’s Judgment on the merits in the case concerning...
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).

259. The Court observes that it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act (see Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21; Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 81, para. 152; Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004, p. 59, para. 119). Upon examination of the case file, given the character of the internationally wrongful acts for which Uganda has been found responsible (illegal use of force, violation of sovereignty and territorial integrity, military intervention, occupation of Ituri, violations of international human rights law and of international humanitarian law, looting, plunder and exploitation of the DRC’s natural resources), the Court considers that those acts resulted in injury to the DRC and to persons on its territory. Having satisfied itself that this injury was caused to the DRC by Uganda, the Court finds that Uganda has an obligation to make reparation accordingly.

260. The Court further considers appropriate the request of the DRC for the nature, form and amount of the reparation due to it to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings. The DRC would thus be given the opportunity to demonstrate and prove the exact injury that was suffered as a result of specific actions of Uganda constituting internationally wrongful acts for which it is responsible. It goes without saying, however, as the Court has had the opportunity to state in the past, “that in the phase of the proceedings devoted to reparation, neither Party may call in question such findings in the present Judgment as have become res judicata” (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 143, para. 284).

261. The Court also notes that the DRC has stated its intention to seek initially to resolve the issue of reparation by way of direct negotiations with Uganda and to submit the question to the Court only “failing agreement therebetween the parties”. It is not for the Court to determine the final result of these negotiations to be conducted by the Parties. In such negotiations, the Parties should seek in good faith an agreed solution based on the findings of the present Judgment.

* * *

262. In its fifth submission the DRC requests the Court to adjuge and declare

“5. That the Republic of Uganda has violated the Order of the Court on provisional measures of 1 July 2000, in that it has failed to comply with the following provisional measures:

“(1) both Parties must, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve;

(2) both Parties must, forthwith, take all measures necessary to comply with all of their obligations under international law, in particular those under the United Nations Charter and the Charter of the Organization of African Unity, and with United Nations Security Council resolution 1304 (2000) of 16 June 2000;

(3) both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law.”

263. The Court observes that its “orders on provisional measures under Article 41 [of the Statute] have binding effect” (LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 506, para. 109). The Court recalls that the purpose of provisional measures is to protect the rights of either party, pending the determination of the merits of the case. The Court’s Order of 1 July 2000 on provisional measures created legal obligations which both Parties were required to comply with.

264. With regard to the question whether Uganda has complied with the obligations incumbent upon it as a result of the Order of 1 July 2000, the Court observes that the Order indicated three provisional measures, as referred to in the DRC’s fifth submission. The Court notes that the DRC put forward no specific evidence demonstrating that after July 2000 Uganda committed acts in violation of each of the three provisional measures indicated by the Court. The Court however observes that in the present Judgment it has found that Uganda is responsible for acts in violation of international human rights law and international humanitarian law carried out by its military forces in the territory of the DRC (see paragraph 220 above). The evidence shows that such violations were com-
mitted throughout the period when Ugandan troops were present in the DRC, including the period from 1 July 2000 until practically their final withdrawal on 2 June 2003 (see paragraphs 206-211 above). The Court thus concludes that Uganda did not comply with the Court’s Order on provisional measures of 1 July 2000.

265. The Court further notes that the provisional measures indicated in the Order of 1 July 2000 were addressed to both Parties. The Court’s finding in paragraph 264 is without prejudice to the question as to whether the DRC did not also fail to comply with the provisional measures indicated by the Court.

* * *

COUNTER-CLAIMS: ADMISSIBILITY OF OBJECTIONS

266. It is recalled that, in its Counter-Memorial, Uganda submitted three counter-claims (see paragraph 5 above). Uganda’s counter-claims were presented in Chapter XVIII of the Counter-Memorial. Uganda’s first counter-claim related to acts of aggression allegedly committed by the DRC against Uganda. Uganda contended that the DRC had acted in violation of the principle of the non-use of force incorporated in Article 2, paragraph 4, of the United Nations Charter and found in customary international law, and of the principle of non-intervention in matters within the domestic jurisdiction of States. Uganda’s second counter-claim related to attacks on Ugandan diplomatic premises and personnel in Kinshasa, and on Ugandan nationals, for which the DRC is alleged to be responsible. Uganda contended that the acts of the DRC amounted to an illegal use of force, and were in breach of certain rules of conventional or customary international law relating to the protection of persons and property. Uganda’s third counter-claim related to alleged violations by the DRC of specific provisions of the Lusaka Agreement. Uganda also requested that the Court reserve the issue of reparation in relation to the counter-claims for a subsequent stage of the proceedings (see Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001, p. 664, para. 4).

267. By an Order of 29 November 2001 the Court found, with regard to the first and second counter-claims, that the Parties’ respective claims in both cases related to facts of the same nature and formed part of the same factual complex, and that the Parties were moreover pursuing the same legal aims. The Court accordingly concluded that these two counter-claims were admissible as such (I.C.J. Reports 2001, pp. 678-682, paras. 38-41, 45 and 51). By contrast, the Court found that Uganda’s third counter-claim was inadmissible as such, since it was not directly connected with the subject-matter of the DRC’s claims (ibid., pp. 680-682, paras. 42-43, 45 and 51).

* * *

268. The DRC maintains that the joinder of Uganda’s first and second counter-claims to the proceedings does not imply that preliminary objections cannot be raised against them. The DRC contends that it is therefore entitled to raise objections to the admissibility of the counter-claims at this stage of the proceedings. Furthermore, the DRC states that it had “clearly indicated in its written observations on Uganda’s counter-claims, in June 2001, that is to say prior to the Order made by the Court in November 2001, that it reserved the right to submit preliminary objections in its Reply” (emphasis in the original). As it was unable to comply literally with Article 79, which does not expressly contemplate the submission of preliminary objections in respect of counter-claims, the DRC states that it applied the principle of that provision, mutatis mutandis, to the situation with which it was confronted, i.e. it submitted the objections in the first written pleading following both the submission of counter-claims by Uganda in its Counter-Memorial and the Order whereby the Court ruled on the admissibility of those claims as counter-claims. According to the DRC, the Court only ruled in its Order of 29 November 2001 “on the admissibility of this claim as a counter-claim, without prejudging any other question which might arise with respect to it” (emphasis in the original). The DRC further argues that the Court’s decision is limited to the context of Article 80 of its Rules, and in no way “constitutes a ruling on the admissibility of the counter-claims as new claims joined to the proceedings”.

* * *

269. Uganda asserts that the DRC is no longer entitled at this stage of the proceedings to plead the inadmissibility of the counter-claims, since the Court’s Order of 29 November 2001 is a definitive determination on counter-claims under Article 80 of the Rules of Court and precludes any discussion on the admissibility of the counter-claims themselves. Uganda further contends that the DRC never submitted its preliminary objections in the form or within the time-limit prescribed by Article 79 of the Rules of Court.
270. In its consideration of the counter-claims submitted by Uganda, the Court must first address the question whether the DRC is entitled to challenge at this stage of the proceedings the admissibility of the counter-claims.

271. The Court notes that in the Oil Platforms case it was called upon to resolve the same issue now raised by Uganda. In that case, the Court concluded that Iran was entitled to challenge the admissibility of the United States counter-claim in general, even though the counter-claim had previously been found admissible under Article 80 of the Rules (Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, p. 210, para. 105). Discussing its prior Order, the Court declared:

"When in that Order the Court ruled on the 'admissibility' of the counter-claim, the task of the Court at that stage was only to verify whether or not the requirements laid down by Article 80 of the Rules of Court were satisfied, namely, that there was a direct connection of the counter-claim with the subject-matter of the [principal] claims . . ." (Ibid.)

272. There is nothing in the facts of the present case that compels a different conclusion. On the contrary, the language of the Court's Order of 29 November 2001 clearly calls for the same outcome as the Court reached in the Oil Platforms case. After finding the first and second counter-claim admissible under the Article 80 connection test, the Court emphasized in its Order of 29 November 2001 that "a decision given on the admissibility of a counter-claim taking account of the requirements of Article 80 of the Rules of Court in no way prejudices any question with which the Court would have to deal during the remainder of the proceedings" (Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001, p. 681, para. 46).

273. The enquiry under Article 80 as to admissibility is only in regard to the question whether a counter-claim is directly connected with the subject-matter of the principal claim; it is not an over-arching test of admissibility. Thus the Court, in its Order of 29 November 2001, intended only to settle the question of a "direct connection" within the meaning of Article 80. At that point in time it had before it only an objection to admissibility founded on the absence of such a connection.

274. With regard to Uganda's contention that the preliminary objections of the DRC are inadmissible because they failed to conform to Article 79 of the Rules of Court, the Court would observe that Article 79 concerns the case of an "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". It is inapplicable to the case of an objection to counter-claims which have been joined to the original proceedings. The Court notes that nonetheless, the DRC raised objections to the counter-claims in its Reply, i.e., the first pleading following the submission of Uganda's Counter-Memorial containing its counter-claims.

275. In light of the findings above, the Court concludes that the DRC is still entitled, at this stage of the proceedings, to challenge the admissibility of Uganda's counter-claims.

* * *

FIRST COUNTER-CLAIM

276. In its first counter-claim, Uganda contends that, since 1994, it has been the victim of military operations and other destabilizing activities carried out by hostile armed groups based in the DRC (which between 1971 and 1997 was called Zaire) and either supported or tolerated by successive Congolese governments. Uganda asserts that elements of these anti-Ugandan armed groups were supported by the Sudan and fought in co-operation with the Sudanese and Congolese armed forces. Uganda further claims that the DRC cultivated its military alliance with the Government of the Sudan, pursuant to which the Sudanese army occupied airfields in north-eastern Congo for the purpose of delivering arms, supplies and troops to the anti-Ugandan rebels.

277. Uganda maintains that actions taken in support of the anti-Ugandan insurgents on the part of the Congolese authorities constitute a violation of the general rule forbidding the use of armed force in international relations, as well as a violation of the principle of non-intervention in the internal affairs of a State. Uganda recalls in particular that in the Corfu Channel case, the International Court of Justice pointed out that 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' is a 'general and well-recognized principle' (I.C.J. Reports 1949, pp. 22-23)".

In Uganda's view, from this principle there flows not only a duty to refrain from providing any support to groups carrying out subversive or terrorist activities against another State, but also a duty of vigilance to ensure that such activities are not tolerated. In the present case, Uganda contends that "the DRC not only tolerated the anti-Ugandan rebels, but also supported them very effectively in various ways, before simply incorporating some of them into its armed forces".
In the context of the DRC’s alleged involvement in supporting anti-Ugandan irregular forces from May 1997 to August 1998, Uganda contends that it is not necessary to prove the involvement of the DRC in each attack; it suffices to prove that “President Kabila and his government were co-ordinating closely with the anti-Ugandan rebels prior to August 1998.”

According to Uganda, the DRC’s support for anti-Ugandan armed forces cannot be justified as a form of self-defence in response to the alleged armed aggression by Uganda. The DRC’s support for the anti-Ugandan rebels is alleged to have been with a view to exploiting the situation to re-establish control of territory claimed by the DRC.

The DRC divides its response into three periods:

(a) the period prior to President Laurent-Désiré Kabila coming to power in May 1997;
(b) the period starting from the accession to power of President Kabila until 2 August 1998, the date on which Uganda’s military attack was launched; and
(c) the period subsequent to 2 August 1998.

In rebuffing Uganda’s first counter-claim, the DRC contends that the Ugandan counter-claim is inadmissible to the extent that it is based on facts that are not proven. The DRC also divides its response into three periods:

(a) the period corresponding to the period in which the DRC was under the leadership of Marshal Mobutu Sese Seko, from May 1997 to August 1998;
(b) the period prior to the accession to power of President Kabila, from August 1998 to August 1999; and
(c) the period subsequent to August 1999.

According to the DRC, it has always denied having provided military support or having participated in any attack of its own initiative during the period under consideration.

With regard to the first period, the DRC contends that the Ugandan counter-claim is inadmissible to the extent that it is based on facts that are not proven. The DRC also divides its response into three periods:

(a) the period prior to the accession to power of President Kabila, from May 1997 to August 1998;
(b) the period from August 1998 to August 1999; and
(c) the period subsequent to August 1999.

In response to the foregoing arguments of the DRC, Uganda states the following.

It disagrees that the first counter-claim should be divided into three historical periods, namely, from 1994 to 1997 (under Mobutu’s presidency), from May 1997 to 2 August 1998, and the period beginning from 2 August 1998.

In any event, the DRC denies having breached any duty of vigilance during the period when Marshal Mobutu was in power, by having failed to prevent a Ugandan rebel attack on its territory. The DRC also denies having provided military support to those groups during the period of May 1997 to August 1998. According to the DRC, it has always denied having provided military support to those groups, and it has always denied having participated in any attack of its own initiative during the period under consideration.

With regard to the second period, the DRC maintains that the Ugandan counter-claim is inadmissible to the extent that it is based on facts that are not proven. The DRC also divides its response into three periods:

(a) the period prior to the accession to power of President Kabila, from May 1997 to August 1998;
(b) the period from August 1998 to August 1999; and
(c) the period subsequent to August 1999.

In response to the foregoing arguments of the DRC, Uganda states the following.

It disagrees that the first counter-claim should be divided into three historical periods, namely, from 1994 to 1997 (under Mobutu’s presidency), from May 1997 to 2 August 1998, and the period beginning from 2 August 1998.
290. With reference to the objection raised by the DRC that Uganda is precluded from filing a claim in relation to alleged violations of its territorial sovereignty on the grounds that it failed to file a claim within the prescribed period under Article 10 of the Rules of Court, the Court observes that there is no evidence that the Court would not have considered the claim if it had been filed.

291. The Court has taken note that Uganda disagrees with the division of the first counter-claim of Uganda into three periods as argued by the DRC. The Court recalls that, in paragraph 39 of its Order of 29 November 2001, the Court found that Uganda's counter-claim satisfied the direct connection requirement laid down by Article 80 of the Court's Rules of Procedure. The Court further observed that, in its Order of 29 November 2001, it had not found any evidence showing that Uganda's counter-claim was not submitted to the Court for examination.

292. The Court now turns to the question of admissibility of the part of the first counter-claim of Uganda relating to the period prior to May 1997. The Court observes that the DRC has not raised any objections to the admissibility of this part of the counter-claim.

293. The Court observes that waivers or renunciations of claims must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right. In the case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), the Court rejected a similar argument of waiver put forth by Australia, which argued that Nauru had renounced certain of its claims. The Court observed that a waiver of those claims could not be implied on the basis of the conduct of Nauru. The Court furthermore considered that a waiver of the claims is equally impossible, notwithstanding the conduct of Nauru. In the present case, the Court concludes that the DRC's objections to the admissibility of this part of the counter-claim should be dismissed.

294. The period of friendly relations enjoyed between the DRC and Uganda between May 1997 and July 1998 does not affect this outcome. A period of friendly relations between two States, for the purposes of the First Protocol to the Convention on the Basis of the Customary International Law of the Sea of 1958 (the 1958 Convention), must be in accordance with Article 36 of the 1958 Convention and must be based on the mutual consent of the States concerned. The Court observes that the DRC and Uganda did not express any consent to the establishment of friendly relations during the period in question.

295. The Court concludes that the part of the first counter-claim of Uganda relating to the period prior to May 1997 is admissible.

296. The Court has taken note that Uganda disagrees with the division of the first counter-claim of Uganda into three periods as argued by the DRC. The Court notes that, in its Order of 29 November 2001, the Court found that Uganda's counter-claim satisfied the direct connection requirement laid down by Article 80 of the Court's Rules of Procedure. The Court further observed that, in its Order of 29 November 2001, it had not found any evidence showing that Uganda's counter-claim was not submitted to the Court for examination.

297. The Court now turns to the question of admissibility of the part of the first counter-claim of Uganda relating to the period prior to May 1997. The Court observes that the DRC has not raised any objections to the admissibility of this part of the counter-claim.

298. The Court observes that waivers or renunciations of claims must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right. In the case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), the Court rejected a similar argument of waiver put forth by Australia, which argued that Nauru had renounced certain of its claims. The Court observed that a waiver of those claims could not be implied on the basis of the conduct of Nauru. The Court furthermore considered that a waiver of the claims is equally impossible, notwithstanding the conduct of Nauru. In the present case, the Court concludes that the DRC's objections to the admissibility of this part of the counter-claim should be dismissed.

299. The period of friendly relations enjoyed between the DRC and Uganda between May 1997 and July 1998 does not affect this outcome. A period of friendly relations between two States, for the purposes of the First Protocol to the Convention on the Basis of the Customary International Law of the Sea of 1958 (the 1958 Convention), must be in accordance with Article 36 of the 1958 Convention and must be based on the mutual consent of the States concerned. The Court observes that the DRC and Uganda did not express any consent to the establishment of friendly relations during the period in question.

300. The Court concludes that the part of the first counter-claim of Uganda relating to the period prior to May 1997 is admissible.

301. The Court has taken note that Uganda disagrees with the division of the first counter-claim of Uganda into three periods as argued by the DRC. The Court notes that, in its Order of 29 November 2001, the Court found that Uganda's counter-claim satisfied the direct connection requirement laid down by Article 80 of the Court's Rules of Procedure. The Court further observed that, in its Order of 29 November 2001, it had not found any evidence showing that Uganda's counter-claim was not submitted to the Court for examination.

302. The Court now turns to the question of admissibility of the part of the first counter-claim of Uganda relating to the period prior to May 1997. The Court observes that the DRC has not raised any objections to the admissibility of this part of the counter-claim.

303. The Court observes that waivers or renunciations of claims must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right. In the case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), the Court rejected a similar argument of waiver put forth by Australia, which argued that Nauru had renounced certain of its claims. The Court observed that a waiver of those claims could not be implied on the basis of the conduct of Nauru. The Court furthermore considered that a waiver of the claims is equally impossible, notwithstanding the conduct of Nauru. In the present case, the Court concludes that the DRC's objections to the admissibility of this part of the counter-claim should be dismissed.

304. The period of friendly relations enjoyed between the DRC and Uganda between May 1997 and July 1998 does not affect this outcome. A period of friendly relations between two States, for the purposes of the First Protocol to the Convention on the Basis of the Customary International Law of the Sea of 1958 (the 1958 Convention), must be in accordance with Article 36 of the 1958 Convention and must be based on the mutual consent of the States concerned. The Court observes that the DRC and Uganda did not express any consent to the establishment of friendly relations during the period in question.

305. The Court concludes that the part of the first counter-claim of Uganda relating to the period prior to May 1997 is admissible.
continue. The political climate between States does not alter their legal rights.

295. The Court further observes that, in a situation where there is a delay on the part of a State in bringing a claim, it is “for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible” (Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 254, para. 32). In the circumstances of the present case, the long period of time between the events at stake during the Mobutu régime and the filing of Uganda’s counter-claims has not rendered inadmissible Uganda’s first counter-claim for the period prior to May 1997.

296. The Court accordingly finds that the DRC’s objection cannot be upheld.

297. Regarding the merits of Uganda’s first counter-claim for the period prior to May 1997, Uganda alleges that the DRC breached its duty of vigilance by allowing anti-Ugandan rebel groups to use its territory to launch attacks on Uganda, and by providing political and military support to those groups during this period.

298. The Court considers that Uganda has not produced sufficient evidence to show that the Zairean authorities were involved in providing political and military support for specific attacks against Ugandan territory. The bulk of the evidence submitted consists of uncorroborated Ugandan military intelligence material and generally fails to indicate the sources from which it is drawn. Many such statements are unsigned. In addition, many documents were submitted as evidence by Uganda, such as the address by President Museveni to the Ugandan Parliament on 28 May 2000, entitled “Uganda’s Role in the Democratic Republic of the Congo”, and a document entitled “Chronological Illustration of Acts of Destabilization by Sudan and Congo based Dissidents”. In the circumstances of this case, these documents are of limited probative value to the extent that they were neither relied on by the other Party nor corroborated by impartial, neutral sources. Even the documents that purportedly relate eyewitness accounts are vague and thus unconvincing. For example, the information allegedly provided by an ADF deserter, reproduced in Annex 60 to the Counter-Memorial, is limited to the following: “In 1996 during Mobutu era before Mpondwe attack, ADF received several weapons from Sudan government with the help of Zaire government.” The few reports of non-governmental organizations put forward by Uganda (e.g. a report by HRW) are too general to support a claim of Congolese involvement rising to a level engaging State responsibility.

299. In sum, none of the documents submitted by Uganda, taken separately or together, can serve as a sound basis for the Court to conclude that the alleged violations of international law occurred. Thus Uganda has failed to discharge its burden of proof with regard to its allegation that Zaire provided political and military support to anti-Ugandan rebel groups operating in its territory during the Mobutu régime.

300. As to the question of whether the DRC breached its duty of vigilance by tolerating anti-Ugandan rebels on its territory, the Court notes that this is a different issue from the question of active support for the rebels, because the Parties do not dispute the presence of the anti-Ugandan rebels on the territory of the DRC as a factual matter. The DRC recognized that anti-Ugandan groups operated on the territory of the DRC from at least 1986. Under the Declaration on Friendly Relations, “every State has the duty to refrain from . . . acquiescing in organized activities within its territory directed towards the commission of such acts” (e.g., terrorist acts, acts of internal strife) and also “no State shall . . . tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State . . . “. As stated earlier, these provisions are declaratory of customary international law (see paragraph 162 above).

301. The Court has noted that, according to Uganda, the rebel groups were able to operate “unimpeded” in the border region between the DRC and Uganda “because of its mountainous terrain, its remoteness from Kinshasa (more than 1,500 km), and the almost complete absence of central government presence or authority in the region during President Mobutu’s 32-year term in office”.

During the period under consideration both anti-Ugandan and anti-Zairean rebel groups operated in this area. Neither Zaire nor Uganda were in a position to put an end to their activities. However, in the light of the evidence before it, the Court cannot conclude that the absence of action by Zaire’s Government against the rebel groups in the border area is tantamount to “tolerating” or “acquiescing” in their activities. Thus, the part of Uganda’s first counter-claim alleging Congolese responsibility for tolerating the rebel groups prior to May 1997 cannot be upheld.

302. With regard to the second period, from May 1997 until 2 August 1998, the DRC does not contest the admissibility of Uganda’s counter-claim. Rather, it argues simply that the counter-claim has no basis in fact.

303. In relation to this period, the Court finds that Uganda has failed to provide conclusive evidence of actual support for anti-Ugandan rebel groups by the DRC. Whereas in the first period the counter-claim suffered from a general lack of evidence showing the DRC’s support for anti-Ugandan rebels, the second period is marked by clear action by the DRC against the rebels. Relations between the DRC and Uganda during
this second period improved and the two Governments undertook joint actions against the anti-Ugandan rebels. The DRC consented to the deployment of Ugandan troops in the border area. In April 1998 the DRC and Uganda even concluded an agreement on security along the common border (see paragraph 46 above). The DRC was thus acting against the rebels, not in support of them. It appears, however, that, due to the difficulty and remoteness of the terrain discussed in relation to the first period, neither State was capable of putting an end to all the rebel activities despite their efforts in this period. Therefore, Uganda’s counter-claim with respect to this second period also must fail.

304. In relation to the third period, following 2 August 1998, the Court has already found that the legal situation after the military intervention of the Ugandan forces into the territory of the DRC was, after 7 August, essentially one of illegal use of force by Uganda against the DRC (see paragraph 149 above). In view of the finding that Uganda engaged in an illegal military operation against the DRC, the Court considers that the DRC was entitled to use force in order to repel Uganda’s attacks. The Court also notes that it has never been claimed that this use of force was not proportionate nor can the Court conclude from this the evidence before it. It follows that any military action taken by the DRC against Uganda during this period could not be deemed wrongful since it would be justified as action taken in self-defence under Article 51 of the United Nations Charter. Moreover, the Court has already found that the facts alleged by Uganda in its counter-claim in respect of this period, namely the participation of DRC regular troops in attacks by anti-Ugandan rebels against the UPDF and the training, arming, equipping, financing and supplying of anti-Ugandan insurgents, cannot be considered as proven (see paragraphs 121-147 above). Consequently, Uganda’s first counter-claim cannot be upheld as regards the period following 2 August 1998.

305. The Court thus concludes that the first counter-claim submitted by Uganda fails in its entirety.

* * *

SECOND COUNTER-CLAIM

306. In its second counter-claim, Uganda claims that Congolese armed forces carried out three separate attacks on the Ugandan Embassy in Kinshasa in August, September and November 1998; confiscated property belonging to the Government of Uganda, Ugandan diplomats and Ugandan nationals; and maltreated diplomats and other Ugandan nationals present on the premises of the mission.

307. In particular, Uganda contends that on or around 11 August 1998 Congolese soldiers stormed the Ugandan Embassy in Kinshasa, threatened the ambassador and other diplomats, demanding the release of certain Rwandan nationals. According to Uganda, the Congolese soldiers also stole money found in the Chancery. Uganda alleges that, despite protests by Ugandan Embassy officials, the Congolese Government took no action.

308. Uganda further asserts that, prior to their evacuation from the DRC on 20 August 1998, 17 Ugandan nationals and Ugandan diplomats were likewise subjected to inhumane treatment by FAC troops stationed at Ndjili International Airport. Uganda alleges that, before releasing the Ugandans, the FAC troops confiscated their money, valuables and briefcases. Uganda states that a Note of protest with regard to this incident was sent by the Embassy of Uganda to the Ministry of Foreign Affairs of the DRC on 21 August 1998.

309. Uganda claims that in September 1998, following the evacuation of the remaining Ugandan diplomats from the DRC, FAC troops forcibly seized the Ugandan Chancery and the official residence of the Ugandan Ambassador in Kinshasa. Uganda maintains that the Congolese troops stole property from the premises, including four embassy vehicles. According to Uganda, on 23 November 1998 FAC troops again forcibly entered the Ugandan Chancery and the official residence of the Ugandan Ambassador in Kinshasa and stole property, including embassy furniture, household and personal effects belonging to the Ambassador and to other diplomatic staff, embassy office equipment, Ugandan flags and four vehicles belonging to Ugandan nationals. Uganda alleges that the Congolese army also occupied the Chancery and the official residence of the Ugandan Ambassador.

310. Uganda states that on 18 December 1998 the Ministry of Foreign Affairs of Uganda sent a Note of protest to the Ministry of Foreign Affairs of the DRC, in which it referred to the incidents of September 1998 and 23 November 1998 and demanded, inter alia, that the Government of the DRC return all the property taken from the Embassy premises, that all Congolese military personnel vacate the two buildings and that the mission be protected from any further intrusion.

311. Uganda alleges, moreover, that “[t]he Congolese government permitted WNBF commander Taban Amin, the son of former Ugandan dictator Idi Amin, to occupy the premises of the Uganda Embassy in Kinshasa and establish his official headquarters and residence at those facilities”. In this regard, Uganda refers to a Note of protest dated 21 March 2001, whereby the Ministry of Foreign Affairs of Uganda
requested that the Government of the DRC ask Mr. Taban Amin to vacate the Ugandan Embassy’s premises in Kinshasa.

312. Uganda further refers to a visit on 28 September 2002 by a joint delegation of Ugandan and Congolese officials to the Chancery and the official residence of the Ambassador of Uganda in Kinshasa. Uganda notes that the Status Report, signed by the representatives of both Parties following the visit, indicates that “at the time of the inspection, both premises were occupied” and that the joint delegation “did not find any movable property belonging to the Uganda embassy or its former officials”. Uganda states that the joint delegation also “found the buildings in a state of total disrepair”. As a result of that situation, Uganda claims that it was recently obliged to rent premises for its diplomatic and consular mission in Kinshasa.

313. Uganda argues that the DRC’s actions are in breach of international diplomatic and consular law, in particular Articles 22 (inviolability of the premises of the mission), 29 (inviolability of the person of diplomatic agents), 30 (inviolability of the private residence of a diplomatic agent) and 24 (inviolability of archives and documents of the mission) of the 1961 Vienna Convention on Diplomatic Relations. In addition, Uganda contends that “the inhumane treatment and threats to the security and freedom of nationals of Uganda . . . constitute a series of breaches of the international minimum standard relating to the treatment of foreign nationals lawfully on State territory, which standard forms a part of customary or general international law”;

and that, in respect of the seizure of the Embassy of Uganda, the official residence of the Ambassador and official cars of the mission, these actions constitute an unlawful expropriation of the public property of Uganda.

314. The DRC contends that Uganda’s second counter-claim is partially inadmissible on the ground that Uganda has ascribed new legal bases in its Rejoinder to the DRC’s responsibility by including claims based on the violation of the Vienna Convention on Diplomatic Relations. According to the DRC, Uganda thus breaks the connection with the principal claim, which refers to “the violation of the United Nations Charter provisions on the use of force and on non-intervention, as well as the Hague and Geneva Conventions on the protection of persons and property in time of occupation and armed conflict”. The DRC also asserts that the alleged modification of the subject-matter of this part of the dispute is manifestly incompatible with the Court’s Order of 29 November 2001.

315. The DRC further argues that the claim based on the inhumane treatment of Ugandan nationals cannot be admitted, because the requirements for admissibility of a diplomatic protection claim are not satisfied. As for the first condition relating to the nationality of the alleged victims, the DRC claims that Uganda has not shown that the persons on whose behalf it is claiming to act are of Ugandan nationality and not Rwandan or of any dual nationality. Regarding the second condition relating to the exhaustion of local remedies, the DRC contends that, “since it seems that these individuals left the Democratic Republic of the Congo in a group in August 1998 and that is when they allegedly suffered the unspecified, unproven injuries, it would not appear that the requirement of exhaustion of local remedies has been satisfied”.

316. Uganda, for its part, claims that Chapter XVIII of its Counter-Memorial “clearly shows, with no possibility of doubt, that since the beginning of the dispute Uganda has invoked violation of the 1961 Vienna Convention in support of its position on the responsibility of the Congo”. Uganda further notes that in its Order of 29 November 2001, in the context of Uganda’s second counter-claim, the Court concluded that the Parties were pursuing the same legal aims by seeking “to establish the responsibility of the other by invoking, in connection with the alleged illegal use of force, certain rules of conventional or customary international law relating to the protection of persons and property” (I.C.J. Reports 2001, p. 679, para. 40). Uganda contends that the reference to “conventional . . . law” must necessarily relate to the Vienna Convention on Diplomatic Relations, “the only conventional instrument expressly named in that part of the Counter-Memorial devoted to the second claim”. Thus Uganda argues that it has not changed the subject-matter of the dispute.

317. As to the inadmissibility of the part of the claim relating to the alleged maltreatment of certain Ugandan nationals, according to Uganda it is not linked to any claims of Ugandan nationals; its claim is based on violations by the DRC, directed against Uganda itself, of general rules of international law relating to diplomatic relations, of which Ugandan nationals present in the premises of the mission were indirect victims. Uganda considers that local remedies need not be exhausted when the individual is only the indirect victim of a violation of a State-to-State obligation. Uganda states that “[t]he breaches of the Convention also constitute direct injury to Uganda and the local remedies rule is therefore inapplicable”. Uganda contends that, even assuming that this aspect of the second claim could be interpreted as the exercise by Uganda of diplomatic protection, the local remedies rule would not in any event
be applicable because the principle is that the rule can only apply when effective remedies are available in the national system. In this regard, Uganda argues that any remedy before Congolese courts would be ineffective, due to the lack of impartiality within the Congolese justice system. Additionally, Uganda contends that

“[t]he inhumane treatment and threats to the security and freedom of nationals of Uganda . . . constitute a series of breaches of the international minimum standard relating to the treatment of foreign nationals lawfully on State territory, which standard forms a part of customary or general international law”.

* 

318. As to the merits of the second counter-claim, the DRC, without prejudice to its arguments on the inadmissibility of the second counter-claim, argues that in any event Uganda has been unable to establish the factual and legal bases of its claims. According to the DRC, “none of these accusations made against [the DRC] by the Respondent has any serious and credible factual basis”. The DRC also challenges the evidentiary value “in law” of the documents adduced by Uganda to support its claims.

319. The DRC denies having subjected Ugandan nationals to inhumane treatment during an alleged attack on the Ugandan Embassy in Kinshasa on 11 August 1998 and denies that further attacks occurred in September and November 1998. According to the DRC, the Ugandan diplomatic buildings in Kinshasa were never seized or expropriated, nor has the DRC ever sought to prevent Uganda from reoccupying its property. The DRC further states that it did not expropriate Ugandan public property in Kinshasa in August 1998, nor did it misappropriate the vehicles of the Ugandan diplomatic mission in Kinshasa, or remove the archives or seize movable property from those premises.

320. The DRC likewise contests the assertion that it allowed the commander of the WNBF to occupy the premises of the Ugandan Embassy in Kinshasa and to establish his official headquarters and residence there. The DRC also refutes the allegation that on 20 August 1998 various Ugandan nationals were maltreated by the FAC at Ndjili International Airport in Kinshasa.

321. The DRC contends that the part of the claim relating to the alleged expropriation of Uganda’s public property is unfounded because Uganda has been unable to establish the factual and legal bases of its claims. According to the DRC, Uganda has not adduced any credible evidence to show that either the two buildings (the Embassy and the

Ambassador’s residence) or the four official vehicles were seized by the DRC.

* 

322. The Court will first turn to the DRC’s challenge to the admissibility of the second counter-claim on the grounds that, by formally invoking the Vienna Convention on Diplomatic Relations for the first time in its Rejoinder of 6 December 2002, Uganda has “[sought] improperly to enlarge the subject-matter of the dispute, contrary to the Statute and Rules of Court” and contrary to the Court’s Order of 29 November 2001.

323. The Court first recalls that the Vienna Convention on Diplomatic Relations continues to apply notwithstanding the state of armed conflict that existed between the Parties at the time of the alleged maltreatment. The Court recalls that, according to Article 44 of the Vienna Convention on Diplomatic Relations:

“The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.”

324. Further, Article 45 of the Vienna Convention provides as follows:

“If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

(a) the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;

(b) the sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;

(c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.”

In the case concerning United States Diplomatic and Consular Staff in Tehran, the Court emphasized that

“[e]ven in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, . . . must be respected by the receiving State” (Judgment, I.C.J. Reports 1980, p. 40, para. 86).

325. In relation to the DRC’s claim that the Court’s Order of 29 November 2001 precludes the subsequent invocation of the Vienna
Convention on Diplomatic Relations, the Court recalls the language of this Order:

“each Party holds the other responsible for various acts of oppression allegedly accompanying an illegal use of force . . . each Party seeks to establish the responsibility of the other by invoking, in connection with the alleged illegal use of force, certain rules of conventional or customary international law relating to the protection of persons and property” (I.C.J. Reports 2001, p. 679, para. 40; emphasis added).

326. The Court finds this formulation sufficiently broad to encompass claims based on the Vienna Convention on Diplomatic Relations, taking note that the new claims are based on the same factual allegation, i.e. the alleged illegal use of force. The Court was entirely aware, when making its Order, that the alleged attacks were on Embassy premises. Later reference to specific additional legal elements, in the context of an alleged illegal use of force, does not alter the nature or subject-matter of the dispute. It was the use of force on Embassy premises that brought this counter-claim within the scope of Article 80 of the Rules, but that does not preclude examination of the special status of the Embassy. As the jurisprudence of the Court reflects, counter-claims do not have to rely on identical instruments to meet the “connection” test of Article 80 (see Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 318-319).

327. The Court therefore finds that Uganda’s second counter-claim is not rendered inadmissible in so far as Uganda has subsequently invoked Articles 22, 24, 29, and 30 of the Vienna Convention on Diplomatic Relations.

328. The Court will now consider the DRC’s challenge to the admissibility of the second counter-claim on the ground that it is in reality a claim founded on diplomatic protection and as such fails, as Uganda has not shown that the requirements laid down by international law for the exercise of diplomatic protection have been satisfied.

329. The Court notes that Uganda relies on two separate legal bases in its allegations concerning the maltreatment of persons. With regard to diplomats, Uganda relies on Article 29 of the Vienna Convention on Diplomatic Relations. With regard to other Ugandan nationals not enjoying diplomatic status, Uganda grounds its claim in general rules of international law relating to diplomatic relations and in the international minimum standard relating to the treatment of foreign nationals who are present on a State’s territory. The Court will now address both of these bases in turn.

330. First, as to alleged acts of maltreatment committed against Ugandan diplomats finding themselves both within embassy premises and elsewhere, the Court observes that Uganda’s second counter-claim aims at obtaining reparation for the injuries suffered by Uganda itself as a result of the alleged violations by the DRC of Article 29 of the Vienna Convention on Diplomatic Relations. Therefore Uganda is not exercising diplomatic protection on behalf of the victims but vindicating its own rights under the Vienna Convention. Accordingly, the Court finds that the failure to exhaust local remedies does not pose a barrier to Uganda’s counter-claim under Article 29 of the Vienna Convention on Diplomatic Relations, and the claim is thus admissible.

331. As to acts of maltreatment committed against other persons on the premises of the Ugandan Embassy at the time of the incidents, the Court observes that the substance of this counter-claim currently before the Court as a direct claim, brought by Uganda in its sovereign capacity, concerning its Embassy in Kinshasa, falls within the ambit of Article 22 of the Vienna Convention on Diplomatic Relations. Consequently, the objection advanced by the DRC to the admissibility of this part of Uganda’s second counter-claim cannot be upheld, and this part of the counter-claim is also admissible.

332. The Court turns now to the part of Uganda’s second counter-claim which concerns acts of maltreatment by FAC troops of Ugandan nationals not enjoying diplomatic status who were present at Ndjili International Airport as they attempted to leave the country.

333. The Court notes that Uganda bases this part of the counter-claim on the international minimum standard relating to the treatment of foreign nationals who are present on a State’s territory. The Court thus considers that this part of Uganda’s counter-claim concerns injury to the particular individuals in question and does not relate to a violation of an international obligation by the DRC causing a direct injury to Uganda. The Court is of the opinion that in presenting this part of the counter-claim Uganda is attempting to exercise its right to diplomatic protection with regard to its nationals. It follows that Uganda would need to meet the conditions necessary for the exercise of diplomatic protection as recognized in general international law, namely the requirement of Ugandan nationality of the claimants and the prior exhaustion of local remedies. The Court observes that no specific documentation can be found in the case file identifying the individuals concerned as Ugandan nationals. The Court thus finds that, this condition not being met, Uganda’s counter-claim concerning the alleged maltreatment of its nationals not enjoying diplomatic status at Ndjili International Airport is inadmissible.
334. Regarding the merits of Uganda’s second counter-claim, the Court finds that there is sufficient evidence to prove that there were attacks against the Embassy and acts of maltreatment against Ugandan diplomats at Ndjili International Airport.

335. The Court observes that various Ugandan diplomatic Notes addressed to the Congolese Foreign Ministry or to the Congolese Embassy in Kampala make reference to attacks by Congolese troops against the premises of the Ugandan Embassy and to the occupation by the latter of the buildings of the Chancery. In particular, the Court considers important the Note of 18 December 1998 from the Ministry of Foreign Affairs of Uganda to the Ministry of Foreign Affairs of the DRC, protesting against Congolese actions in detriment of the Ugandan Chancery and property therein in September and November 1998, in violation of international law and the 1961 Vienna Convention on Diplomatic Relations. This Note deserves special attention because it was sent in duplicate to the Secretary-General of the United Nations and to the Secretary-General of the OAU, requesting them to urge the DRC to meet its obligations under the Vienna Convention. The Court takes particular note of the fact that the DRC did not reject this accusation at the time at which it was made.

336. Although some of the other evidence is inconclusive or appears to have been prepared unilaterally for purposes of litigation, the Court was particularly persuaded by the Status Report on the Residence and Chancery, jointly prepared by the DRC and Uganda under the Luanda Agreement. The Court has given special attention to this report, which was prepared on site and was drawn up with the participation of both Parties. Although the report does not offer a clear picture regarding the alleged attacks, it does demonstrate the resulting long-term occupation of the Ugandan Embassy by Congolese forces.

337. Therefore, the Court finds that, as regards the attacks on Uganda’s diplomatic premises in Kinshasa, the DRC has breached its obligations under Article 22 of the Vienna Convention on Diplomatic Relations.

338. Acts of maltreatment by DRC forces of persons within the Ugandan Embassy were necessarily consequential upon a breach of the inviolability of the premise prohibited by Article 22 of the Vienna Convention on Diplomatic Relations. This is true regardless of whether the persons were or were not nationals of Uganda or Ugandan diplomats. In so far as the persons attacked were in fact diplomats, the DRC further breached its obligations under Article 29 of the Vienna Convention.

339. Finally, there is evidence that some Ugandan diplomats were maltreated at Ndjili International Airport when leaving the country. The Court considers that a Note of Protest sent by the Embassy of Uganda to the Ministry of Foreign Affairs of the DRC on 21 August 1998, i.e. on the day following the incident, which at the time did not lead to a reply by the DRC denying the incident, shows that the DRC committed acts of maltreatment of Ugandan diplomats at Ndjili International Airport. The fact that the assistance of the dean of the diplomatic corps (Ambassador of Switzerland) was needed in order to organize an orderly departure of Ugandan diplomats from the airport is also an indication that the DRC failed to provide effective protection and treatment required under international law on diplomatic relations. The Court therefore finds that, through acts of maltreatment inflicted on Ugandan diplomats at the airport when they attempted to leave the country, the DRC acted in violation of its obligations under international law on diplomatic relations.

340. In summary, the Court concludes that, through the attacks by members of the Congolese armed forces on the premises of the Ugandan Embassy in Kinshasa, and their maltreatment of persons who found themselves at the Embassy at the time of the attacks, the DRC breached its obligations under Article 22 of the Vienna Convention on Diplomatic Relations. The Court further concludes that by the maltreatment by members of the Congolese armed forces of Ugandan diplomats on Embassy premises and at Ndjili International Airport, the DRC also breached its obligations under Article 29 of the Vienna Convention.

341. As to the claim concerning Ugandan public property, the Court notes that the original wording used by Uganda in its Counter-Memorial was that property belonging to the Government of Uganda and Ugandan diplomats had been “confiscated”, and that later pleadings referred to “expropriation” of Ugandan public property. However, there is nothing to suggest that in this case any confiscation or expropriation took place in the technical sense. The Court therefore finds neither term suitable in the present context. Uganda appears rather to be referring to an illegal appropriation in the general sense of the term. The seizures clearly constitute an unlawful use of that property, but no valid transfer of the title to the property has occurred and the DRC has not become, at any point in time, the lawful owner of such property.

342. Regarding evidentiary issues, the Status Report on the Residence and Chancery, jointly prepared by the DRC and Uganda under the Luanda Agreement, provides sufficient evidence for the Court to conclude that Ugandan property was removed from the premises of the official residence and Chancery. It is not necessary for the Court to make a determination as to who might have removed the property reported missing. The Vienna Convention on Diplomatic Relations not only prohibits any infringements of the inviolability of the mission by the receiving State
itself but also puts the receiving State under an obligation to prevent others — such as armed militia groups — from doing so (see United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, pp. 30-32, paras. 61-67). Therefore, although the evidence available is insufficient to identify with precision the individuals who removed Ugandan property, the mere fact that items were removed is enough to establish that the DRC breached its obligations under the Vienna Convention on Diplomatic Relations. At this stage, the Court considers that it has found sufficient evidence to hold that the removal of Ugandan property violated the rules of international law on diplomatic relations, whether it was committed by actions of the DRC itself or by the DRC’s failure to prevent such acts on the part of armed militia groups. Similarly, the Court need not establish a precise list of items removed — a point of disagreement between the Parties — in order to conclude at this stage of the proceedings that the DRC breached its obligations under the relevant rules of international law. Although these issues will become important should there be a reparation stage, they are not relevant for the Court’s finding on the legality or illegality of the acts of the DRC.

343. In addition to the issue of the taking of Ugandan public property described in paragraph 309, above, Uganda has specifically pleaded that the removal of “almost all of the documents in their archives and working files” violates Article 24 of the Vienna Convention on Diplomatic Relations. The same evidence discussed in paragraph 342 also supports this contention, and the Court accordingly finds the DRC in violation of its obligations under Article 24 of the Vienna Convention.

344. The Court notes that, at this stage of the proceedings, it suffices for it to state that the DRC bears responsibility for the breach of the inviolability of the diplomatic premises, the maltreatment of Ugandan diplomats at the Ugandan Embassy in Kinshasa, the maltreatment of Ugandan diplomats at Ndjili International Airport, and for attacks on and seizure of property and archives from Ugandan diplomatic premises, in violation of international law on diplomatic relations. It would only be at a subsequent phase, failing an agreement between the Parties, that the specific circumstances of these violations as well as the precise damage suffered by Uganda and the extent of the reparation to which it is entitled would have to be demonstrated.

* * *

345. For these reasons,

(1) By sixteen votes to one,

Finds that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter’s territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge ad hoc Verhoeven;

AGAINST: Judge ad hoc Kateka;

(2) Unanimously,

Finds admissible the claim submitted by the Democratic Republic of the Congo relating to alleged violations by the Republic of Uganda of its obligations under international human rights law and international humanitarian law in the course of hostilities between Ugandan and Rwandan military forces in Kisangani;

(3) By sixteen votes to one,

Finds that the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge ad hoc Verhoeven;

AGAINST: Judge ad hoc Kateka;

(4) By sixteen votes to one,

Finds that the Republic of Uganda, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of
the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law;

**IN FAVOUR:** President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge ad hoc Verhoeven;

**AGAINST:** Judge ad hoc Kateka;

(5) Unanimously,

*Finds* that the Republic of Uganda is under obligation to make reparation to the Democratic Republic of the Congo for the injury caused;

(6) Unanimously,

*Decides* that, failing agreement between the Parties, the question of reparation due to the Democratic Republic of the Congo shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case;

(7) By fifteen votes to two,

*Finds* that the Republic of Uganda did not comply with the Order of the Court on provisional measures of 1 July 2000;

**IN FAVOUR:** President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge ad hoc Verhoeven;

**AGAINST:** Judge Kooijmans; Judge ad hoc Kateka;

(8) Unanimously,

*Rejects* the objections of the Democratic Republic of the Congo to the admissibility of the first counter-claim submitted by the Republic of Uganda;

(9) By fourteen votes to three,

*Finds* that the first counter-claim submitted by the Republic of Uganda cannot be upheld;

**IN FAVOUR:** President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge ad hoc Verhoeven;

**AGAINST:** Judges Kooijmans, Tomka; Judge ad hoc Kateka;

(10) Unanimously,

*Rejects* the objection of the Democratic Republic of the Congo to the admissibility of the part of the second counter-claim submitted by the Republic of Uganda relating to the breach of the Vienna Convention on Diplomatic Relations of 1961;

(11) By sixteen votes to one,

*Upholds* the objection of the Democratic Republic of the Congo to the admissibility of the part of the second counter-claim submitted by the Republic of Uganda relating to the maltreatment of individuals other than Ugandan diplomats at Ndjili International Airport on 20 August 1998;

**IN FAVOUR:** President Shi; Vice-President Ranjeva; Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge ad hoc Verhoeven;

**AGAINST:** Judge ad hoc Kateka;

(12) Unanimously,

*Finds* that the Democratic Republic of the Congo, by the conduct of its armed forces, which attacked the Ugandan Embassy in Kinshasa, maltreated Ugandan diplomats and other individuals on the Embassy premises, maltreated Ugandan diplomats at Ndjili International Airport, as well as by its failure to provide the Ugandan Embassy and Ugandan diplomats with effective protection and by its failure to prevent archives and Ugandan property from being seized from the premises of the Ugandan Embassy, violated obligations owed to the Republic of Uganda under the Vienna Convention on Diplomatic Relations of 1961;

(13) Unanimously,

*Finds* that the Democratic Republic of the Congo is under obligation to make reparation to the Republic of Uganda for the injury caused;

(14) Unanimously,

*Decides* that, failing agreement between the Parties, the question of reparation due to the Republic of Uganda shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this nineteenth day of December, two thousand and five, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Demo-
the Democratic Republic of the Congo and the Government of the Republic of Uganda, respectively.

(Signed) Shi Juyong,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge KOROMA appends a declaration to the Judgment of the Court; Judges PARRA-ARANGUREN, KOOMANS, ELARABY and SIMMA append separate opinions to the Judgment of the Court; Judge TOMKA and Judge ad hoc VERHOEVEN append declarations to the Judgment of the Court; Judge ad hoc KATEKA appends a dissenting opinion to the Judgment of the Court.

(Initialled) J.Y.S.

(Initialled) Ph.C.
International Court of Justice

Separate Opinion of Judge Simma, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)

Judgment

I.C.J. Reports 2005
SEPARATE OPINION OF JUDGE SIMMA

The Court should have called the Ugandan invasion of a large part of the DRC’s territory an act of aggression — The Court should not have avoided dealing with the issue of self-defence against large-scale cross-boundary armed attacks by non-State actors but rather it should have taken the opportunity to clarify a matter to the confused state of which it has itself contributed — Against the background of current attempts to deprive certain persons of the protection due to them under international humanitarian and human rights law, the Court should have found that the private persons maltreated at Kinshasa Airport in August 1998 did enjoy such protection, and that Uganda would have had standing to raise a claim in their regard irrespective of their nationality.

1. Let me emphasize at the outset that I agree with everything the Court is saying in its Judgment. Rather, what I am concerned about are certain issues on which the Court decided to say nothing. The first two matters in this regard fall within the ambit of the use of force in the context of the claims of the Democratic Republic of the Congo: the third issue concerns the applicability of international humanitarian and human rights law to a certain part of Uganda’s second counter-claim.

1. THE USE OF FORCE BY UGANDA AS AN ACT OF AGGRESSION

2. One deliberate omission characterizing the Judgment will strike any politically alert reader: it is the way in which the Court has avoided dealing with the explicit request of the DRC to find that Uganda, by its massive use of force against the Applicant has committed an act of aggression. In this regard I associate myself with the criticism expressed in the separate opinion of Judge Elaraby. After all, Uganda invaded a part of the territory of the DRC of the size of Germany and kept it under its own control, or that of the various Congolese warlords it befriended, for several years, helping itself to the immense natural riches of these tormented regions. In its Judgment the Court cannot but acknowledge of course that by engaging in these “military activities” Uganda “violated the principle of non-use of force in international relations and the principle of non-intervention” (Judgment, para. 345 (1)). The Judgment gets toughest in paragraph 165 of its reasoning where it states that “[t]he unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter”. So, why not call a spade a spade? If there ever was a military activity before the Court that deserves to be qualified as an act of aggression, it is the Ugandan invasion of the DRC. Compared to its scale and impact, the military adventures the Court had to deal with in earlier cases, as in Corfu Channel, Military and Paramilitary Activities in and against Nicaragua or Oil Platforms, border on the insignificant.

3. It is true that the United Nations Security Council, despite adopting a whole series of resolutions on the situation in the Great Lakes region (cf. paragraph 150 of the Judgment) has never gone as far as expressly qualifying the Ugandan invasion as an act of aggression, even though it must appear as a textbook example of the first one of the definitions of “this most serious and dangerous form of the illegal use of force” laid down in General Assembly resolution 3314 (XXIX). The Council will have had its own — political — reasons for refraining from such a determination. But the Court, as the principal judicial organ of the United Nations, does not have to follow that course. Its very raison d’être is to arrive at decisions based on law and nothing but the law, keeping the political context of the cases before it in mind, of course, but not desisting from stating what is manifest out of regard for such non-legal considerations. This is the division of labour between the Court and the political organs of the United Nations envisaged by the Charter!

2. SELF-DEFENCE AGAINST LARGE-SCALE ARMED ATTACKS BY NON-STATE ACTORS

4. I am in agreement with the Court’s finding in paragraph 146 of the Judgment that the “armed attacks” to which Uganda referred when claiming to have acted in self-defence against the DRC were perpetrated not by the Congolese armed forces but rather by the Allied Democratic Forces (ADF), that is, from a rebel group operating against Uganda from Congolese territory. The Court stated that Uganda could provide no satisfactory proof that would have sustained its allegation that these attacks emanated from armed bands or regulars sent by or on behalf of the DRC. Thus these attacks are not attributable to the DRC.

5. The Court, however, then finds, that for these reasons the legal and factual circumstances for the exercise of a right to self-defence by Uganda against the DRC were not present (Judgment, para. 147). Accordingly, the Court continues, it has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary interna-
6. Thus, the reasoning on which the Judgment relies in its findings on the first submission by the DRC appears to be as follows:

— since the submission of the DRC requests the Court (only) to find that it was Uganda’s use of force against the DRC which constituted an act of aggression, and

— since the Court does not consider that the military activities carried out from Congolese territory onto the territory of the Respondent by anti-Ugandan rebel forces are attributable to the DRC,

— and since therefore Uganda’s claim that its use of force against the DRC was justified as an exercise of self-defence, cannot be upheld,

it suffices for the Court to find Uganda in breach of the prohibition of the use of force enshrined in the United Nations Charter and in general international law. The Applicant, the Court appears to say, has not asked for anything beyond that. Therefore, it is not necessary for the Court to deal with the legal qualification of either the cross-border military activities of the anti-Ugandan groups as such, or of the Ugandan countermeasures against these hostile acts.

7. What thus remains unanswered by the Court is the question whether, even if not attributable to the DRC, such activities could have been repelled by Uganda through engaging these groups also on Congolese territory, if necessary, provided that the rebel attacks were of a scale sufficient to reach the threshold of an “armed attack” within the meaning of Article 51 of the United Nations Charter.

8. Like Judge Kooijmans in paragraphs 25 ff. of his separate opinion, I submit that the Court should have taken the opportunity presented by the present case to clarify the state of the law on a highly controversial matter which is marked by great controversy and confusion — not the least because it was the Court itself that has substantially contributed to this confusion by its Nicaragua Judgment of two decades ago. With Judge Kooijmans, I regret that the Court “thus has missed a chance to fine-tune the position it took 20 years ago in spite of the explicit invitation by one of the Parties to do so” (separate opinion of Judge Kooijmans, para. 25).

9. From the Nicaragua case onwards the Court has made several pronouncements on questions of use of force and self-defence which are problematic less for the things they say than for the questions they leave open, prominently among them the issue of self-defence against armed attacks by non-State actors.

10. The most recent — and most pertinent — statement in this context is to be found in the (extremely succinct) discussion by the Court in its Wall Opinion of the Israeli argument that the separation barrier under construction was a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 194, para. 138). To this argument the Court replied that Article 51 recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another. Since Israel did not claim that the attacks against it were imputable to a foreign State, however, Article 51 of the Charter had no relevance in the case of the wall (ibid., para. 139).

11. Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying opinio juris, it ought urgently to be reconsidered, also by the Court. As is well known, these developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter provisions, particularly the “Bush doctrine” justifying the pre-emptive use of force. Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as “armed attacks” within the meaning of Article 51.

12. In his separate opinion, Judge Kooijmans points to the fact that the almost complete absence of governmental authority in the whole or part of the territory of certain States has unfortunately become a phenomenon as familiar as international terrorism (separate opinion of Judge Kooijmans, para. 30). I fully agree with his conclusions that, if armed attacks are carried out by irregular forces from such territory against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State, and, further, that it “would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not so require” (ibid.)

13. I also subscribe to Judge Kooijmans’s opinion that the lawfulness


of the conduct of the attacked State in the face of such an armed attack by a non-State group must be put to the same test as that applied in the case of a claim of self-defence against a State, namely, does the scale of the armed action by the irregulars amount to an armed attack and, if so, is the defensive action by the attacked State in conformity with the requirements of necessity and proportionality? (Separate opinion of Judge Kooijmans, para. 31.)

14. In applying this test to the military activities of Uganda on Congolese territory from August 1998 onwards, Judge Kooijmans concludes — and I agree — that, while the activities that Uganda conducted in August in an area contiguous to the border may still be regarded as keeping within these limits, the stepping up of Ugandan military operations starting with the occupation of the Kisangani airport and continuing thereafter, leading the Ugandan forces far into the interior of the DRC, assumed a magnitude and duration that could not possibly be justified any longer by reliance on any right of self-defence. Thus, at this point, our view meets with, and shares, the Court’s final conclusion that Uganda’s military intervention constitutes “a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter” (Judgment, para. 165).

15. What I wanted to demonstrate with the preceding reasoning is that the Court could well have afforded to approach the question of the use of armed force on a large scale by non-State actors in a realistic vein, instead of avoiding it altogether by a sleight of hand, and still arrive at the same convincing result. By the unnecessarily cautious way in which it handles this matter, as well as by dodging the issue of “aggression”, the Court creates the impression that it somehow feels uncomfortable being confronted with certain questions of utmost importance in contemporary international relations.

3. THE MALTREATMENT OF PERSONS AT Ndjili INTERNATIONAL AIRPORT AND INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW


In its second counter-claim, Uganda alleged, inter alia, that by maltreating certain individuals other than Ugandan diplomats when they attempted to leave the country following the outbreak of the armed conflict, the DRC violated its obligations under the “international minimal standard relating to the treatment of foreign nationals lawfully on State territory”, as well as “universally recognized standards of human rights concerning the security of the human person” (Counter-Memorial of Uganda (CMU), paras. 405-407). The Court concluded in paragraph 333 of its Judgment that in presenting this part of the counter-claim Uganda was attempting to exercise its right to diplomatic protection with regard to its nationals. It followed that Uganda would need to meet the conditions necessary for the exercise of diplomatic protection as recognized in general international law, that is, the requirement of Ugandan nationality of the individuals concerned and the prior exhaustion of local remedies. The Court observed that no specific documentation could be found in the case file identifying the persons as Ugandan nationals. The Court thus decided that, this condition not being met, the part of Uganda’s counter-claim under consideration here was inadmissible. It thus upheld the objection of the DRC to this effect (Judgment, para. 345 (11)).

17. My vote in favour of this part of the Judgment only extends to the inadmissibility of Uganda’s claim to diplomatic protection, since I agree with the Court’s finding that the preconditions for a claim of diplomatic protection by Uganda were not met. I am of the view, however, that the Court’s reasoning should not have finished at this point. Rather, the Court should have recognized that the victims of the attacks at the Ndjili International Airport remained legally protected against such maltreatment irrespective of their nationality, by other branches of international law, namely international human rights and, particularly, international humanitarian law. In its Judgment the Court has made a laudable effort to apply the rules developed in these fields to the situation of persons of varying nationality and status finding themselves in the war zones, in as comprehensive a manner as possible. The only group of people that remains unprotected by the legal shield thus devised by the Court are the 17 unfortunate individuals encountering the fury of the Congolese soldiers at the airport in Kinshasa.

18. I have to admit that the way in which Uganda presented and argued the part of its second counter-claim devoted to this group struck me as somewhat careless, both with regard to the evidence that Uganda mustered and to the quality of its legal reasoning. Such superficiality might stem from the attempts of more or less desperate counsel to find issues out of which they think they could construe what to them might look like a professionally acceptable counter-claim, instead of genuine concern for the fate of the persons concerned.

3 This is not the first case giving me this impression; cf. my separate opinion in the case concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, pp. 342-343, para. 36.
19. Be this as it may, I will take the opportunity of Uganda’s claim concerning the events at the airport further to develop the thesis presented at the outset, namely that it would have been possible for the Court in its Judgment to embrace the situation in which these individuals found themselves, on the basis of international humanitarian and human rights law, and that no legal void existed in their regard. The reader might ask himself why I should give so much attention to an incident which happened more than seven years ago, whose gravity must certainly pale beside the unspeakable atrocities committed in the war in the Congo. I will be very clear: I consider that legal arguments clarifying that situations like the one before us no gaps exist in the law that would deprive the affected persons of any legal protection, have, unfortunately, never been as important as at present, in the face of certain recent deplorable developments.

20. Let me, first, turn to the relevance of international humanitarian law to the incident at Ndjili International Airport.

To begin with, the fact that the airport was not a site of major hostilities in the armed conflict between the DRC and Uganda does not present a barrier to the application of international humanitarian law to the events which happened there. There are two reasons for this.

21. First, the key issue in finding whether international humanitarian law should apply also in peaceful areas of the territory of a belligerent State is whether those areas are somehow connected to the conflict. This was indeed the case with Ndjili International Airport because the individuals maltreated there found themselves in a situation of evacuation from armed conflict. The Note of Protest sent by the Embassy of Uganda to the Ministry of Foreign Affairs of the DRC on 21 August 1998 — which the Court considers reliable evidence in paragraph 339 of its Judgment — states that individuals and Ugandan diplomats were at Ndjili International Airport in the context of evacuation (CMU, Ann. 23). This evacuation was necessary due to the armed conflict taking place in the DRC. Therefore, the events at the airport were factually connected to the armed conflict. The airport was not a random peaceful location completely unconnected to that conflict. Quite the contrary, it was the point of departure for an evacuation rendered necessary precisely by the armed conflict. During that evacuation, the airport became the scene of violence by Congolese forces against the evacuees.

22. Article 80 (1) of the Rules of Court states that: “A counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court.” (Emphasis added.) In its Order of 29 November 2001, the Court found the second counter-claim admissible under the "direct connection" test, stating that “each Party holds the other responsible for various acts of oppression allegedly accompanying an illegal use of force; . . . these are facts of the same nature, and . . . the Parties’ claims form part of the same factual complex” (para. 40; emphasis added). Therefore the Court had already determined, in its Order under Article 80, that the events at the airport formed part of the “same factual complex” as the armed conflict which constitutes the basis of the main claim. Hence, international humanitarian law should apply to the counter-claim as it does to the main claim.

23. Second, the application of international humanitarian law to the events at the airport would be consistent with the understanding of the scope of international humanitarian law developed by the ICTY Appeals Chamber. In Prosecutor v. Tadić, the Appeals Chamber stated:

"Armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between . . . such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal armed conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.” (No. IT-94-1, Decision of the Appeals Chamber on the defence motion for interlocutory appeal on jurisdiction, para. 70 (2 October 1995); emphasis added.)

The Appeals Chamber also noted that "the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities" (ibid., para. 67). Later in the same case, a Trial Chamber analysed the phrase “when committed in armed conflict”, which qualifies the unlawful acts set out in Article 5 of the Statute of the ICTY, and concluded that “it is not necessary that the acts occur in the heat of battle” (Prosecutor v. Duško Tadić, No. IT-94-1-T, Trial Chamber, Opinion and Judgment, para. 632 (7 May 1997)). Similarly, a Trial Chamber of the ICTY has stated that “there does not have to be actual combat activities in a particular location for the norms of international humanitarian law to be applicable” (Prosecutor v. Delalić, Mučić, Delić, & Landzo, No. IT-96-21-T, Trial Chamber Judgment, para. 185 (16 November 1998)).

24. I turn, next, to the substantive rules of international humanitarian
law applicable to the persons in question. The provision which first comes to mind is Article 4 of the Fourth Geneva Convention of 1949. According to Article 4, persons who “at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals” are considered “protected persons” under the Convention. If the individuals maltreated by the DRC at Ndjili International Airport were considered protected persons under Article 4 of the Fourth Geneva Convention, the behaviour of the Congolese soldiers would have violated several provisions of that Convention, including Article 27 (requiring that protected persons “shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity”), Article 32 (prohibiting the infliction of physical suffering on protected persons), Article 33 (prohibiting reprisals against protected persons and their property), and Article 36 (requiring that evacuations of protected persons be carried out safely).

25. However, the qualification of the 17 individuals at the airport as “protected persons” within the meaning of Article 4 meets with great difficulties. As I stated above, Uganda was not able to prove that these persons were its own nationals; in fact we have no information whatsoever as to their nationality. In this regard, Article 4 of the Fourth Geneva Convention states that:

“Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”

The individuals under consideration might have been nationals of a neutral State or those of a co-belligerent (like Rwanda), and we do not know whether their home State maintained normal diplomatic relations with the DRC at the time of the incident. Against this factual background — or rather, the lack thereof — it would not have been possible for the Court to regard them as “protected persons”.

26. But this is not the end of the matter. The gap thus left by Geneva Convention Article 4 has in the meantime been — deliberately — closed by Article 75 of Protocol I Additional to the Geneva Conventions of 1949. This provision enshrines the fundamental guarantees of international humanitarian law and reads in pertinent part as follows:

“1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article . . .

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

. . . . . . . . . . . . . . . . . . .

(iii) corporal punishment;

. . . . . . . . . . . . . . . . . . .

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, . . .”

The Commentary of the International Committee of the Red Cross to Article 75 specifically notes that this provision was meant to provide protection to individuals who, by virtue of the exceptions listed in Article 4 of the Fourth Geneva Convention, did not qualify as “protected persons”. Thus, the Commentary makes clear that Article 75 provides protection to both nationals of States not parties to the conflict and nationals of allied States, even if their home State happened to have normal diplomatic representation in the State in whose hands they find themselves 4. The Commentary emphasizes that “[i]f . . . there were . . . cases in which the status of . . . protected person were denied to certain individuals, the protection of Article 75 must be applied to them as a minimum” 5.

27. The conclusion just arrived at has been confirmed recently in an Opinion of the European Commission for Democracy through Law (Venice Commission) established by the Council of Europe 6. This Opinion was prepared to answer the question whether the new challenges posed by international terrorism, and the claims made by the United States in the wake of September 11 to the effect that the United States could deny certain persons the protection of the Geneva Conventions because they were “enemy unlawful combatants” 7, rendered necessary a further development of international humanitarian law. According to the Venice Commission, Article 75 of Protocol I Additional to the Geneva Conventions, as well as common Article 3 to the Geneva Conventions (on which infra)

“are based on the assumption that nationals of States which are not

5 Ibid., p. 867.
Parties to the conflict or nationals of co-belligerent States do not need the full protection of GC IV since they are normally even better protected by the rules on diplomatic protection. Should, however, diplomatic protection not be (properly) exercised on behalf of such third party nationals, International Humanitarian Law provides for protection under Article 75 P I and common Article 3 so that such persons do not remain without certain minimum rights.”

Thus, also according to the Venice Commission, there is “in respect of these matters . . . no legal void in international law”.

28. Further, it can safely be concluded that the fundamental guarantees enshrined in Article 75 of Additional Protocol I are also embodied in customary international law.

29. Attention must also be drawn to Article 3 common to all four Geneva Conventions, which defines certain rules to be applied in armed conflicts of a non-international character. As the Court stated in the Nicaragua case:

“There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’ (Corfu Channel, Merits, I.C.J. Reports 1949, p. 22 . . .).” (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 114, para. 218.)

As such, the Court in Nicaragua found these rules applicable to the international dispute before it. The same is valid in the present case. In this regard, the decision of the Tadić Appeals Chamber discussed above is also of note. In relation to common Article 3, it stated that “the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations” (Prosecutor v. Tadić, Decision of the Appeals Chamber on the defence motion for interlocutory appeal on jurisdiction, para. 69; see supra, para. 23).

30. In addition to constituting breaches of international humanitarian

law, the maltreatment of the persons in question at Ndjili International Airport was also in violation of international human rights law. In paragraph 216 of its Judgment, the Court recalls its finding in the Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, according to which “the protection offered by human rights conventions does not cease in case of armed conflict . . .” (I.C.J. Reports 2004, p. 178, para. 106). In its Advisory Opinion, the Court continued:

“As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.” (Ibid.)

In my view, the maltreatment of the individuals at the airport falls under the third category of the situations mentioned: it is a matter of both international humanitarian and international human rights law.

31. Applying international human rights law to the individuals maltreated by the DRC at Ndjili International Airport, the conduct of the DRC would violate provisions of the International Covenant on Civil and Political Rights of 19 December 1966, the African Charter on Human and Peoples’ Rights of 27 June 1981, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, to all of which both the DRC and Uganda are parties. Specifically, under the International Covenant on Civil and Political Rights, the conduct of the DRC would violate Article 7 (“No one shall be subjected to . . . cruel, inhuman or degrading treatment or punishment”), Article 9, paragraph 1 (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”), Article 10, paragraph 1 (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”), and Article 12, paragraphs 1 and 2 (“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement . . . 2. Everyone shall be free to leave any country, including his own”).

Under the African Charter, the conduct of the DRC would violate Article 4 (“Human beings are inviolable. Every human being shall be entitled to respect for . . . the integrity of his person. No one may be arbitrarily deprived of this right”), Article 5 (“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly . . . cruel, inhuman or degrading punishment and
treatment shall be prohibited”), Article 6 (“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”), as well as Article 12, paragraphs 1 and 2 (“1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law. 2. Every individual shall have the right to leave any country including his own, and to return to his country . . .”). Finally, although the conduct of the DRC at Ndjili International Airport did not rise to the level of torture, it was nevertheless in violation of Article 16, paragraph 1, of the Convention against Torture which reads as follows:

“Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

32. The jurisdiction of the Court being firmly established, there remains the issue of standing to raise violations of international humanitarian and human rights law in the case of persons who may not have the nationality of the claimant State. In the present case, regarding Uganda’s counterclaim, the issue does not present itself in a technical sense because Uganda has not actually pleaded a violation of either of these branches of international law in relation to the persons in question. But if Uganda had chosen to raise these violations before the Court, it would undoubtedly have had standing to bring such claims.

33. As to international humanitarian law, Uganda would have had standing because, as the Court emphasized in its Advisory Opinion on the Wall:

“Article I of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.’ It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.” (I.C.J. Reports 2004, pp. 199-200, para. 158.)

The Court concluded that given the character and the importance of the rights and obligations involved, there is an obligation on all States parties to the Convention to respect and ensure respect for violations of the international humanitarian law codified in the Convention (ibid., p. 200, paras. 158-159). The same reasoning is applicable in the instant case.

34. The ICRC Commentary to common Article 1 of the Conventions arrives at the same result in its analysis of the obligation to respect and to ensure respect, where it is stated that:

“in the event of a Power failing to fulfil its obligations [under the Convention], the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.”

Thus, regardless of whether the maltreated individuals were Ugandans or not, Uganda had the right — indeed the duty — to raise the violations of international humanitarian law committed against the private persons at the airport. The implementation of a State party’s international legal duty to ensure respect by another State party for the obligations arising under humanitarian treaties by way of raising it before the International Court of Justice is certainly one of the most constructive avenues in this regard.

35. As to the question of standing of a claimant State for violations of human rights committed against persons which might or might not possess the nationality of that State, the jurisdiction of the Court not being at issue, the contemporary law of State responsibility provides a positive answer as well. The International Law Commission’s 2001 draft on Responsibility of States for Internationally Wrongful Acts provides not only for the invocation of responsibility by an injured State (which quality Uganda would possess if it had been able to establish the Ugandan nationality of the individuals at the airport) but also for the possibility that such responsibility can be invoked by a State other than an injured State. In this regard, Article 48 of the draft reads as follows:

“Article 48

Invocation of Responsibility by a State Other than an Injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.11

The obligations deriving from the human rights treaties cited above and breached by the DRC are instances par excellence of obligations that are owed to a group of States including Uganda, and are established for the protection of a collective interest of the States parties to the Covenant.

36. With regard to the customary requirement of the exhaustion of local remedies, this condition only applies if effective remedies are available in the first place (cf. ILC Article 44 (b) and the commentary thereto). In view of the circumstances of the airport incident and, more generally, of the political situation prevailing in the DRC at the time of the Ugandan invasion, I tend to agree with the Ugandan argument that attempts by the victims of that incident to seek justice in the Congolese courts would have remained futile (cf. paragraph 317 of the Judgment). Hence, no obstacle would have stood in the way for Uganda to raise the violation of human rights of the persons maltreated at Ndjili International Airport, even if these individuals did not possess its nationality.

37. In summary of this issue, Uganda would have had standing to bring, and the Court would have had jurisdiction to decide upon a claim both under international humanitarian law and international human rights law for the maltreatment of the individuals at the airport, irrespective of the nationality of these individuals. The specific construction of the rights and obligations under the Fourth Geneva Convention as well as the relevant provisions of Protocol I Additional to this Convention not only entitles every State party to raise these violations but even creates an obligation to ensure respect for the humanitarian law in question. The rules of the international law of State responsibility lead to an analogous result as concerns the violations of human rights of the persons concerned by the Congolese soldiers. Uganda chose the avenue of diplomatic protection and failed. A reminder by the Court of the applicability of international humanitarian and human rights law standards and of Uganda’s standing to raise violations of the obligations deriving from these standards by the DRC would, in my view, not have gone ultra petita partium.

38. Let me conclude with a more general observation on the community interest underlying international humanitarian and human rights law. I feel compelled to do so because of the notable hesitation and weakness with which such community interest is currently manifesting itself vis-à-vis the ongoing attempts to dismantle important elements of these branches of international law in the proclaimed “war” on international terrorism.

39. As against such undue restraint it is to be remembered that at least the core of the obligations deriving from the rules of international humanitarian and human rights law are valid erga omnes. According to the Commentary of the ICRC to Article 4 of the Fourth Geneva Convention, “[t]he spirit which inspires the Geneva Conventions naturally makes it desirable that they should be applicable ‘erga omnes’, since they may be regarded as the codification of accepted principles”12. In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons the Court 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). Similarly, in the Wall Advisory Opinion, the Court affirmed that the rules of international humanitarian law “incorporate obligations which are essentially of an erga omnes character” (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 199, para. 157).

40. As the Court indicated in the Barcelona Traction case, obligations erga omnes are by their very nature “the concern of all States” and, “[i]n 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). In the same vein, the International Law Commission has

---


stated in the Commentaries to its Articles on the Responsibility of States for Internationally Wrongful Acts that there are certain rights in the protection of which, by reason of their importance, “all States have a legal interest . . .” (A/56/10 at p. 278)\(^\text{13}\).

41. If the international community allowed such interest to erode in the face not only of violations of obligations \textit{erga omnes} but of outright attempts to do away with these fundamental duties, and in their place to open black holes in the law in which human beings may be “disappeared” and deprived of any legal protection whatsoever for indefinite periods of time, then international law, for me, would become much less worthwhile.

\textit{(Signed) Bruno Simma.}

\(^{13}\) Concerning the specific question of standing in case of breaches of obligations \textit{erga omnes} the Institute of International Law, in a resolution on the topic of obligations of this nature adopted at its Krakow Session of 2005, accepted the following provisions:

\textit{Article 3}

In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation \textit{erga omnes} and a State to which the obligation is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation.

\textit{Article 4}

The International Court of Justice or other international judicial institution should give a State to which an obligation \textit{erga omnes} is owed the possibility to participate in proceedings pending before the Court or that institution and relating to that obligation. Specific rules should govern this participation."
Situation in Palestine, Office of the Prosecutor, International Criminal Court, 3 April 2012
Situation in Palestine

1. On 22 January 2009, pursuant to article 12(3) of the Rome Statute, Ali Khasman acting as Minister of Justice of the Government of Palestine lodged a declaration accepting the exercise of jurisdiction by the International Criminal Court for “acts committed on the territory of Palestine since 1 July 2002.”

2. In accordance with article 15 of the Rome Statute, the Office of the Prosecutor initiated a preliminary examination in order to determine whether there is a reasonable basis to proceed with an investigation. The Office ensured a fair process by giving all those concerned the opportunity to present their arguments. The Arab League’s Independent Fact Finding Committee on Gaza presented its report during a visit to the Court. The Office provided Palestine with the opportunity to present its views extensively, in both oral and written form. The Office also considered various reports with opposing views. In July 2011, Palestine confirmed to the Office that it had submitted its principal arguments, subject to the submission of additional supporting documentation.

3. The first stage in any preliminary examination is to determine whether the preconditions to the exercise of jurisdiction under article 12 of the Rome Statute are met. Only when such criteria are established will the Office proceed to analyse information on alleged crimes as well as other conditions for the exercise of jurisdiction as set out in articles 13 and 53(1).

4. The jurisdiction of the Court is not based on the principle of universal jurisdiction; it requires that the United Nations Security Council (article 13(b)) or a “State” (article 12) provide jurisdiction. Article 12 establishes that a “State” can confer jurisdiction to the Court by becoming a Party to the Rome Statute (article 12(1)) or by making an ad hoc declaration accepting the Court’s jurisdiction (article 12(3)).

5. The issue that arises, therefore, is who defines what is a “State” for the purpose of article 12 of the Statute? In accordance with article 125, the Rome Statute is open to accession by “all States”, and any State seeking to become a Party to the Statute must deposit an instrument of accession with the Secretary-General of the United Nations. In instances where it is controversial or unclear whether an applicant constitutes a “State”, it is the practice of the Secretary-General to follow or seek the General Assembly’s directives on the matter. This is reflected in General Assembly resolutions which provide indications of whether an applicant is a “State.” Thus, competence for determining the term “State” within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General, who, in case of doubt, will defer to the guidance of General Assembly. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter in accordance with article 112(2)(g) of the Statute.

6. In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of according to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term “State” under article 12(3) which would be at variance with that established for the purpose of article 12(1).

7. The Office has been informed that Palestine has been recognised as a State in bilateral relations by more than 130 governments and by certain international organisations, including United Nations bodies. However, the current status granted to Palestine by the United Nations General Assembly is that of “observer”, not as a “Non-member State”. The Office understands that on 23 September 2011, Palestine submitted an application for admission to the United Nations as a Member State in accordance with article 4(2) of the United Nations Charter, but the Security Council has not yet made a recommendation in this regard. While this process has no direct link with the declaration lodged by Palestine, it informs the current legal status of Palestine for the interpretation and application of article 12.

8. The Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction.

EMBARGO UNTIL DELIVERY 3 April 2012
Status of Palestine in the United Nations (General Assembly resolution 67/19 of 29 November 2012)
Resolution adopted by the General Assembly

[without reference to a Main Committee (A/67/L.28 and Add.1)]


The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and stressing in this regard the principle of equal rights and self-determination of peoples,

Recalling its resolution 2625 (XXV) of 24 October 1970, by which it affirmed, inter alia, the duty of every State to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples,

Stressing the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights,

Recalling its resolution 181 (II) of 29 November 1947,

Reaffirming the principle, set out in the Charter, of the inadmissibility of the acquisition of territory by force,


Reaffirming further the applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, including with regard to the matter of prisoners,

Reaffirming its resolution 3236 (XXIX) of 22 November 1974 and all relevant resolutions, including resolution 66/146 of 19 December 2011, reaffirming the right of the Palestinian people to self-determination, including the right to their independent State of Palestine,

Reaffirming also its resolutions 43/176 of 15 December 1988 and 66/17 of 30 November 2011 and all relevant resolutions regarding the peaceful settlement of the question of Palestine, which, inter alia, stress the need for the withdrawal of Israel from the Palestinian territory occupied since 1967, including East Jerusalem, the realization of the inalienable rights of the Palestinian people, primarily the right to self-determination and the right to their independent State, a just resolution of the problem of the Palestine refugees in conformity with resolution 194 (III) of 11 December 1948 and the complete cessation of all Israeli settlement activities in the Occupied Palestinian Territory, including East Jerusalem,

Reaffirming further its resolution 66/18 of 30 November 2011 and all relevant resolutions regarding the status of Jerusalem, bearing in mind that the annexation of East Jerusalem is not recognized by the international community, and emphasizing the need for a way to be found through negotiations to resolve the status of Jerusalem as the capital of two States,

Recalling the advisory opinion of the International Court of Justice of 9 July 2004,

Reaffirming its resolution 58/292 of 6 May 2004 affirming, inter alia, that the status of the Palestinian territory occupied since 1967, including East Jerusalem, remains one of military occupation and that, in accordance with international law and relevant United Nations resolutions, the Palestinian people have the right to self-determination and to sovereignty over their territory,

Recalling its resolutions 3210 (XXIX) of 14 October 1974 and 3237 (XXIX) of 22 November 1974, by which, respectively, the Palestine Liberation Organization was invited to participate in the deliberations of the General Assembly as the representative of the Palestinian people and was granted observer status,

Recalling also its resolution 43/177 of 15 December 1988, by which it, inter alia, acknowledged the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988 and decided that the designation “Palestine” should be used in place of the designation “Palestine Liberation Organization” in the United Nations system, without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system,

Taking into consideration that the Executive Committee of the Palestine Liberation Organization, in accordance with a decision by the Palestine National Council, is entrusted with the powers and responsibilities of the Provisional Government of the State of Palestine,

Recalling its resolution 52/250 of 7 July 1998, by which additional rights and privileges were accorded to Palestine in its capacity as observer,

Recalling also the Arab Peace Initiative adopted in March 2002 by the Council of the League of Arab States,

Reaffirming its commitment, in accordance with international law, to the two-State solution of an independent, sovereign, democratic, viable and contiguous State
of Palestine living side by side with Israel in peace and security on the basis of the pre-1967 borders,

Bearing in mind the mutual recognition of 9 September 1993 between the Government of the State of Israel and the Palestine Liberation Organization, the representative of the Palestinian people,

Affirming the right of all States in the region to live in peace within secure and internationally recognized borders,

Commending the Palestinian National Authority’s 2009 plan for constructing the institutions of an independent Palestinian State within a two-year period, and welcoming the positive assessments in this regard about readiness for statehood by the World Bank, the United Nations and the International Monetary Fund and as reflected in the Ad Hoc Liaison Committee Chair conclusions of April 2011 and subsequent Chair conclusions, which determined that the Palestinian Authority is above the threshold for a functioning State in key sectors studied,

Recognizing that full membership is enjoyed by Palestine in the United Nations Educational, Scientific and Cultural Organization, the Economic and Social Commission for Western Asia and the Group of Asia-Pacific States and that Palestine is also a full member of the League of Arab States, the Movement of Non-Aligned Countries, the Organization of Islamic Cooperation and the Group of 77 and China,

Recognizing also that, to date, 132 States Members of the United Nations have accorded recognition to the State of Palestine,

Taking note of the 11 November 2011 report of the Security Council Committee on the Admission of New Members,

Stressing the permanent responsibility of the United Nations towards the question of Palestine until it is satisfactorily resolved in all its aspects,

Reaffirming the principle of universality of membership of the United Nations,

1. Reaffirms the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967;
2. Decides to accord to Palestine non-member observer State status in the United Nations, without prejudice to the acquired rights, privileges and role of the Palestine Liberation Organization in the United Nations as the representative of the Palestinian people, in accordance with the relevant resolutions and practice;
3. Expresses the hope that the Security Council will consider favourably the application submitted on 23 September 2011 by the State of Palestine for admission to full membership in the United Nations;
4. Affirms its determination to contribute to the achievement of the inalienable rights of the Palestinian people and the attainment of a peaceful settlement in the Middle East that ends the occupation that began in 1967 and fulfils the vision of two States: an independent, sovereign, democratic, contiguous and viable State of Palestine living side by side in peace and security with Israel on the basis of the pre-1967 borders;

5. Expresses the urgent need for the resumption and acceleration of negotiations within the Middle East peace process based on the relevant United Nations resolutions, the terms of reference of the Madrid Conference, including the principle of land for peace, the Arab Peace Initiative and the Quartet road map to a permanent two-State solution to the Israeli-Palestinian conflict for the achievement of a just, lasting and comprehensive peace settlement between the Palestinian and Israeli sides that resolves all outstanding core issues, namely the Palestine refugees, Jerusalem, settlements, borders, security and water;

6. Urges all States and the specialized agencies and organizations of the United Nations system to continue to support and assist the Palestinian people in the early realization of their right to self-determination, independence and freedom;

7. Requests the Secretary-General to take the necessary measures to implement the present resolution and to report to the General Assembly within three months on progress made in this regard.

44th plenary meeting
29 November 2012
International Court of Justice

North Sea Continental Shelf
(Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)
Judgment

*I.C.J. Reports 1969*, paras. 60-81
ference of language to be observed in the two paragraphs of Article 6 of the Geneva Convention (reproduced in paragraph 26 above) as respects recourse in the one case to median lines and in the other to lateral equidistance lines, in the event of absence of agreement.

58. If on the other hand, contrary to the view expressed in the preceding paragraph, it were correct to say that there is no essential difference in the process of delimiting the continental shelf areas between opposite States and that of delimitations between adjacent States, then the results ought in principle to be the same or at least comparable. But in fact, whereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other.

59. Equally distinct in the opinion of the Court is the case of the lateral boundary between adjacent territorial waters to be drawn on an equidistance basis. As was convincingly demonstrated in the maps and diagrams furnished by the Parties, and as has been noted in paragraph 9, the distorting effects of lateral equidistance lines under certain conditions of coastal configuration are nevertheless comparatively small within the limits of territorial waters, but produce their maximum effect in the localities where the main continental shelf areas lie further out. There is also a direct correlation between the notion of closest proximity to the coast and the sovereign jurisdiction which the coastal State is entitled to exercise and must exercise, not only over the seabed underneath the territorial waters but over the waters themselves, which does not exist in respect of continental shelf areas where there is no jurisdiction over the superjacent waters, and over the seabed only for purposes of exploration and exploitation.

60. The conclusions so far reached leave open, and still to be considered, the question whether on some basis other than that of an a priori logical necessity, i.e., through positive law processes, the equidistance principle has come to be regarded as a rule of customary international law, so that it would be obligatory for the Federal Republic in that way, even though Article 6 of the Geneva Convention is not, as such, opposable to it. For this purpose it is necessary to examine the status of the principle as it stood when the Convention was drawn up, as it resulted from the effect of the Convention, and in the light of State practice subsequent to the Convention; but it should be clearly understood that in the pronouncements the Court makes on these matters it has in view solely the delimitation provisions (Article 6) of the Convention, not other parts of it, nor the Convention as such.

61. The first of these questions can conveniently be considered in the form suggested on behalf of Denmark and the Netherlands themselves in the course of the oral hearing, when it was stated that they had not in fact contended that the delimitation article (Article 6) of the Convention "embodied already received rules of customary law in the sense that the Convention was merely declaratory of existing rules". Their contention was, rather, that although prior to the Conference, continental shelf law was only in the formative stage, and State practice lacked uniformity, yet "the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference"; and this emerging customary law became "crystallized in the adoption of the Continental Shelf Convention by the Conference".

62. Whatever validity this contention may have in respect of at least certain parts of the Convention, the Court cannot accept it as regards the delimitation provision (Article 6), the relevant parts of which were adopted almost unchanged from the draft of the International Law Commission that formed the basis of discussion at the Conference. The status of the rule in the Convention therefore depends mainly on the processes that led the Commission to propose it. These processes have already been reviewed in connection with the Danish-Netherlands contention of an a priori necessity for equidistance, and the Court considers this review sufficient for present purposes also, in order to show that the principle of equidistance, as it now appears in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most de lege ferenda, and not at all de lege lata or as an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule.

63. The foregoing conclusion receives significant confirmation from the fact that Article 6 is one of those in respect of which, under the reservations article of the Convention (Article 12) reservations may be made by any State on signing, ratifying or acceding.—for, speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;—whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own
favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded. This expectation is, in principle, fulfilled by Article 12 of the Geneva Continental Shelf Convention, which permits reservations to be made to all the articles of the Convention "other than to Articles 1 to 3 inclusive"—these three Articles being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf; the juridical character of the coastal State's entitlement; the nature of the rights exercisable; the kind of natural resources to which these relate; and the preservation intact of the legal status as high seas of the waters over the shelf, and the legal status of the superjacent air-space.

64. The normal inference would therefore be that any articles that do not figure among those excluded from the faculty of reservation under Article 12, were not regarded as declaratory of previously existing or emergent rules of law; and this is the inference the Court in fact draws in respect of Article 6 (delimitation), having regard also to the attitude of the International Law Commission to this provision, as already described in general terms. Naturally this would not of itself prevent this provision from eventually passing into the general corpus of customary international law by one of the processes considered in paragraphs 70-81 below. But that is not here the issue. What is now under consideration is whether it originally figured in the Convention as such a rule.

65. It has however been suggested that the inference drawn at the beginning of the preceding paragraph is not necessarily warranted, seeing that there are certain other provisions of the Convention, also not excluded from the faculty of reservation, but which do undoubtedly in principle relate to matters that lie within the field of received customary law, such as the obligation not to impede the laying or maintenance of submarine cables or pipelines on the continental shelf seabed (Article 4), and the general obligation not unjustifiably to interfere with freedom of navigation, fishing, and so on (Article 5, paragraphs 1 and 6). These matters however, all relate to or are consequential upon principles or rules of general maritime law, very considerably ante-dating the Convention, and not directly connected with but only incidental to continental shelf rights as such. They were mentioned in the Convention, not in order to declare or confirm their existence, which was not necessary, but simply to ensure that they were not prejudiced by the exercise of continental shelf rights as provided for in the Convention. Another method of drafting might have clarified the point, but this cannot alter the fact that no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention, and especially obligations formalized in Article 2 of the contemporaneous Convention on the High Seas, expressed by its preamble to be declaratory of established principles of international law.

66. Article 6 (delimitation) appears to the Court to be in a different position. It does directly relate to continental shelf rights as such, rather than to matters incidental to these; and since it was not, as were Articles 1 to 3, excluded from the faculty of reservation, it is a legitimate inference that it was considered to have a different and less fundamental status and not, like those Articles, to reflect pre-existing or emergent customary law. It was however contended on behalf of Denmark and the Netherlands that the right of reservation given in respect of Article 6 was not intended to be an unfettered right, and that in particular it does not extend to effecting a total exclusion of the equidistance principle of delimitation—for, so it was claimed, delimitation on the basis of that principle is implicit in Articles 1 and 2 of the Convention, in respect of which no reservations are permitted. Hence the right of reservation under Article 6 could only be exercised in a manner consistent with the preservation of at least the basic principle of equidistance. In this connection it was pointed out that, of the no more than four reservations so far entered in respect of Article 6, one at least of which was somewhat far-reaching, none has purported to effect such a total exclusion or denial.

67. The Court finds this argument unconvincing for a number of reasons. In the first place, Articles 1 and 2 of the Geneva Convention do not appear to have any direct connection with inter-State delimitation as such. Article 1 is concerned only with the outer, seaward, limit of the shelf generally, not with boundaries between the shelf areas of opposite or adjacent States. Article 2 is equally not concerned with such boundaries. The suggestion seems to be that the notion of equidistance is implicit in the reference in paragraph 2 of Article 2 to the rights of the coastal State over its continental shelf being "exclusive". So far as actual language is concerned this interpretation is clearly incorrect. The true sense of the passage is that in whatever areas of the continental shelf a coastal State has rights, those rights are exclusive rights, not exercisable by any other State. But this says nothing as to what in fact are the precise areas in respect of which each coastal State possesses these exclusive rights. This question, which can arise only as regards the fringes of a coastal State's shelf area is, as explained at the end of paragraph 20 above, exactly what falls to be settled through the process of delimitation, and this is the sphere of Article 6, not Article 2.
68. Secondly, it must be observed that no valid conclusions can be drawn from the fact that the faculty of entering reservations to Article 6 has been exercised only sparingly and within certain limits. This is the affair exclusively of those States which have not wished to exercise the faculty, or which have been content to do so only to a limited extent. Their action or inaction cannot affect the right of other States to enter reservations to whatever is the legitimate extent of the right.

69. In the light of these various considerations, the Court reaches the conclusion that the Geneva Convention did not embody or crystallize any pre-existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance-special circumstances basis. A rule was of course embodied in Article 6 of the Convention, but as a purely conventional rule. Whether it has since acquired a broader basis remains to be seen: qua conventional rule, however, as has already been concluded, it is not opposable to the Federal Republic.

* * *

70. The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice,—and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

71. In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

72. It would in the first place be necessary that the provision con-

cerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law. Considered in abstracto the equidistance principle might be said to fulfil this requirement. Yet in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. Without attempting to enter into, still less pronounce upon any question of jus cogens, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties,—but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention. Secondly the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm-creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, and is not the subject of any revision brought about in consequence of a request made under Article 13 of the Convention—of which there is at present no official indication—it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess.

73. With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. In the present case however, the Court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient. That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain.
74. As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964, and that when the present proceedings were brought it was less than three years, while less than one had elapsed at the time when the respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

*

75. The Court must now consider whether State practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement. Leaving aside cases which, for various reasons, the Court does not consider to be reliable guides as precedents, such as delimitations effected between the present Parties themselves, or not relating to international boundaries, some fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the 1958 Geneva Convention, in which continental shelf boundaries have been delimited according to the equidistance principle—in the majority of the cases by agreement, in a few others unilaterally—or else the delimitation was foreshadowed but has not yet been carried out. Amongst these fifteen are the four North Sea delimitations United Kingdom/Norway-Denmark-Netherlands, and Norway/Denmark already mentioned in paragraph 4 of this Judgment. But even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it necessary to enumerate or evaluate them separately, since there are, a priori, several grounds which deprive them of weight as precedents in the present context.

76. To begin with, over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably, as far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle. As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and, as has been seen (paragraphs 22 and 23), there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.

77. The essential point in this connection—and it seems necessary to stress it—is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the opinio juris:—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

78. In this respect the Court follows the view adopted by the Permanent Court of International Justice in the Lotus case, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, mutatis mutandis, to the present case (P.C.I.J., Series A, No. 10, 1927, at p. 28):

"Even if the rarity of the judicial decisions to be found ... were sufficient to prove ... the circumstance alleged ... it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, ... there are other circumstances calculated to show that the contrary is true."

Applying this dictum to the present case, the position is simply that in certain cases—not a great number—the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt
legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so—especially considering that they might have been motivated by other obvious factors.

79. Finally, it appears that in almost all of the cases cited, the delimitations concerned were median-line delimitations between opposite States, not lateral delimitations between adjacent States. For reasons which have already been given (paragraph 57) the Court regards the case of median-line delimitations between opposite States as different in various respects, and as being sufficiently distinct not to constitute a precedent for the delimitation of lateral boundaries. In only one situation discussed by the Parties does there appear to have been a geographical configuration which to some extent resembles the present one, in the sense that a number of States on the same coastline are grouped around a sharp curve or bend of it. No complete delimitation in this area has however yet been carried out. But the Court is not concerned to deny to this case, or any other of those cited, all evidential value in favour of the thesis of Denmark and the Netherlands. It simply considers that they are inconclusive, and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifest in such circumstances, as would justify the inference that delimitation according to the principle of equidistance amounts to a mandatory rule of customary international law,—more particularly where lateral delimitations are concerned.

80. There are of course plenty of cases (and a considerable number were cited) of delimitations of waters, as opposed to seabed, being carried out on the basis of equidistance—mostly of internal waters (lakes, rivers, etc.), and mostly median-line cases. The nearest analogy is that of adjacent territorial waters, but as already explained (paragraph 59) the Court does not consider this case to be analogous to that of the continental shelf.

81. The Court accordingly concludes that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent States, neither has its subsequent effect been constitutive of such a rule; and that State practice up-to-date has equally been insufficient for the purpose.

82. The immediately foregoing conclusion, coupled with that reached earlier (paragraph 56) to the effect that the equidistance principle could not be regarded as being a rule of law on any a priori basis of logical

necessity deriving from the fundamental theory of the continental shelf, leads to the final conclusion on this part of the case that the use of the equidistance method is not obligatory for the delimitation of the areas concerned in the present proceedings. In these circumstances, it becomes unnecessary for the Court to determine whether or not the configuration of the German North Sea coast constitutes a “special circumstance” for the purposes either of Article 6 of the Geneva Convention or of any rule of customary international law,—since once the use of the equidistance method of delimitation is determined not to be obligatory in any event, it ceases to be legally necessary to prove the existence of special circumstances in order to justify not using that method.

* * * * *

83. The legal situation therefore is that the Parties are under no obligation to apply either the 1958 Convention, which is not opposable to the Federal Republic, or the equidistance method as a mandatory rule of customary law, which it is not. But as between States faced with an issue concerning the lateral delimitation of adjacent continental shelves, there are still rules and principles of law to be applied; and in the present case it is not the fact either that rules are lacking, or that the situation is one for the unfettered appreciation of the Parties. Equally, it is not the case that if the equidistance principle is not a rule of law, there has to be as an alternative some other single equivalent rule.

84. As already indicated, the Court is not called upon itself to delimit the areas of continental shelf appertaining respectively to each Party, and in consequence is not bound to prescribe the methods to be employed for the purposes of such a delimitation. The Court has to indicate to the Parties the principles and rules of law in the light of which the methods for eventually effecting the delimitation will have to be chosen. The Court will discharge this task in such a way as to provide the Parties with the requisite directions, without substituting itself for them by means of a detailed indication of the methods to be followed and the factors to be taken into account for the purposes of a delimitation the carrying out of which the Parties have expressly reserved to themselves.

85. It emerges from the history of the development of the legal régime of the continental shelf, which has been reviewed earlier, that the essential reason why the equidistance method is not to be regarded as a rule of law is that, if it were to be compulsorily applied in all situations, this would not be consonant with certain basic legal notions which, as has been observed in paragraphs 48 and 55, have from the beginning reflected the opinio juris in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles. On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the
International Court of Justice

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo
Advisory Opinion

I.C.J. Reports 2010
ACCORDANCE WITH INTERNATIONAL LAW
OF THE UNILATERAL DECLARATION OF INDEPENDENCE
IN RESPECT OF KOSOVO

22 JULY 2010
ADVISORY OPINION

TABLE OF CONTENTS

Paragraphs

Chronology of the Procedure 1-16

I. Jurisdiction and Discretion 17-48
   A. Jurisdiction 18-28
   B. Discretion 29-48

II. Scope and Meaning of the Question 49-56

III. Factual Background 57-77
   A. Security Council resolution 1244 (1999) and the relevant UNMIK regulations 58-63
   B. The relevant events in the final status process prior to 17 February 2008 64-73
   C. The events of 17 February 2008 and thereafter 74-77

IV. The Question Whether the Declaration of Independence Is in Accordance with International Law 78-121
   A. General international law 79-84
   B. Security Council resolution 1244 (1999) and the UNMIK Constitutional Framework created thereunder 85-121
      1. Interpretation of Security Council resolution 1244 (1999) 94-100
      2. The question whether the declaration of independence is in accordance with Security Council resolution 1244 (1999) and the measures adopted thereunder 101-121
         (a) The identity of the authors of the declaration of independence 102-109
         (b) The question whether the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999) or the measures adopted thereunder 110-121

V. General Conclusion 122

Operative Clause 123
INTERNATIONAL COURT OF JUSTICE  

YEAR 2010  

22 July 2010  

ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO

Jurisdiction of the Court to give the advisory opinion requested.  
Article 65, paragraph 1, of the Statute - Article 96, paragraph 1, of the Charter - Power of General Assembly to request advisory opinions - Article 10 and 11 of the Charter - Contention that General Assembly acted outside its powers under the Charter - Article 12, paragraph 1, of the Charter - Authorization to request an advisory opinion not limited by Article 12.

Requirement that the question on which the Court is requested to give its opinion is a "legal question" - Contention that the act of making a declaration of independence is governed by domestic constitutional law - The Court can respond to the question by reference to international law without the need to address domestic law - The fact that a question has political aspects does not deprive it of its character as a legal question - The Court is not concerned with the political motives behind a request or the political implications which its opinion may have.

The Court has jurisdiction to give the advisory opinion requested.

Discretion of the Court to decide whether it should give an opinion.  
Integrity of the Court's judicial function - Only "compelling reasons" should lead the Court to decline to exercise its judicial function - The motives of individual States which sponsor a resolution requesting an advisory opinion are not relevant to the Court's exercise of its discretion - Requesting organ to assess purpose, usefulness and political consequences of opinion.

Delimitation of the respective powers of the Security Council and the General Assembly - Nature of the Security Council's involvement in relation to Kosovo - Article 12 of the Charter does not bar action by the General Assembly in respect of threats to international peace and security which are before the Security Council - General Assembly has taken action with regard to the situation in Kosovo.

No compelling reasons for Court to use its discretion not to give an advisory opinion.

Scope and meaning of the question.  
Text of the question in General Assembly resolution 63/3 - Power of the Court to clarify the question - No need to reformulate the question posed by the General Assembly - For the proper exercise of its judicial function, the Court must establish the identity of the authors of the declaration of independence - No intention by the General Assembly to restrict the Court's freedom to determine that issue - The Court's task is to determine whether or not the declaration was adopted in violation of international law.

Factual background.  
Framework for interim administration of Kosovo put in place by the Security Council - Security Council resolution 1244 (1999) - Establishment of the United Nations Interim Administration Mission in Kosovo (UNMIK) - Role of Special Representative of the Secretary-General - "Four pillars" of the UNMIK régime - Constitutional Framework for Provisional Self-Government - Relations between the Provisional Institutions of Self-Government and the Special Representative of the Secretary-General.

Relevant events in the final status process - Appointment by Secretary-General of Special Envoy for the future status process for Kosovo - Guiding Principles of the Contact Group - Failure of consultative process - Comprehensive Proposal for the Kosovo Status Settlement by Special Envoy - Failure of negotiations on the future status of Kosovo under the auspices of the Troika - Elections held for the Assembly of Kosovo on 17 November 2007 - Adoption of the declaration of independence on 17 February 2008.

Whether the declaration of independence is in accordance with international law.  
No prohibition of declarations of independence according to State practice - Contention that prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity - Scope of the principle of territorial integrity is confined to the sphere of relations between States - No general prohibition may be inferred from the practice of the Security Council with regard to declarations of independence - Issues relating to the extent of the right of self-
determination and the existence of any right of “remedial secession” are beyond
the scope of the question posed by the General Assembly.

General international law contains no applicable prohibition of declarations
of independence — Declaration of independence of 17 February 2008 did not
violate general international law.

Security Council resolution 1244 and the Constitutional Framework — Reso-
lution 1244 (1999) imposes international legal obligations and is part of the
applicable international law. — Constitutional Framework possesses interna-
tional legal character — Constitutional Framework is part of specific legal
order created pursuant to resolution 1244 (1999) — Constitutional Framework
regulates matters which are the subject of internal law — Supervisory powers of
the Special Representative of the Secretary-General — Security Council resolu-
tion 1244 (1999) and the Constitutional Framework were in force and applica-
able as at 17 February 2008 — Neither of them contains a clause providing for
termination and neither has been repealed — The Special Representative of
the Secretary-General continues to exercise his functions in Kosovo.

Security Council resolution 1244 (1999) and the Constitutional Framework
form part of the international law to be considered in replying to the question
before the Court.

Interpretation of Security Council resolutions — Resolution 1244 (1999)
established an international civil and security presence in Kosovo — Temporary
suspension of exercise of Serbia’s authority flowing from its continuing sover-
eignty over the territory of Kosovo — Resolution 1244 (1999) created an inter-
im régime — Object and purpose of resolution 1244 (1999).

Identity of the authors of the declaration of independence — Whether the de-
claration of independence was an act of the Assembly of Kosovo — Authors of
the declaration did not seek to act within the framework of interim self-admin-
istration of Kosovo — Authors undertook to fulfil the international obligations
of Kosovo prior to the declaration — No reference in original Albanian text to the
declarants’ status as representatives of the people of Kosovo outside the frame-
work of the interim administration.

Whether or not the authors of the declaration of independence acted in viola-
adressed to United Nations Member States and organs of the United Nations —
No specific obligations addressed to other actors — The resolution did not con-
tain any provision dealing with the final status of Kosovo — Security Council
did not reserve for itself the final determination of the situation in Kosovo
— Security Council resolution 1244 (1999) did not bar the authors of the declara-
tion of 17 February 2008 from issuing a declaration of independence — Decla-

Declaration of independence was not issued by the Provisional Institutions of
Self-Government — Declaration of independence did not violate the Consti-
tutional Framework.

Adoption of the declaration of independence did not violate any applicable
rule of international law.

407 UNILATERAL DECLARATION OF INDEPENDENCE (ADVISORY OPINION)

ADVISORY OPINION

Present: President Owada; Vice-President Tomka; Judges Koroma,
Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-
Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Green-
wood; Registrar Couveur.

On the accordance with international law of the unilateral declaration of
independence in respect of Kosovo,

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The question on which the advisory opinion of the Court has been requested
is set forth in resolution 63/3 adopted by the General Assembly of the United
Nations (hereinafter the General Assembly) on 8 October 2008. By a letter
dated 9 October 2008 and received in the Registry by facsimile on 10 Octo-
ber 2008, the original of which was received in the Registry on 15 Octo-
ber 2008, the Secretary-General of the United Nations officially communique
to the Court the decision taken by the General Assembly to submit the ques-
tion for an advisory opinion. Certified true copies of the English and French
versions of the resolution were enclosed with the letter. The resolution reads as
follows:

“The General Assembly,

Mindful of the purposes and principles of the United Nations,

Bearing in mind its functions and powers under the Charter of the
United Nations,

Recalling that on 17 February 2008 the Provisional Institutions of Self-
Government of Kosovo declared independence from Serbia,

Aware that this act has been received with varied reactions by the Mem-
bers of the United Nations as to its compatibility with the existing inter-
national legal order,

Decides, in accordance with Article 96 of the Charter of the United
Nations to request the International Court of Justice, pursuant to Arti-
cles 65 of the Statute of the Court, to render an advisory opinion on the
following question:

‘Is the unilateral declaration of independence by the Provisional Insti-
tutions of Self-Government of Kosovo in accordance with internation-
aland law?’

2. By letters dated 10 October 2008, the Registrar, pursuant to Article 66,
paragraph 1, of the Statute, gave notice of the request for an advisory opinion
to all States entitled to appear before the Court.

3. By an Order dated 17 October 2008, in accordance with Article 66, para-
graph 2, of the Statute, the Court decided that the United Nations and its
Member States were likely to be able to furnish information on the question.
By the same Order, the Court fixed, respectively, 17 April 2009 as the time-limit within which written statements might be submitted to it on the question, and 17 July 2009 as the time-limit within which written comments on the other written statements in accordance with Article 66, paragraph 4, of the Statute. The Court also decided that, taking account of the fact that the unilateral declaration of independence of 17 February 2008 is the subject of the questions submitted to the Court for an advisory opinion, the authors of the unilateral declaration of independence be invited to make written contributions to the Court within the same time-limits.

4. By letters dated 20 October 2008, the Registrar informed the United Nations and its Member States of the Court’s decisions and transmitted a copy of the Order. By letter of the same date, the Registrar communicated the Court’s decisions to the authors of the unilateral declaration of independence.

5. Pursuant to Article 65, paragraph 2, of the Statute, on 30 January 2009 the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question. The dossier was subsequently placed on the Court’s website.

6. Within the time-limit fixed by the Court for that purpose, written statements were filed, in order of their receipt, by: Czech Republic, France, Cyprus, China, Switzerland, Romania, Albania, China, Russia, Germany, Russia, China, Ukraine, Morocco, Spain, Mexico, and the United States of America.

7. On 29 April 2009, the Court decided to accept the written statement filed by the Bolivarian Republic of Venezuela, submitted on 24 April 2009, after expiry of the relevant time-limit. On 15 May 2009, the Registrar communicated the written statement to all States having submitted a written statement, as well as to the authors of the unilateral declaration of independence and the Permanent Court of Arbitration.

8. By letters dated 8 June 2009, the Registrar informed the United Nations and its Member States that the Court had decided to hold hearings, opening on 1 December 2009, at which they could present oral statements. The Registrar further indicated that the authors of the unilateral declaration of independence could present an oral contribution.

9. Within the time-limit fixed by the Court, written comments were filed, in order of their receipt, by: France, Norway, Cyprus, Serbia, Argentina, Germany, the Netherlands, and the Bolivarian Republic of Venezuela. The authors of the unilateral declaration of independence submitted a written contribution regarding the written statements.

10. Upon receipt of the above-mentioned written comments and written contribution, the Registrar, on 24 July 2009, communicated copies thereof to all States having submitted written statements, as well as to the authors of the unilateral declaration of independence.
<table>
<thead>
<tr>
<th>Country</th>
<th>Representative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania</td>
<td>H.E. Mr. Gazmend Barbulushi, Ambassador Extraordinary and Plenipotentiary</td>
</tr>
<tr>
<td></td>
<td>of the Republic of Albania</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>Ms Susanne Wasum-Rainer, Legal Adviser, Federal Foreign Office (Berlin);</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>H.E. Mr. Abdullah A. Aghaghaood, Ambassador of the Kingdom of Saudi Arabia</td>
</tr>
<tr>
<td></td>
<td>to the Kingdom of the Netherlands, Head of Delegation;</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Cyprus</td>
<td>H.E. Madam Susana Ruiz Cerutti, Ambassador, Legal Adviser to the Ministry of</td>
</tr>
<tr>
<td></td>
<td>Foreign Affairs, International Trade and Worship, Head of Delegation;</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Austria</td>
<td>H.E. Mr. Helmut Tichy, Ambassador, Deputy Legal Adviser, Federal Ministry of</td>
</tr>
<tr>
<td></td>
<td>European and International Affairs;</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Azerbaijan</td>
<td>H.E. Mr. Agshin Mehdiyev, Ambassador and Permanent Representative of Azerbaijan</td>
</tr>
<tr>
<td></td>
<td>to the United Nations;</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Belarus</td>
<td>H.E. Madam Ekna Gritsenko, Ambassador of the Republic of Belarus to the Kingdom</td>
</tr>
<tr>
<td></td>
<td>of the Netherlands, Head of Delegation;</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Bolivia</td>
<td>H.E. Mr. Roberto Calzadilla Sarmiento, Ambassador of the Plurinational State</td>
</tr>
<tr>
<td></td>
<td>of Bolivia to the Kingdom of the Netherlands;</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Brazil</td>
<td>H.E. Mr. José Artur Denot Medeiros, Ambassador of the Federative Republic of</td>
</tr>
<tr>
<td></td>
<td>Brazil to the Kingdom of the Netherlands;</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Questions were put by Members of the Court to participants in the oral proceedings; several of them replied in writing, as requested, within the prescribed time-limit.

16. Judge Shi took part in the oral proceedings; he subsequently resigned from the Court with effect from 28 May 2010.

* * *

I. JURISDICTION AND DISCRETION

17. When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why the Court, in its discretion, should decline to exercise any such jurisdiction in the case before it (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 232, para. 10; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 144, para. 13).

A. Jurisdiction

18. The Court will thus first address the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 October 2008. The power of the Court to give an advisory opinion is based upon Article 65, paragraph 1, of its Statute, which provides that:

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

19. In its application of this provision, the Court has indicated that:

"It is . . . a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ." (Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, pp. 333-334, para. 21.)

20. It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ of the United Nations or a specialized agency having competence to make it. The General Assembly is authorized to request an advisory opinion by Article 96 of the Charter, which provides that:

"1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

21. While paragraph 1 of Article 96 confers on the General Assembly the competence to request an advisory opinion on "any legal question", the Court has sometimes in the past given certain indications as to the relationship between the question which is the subject of a request for an advisory opinion and the activities of the General Assembly (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 70; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), pp. 232-233, paras. 11-12; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 145, paras. 16-17).

22. The Court observes that Article 10 of the Charter provides that:

"The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and
functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

Moreover, Article 11, paragraph 2, of the Charter has specifically provided the General Assembly with competence to discuss "any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations" and, subject again to the limitation in Article 12, to make recommendations with respect thereto.

23. Article 12, paragraph 1, of the Charter provides that:

"While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

24. In the present proceedings, it was suggested that, since the Security Council was seised of the situation in Kosovo, the effect of Article 12, paragraph 1, was that the General Assembly’s request for an advisory opinion was outside its powers under the Charter and thus did not fall within the authorization conferred by Article 96, paragraph 1. As the Court has stated on an earlier occasion, however, "[a] request for an advisory opinion is not in itself a 'recommendation' by the General Assembly 'with regard to [a] dispute or situation'" (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 148, para. 25). Accordingly, while Article 12 may limit the scope of the action which the General Assembly may take subsequent to its receipt of the Court’s opinion (a matter on which it is unnecessary for the Court to decide in the present context), it does not in itself limit the authorization to request an advisory opinion which is conferred upon the General Assembly by Article 96, paragraph 1. Whether the delimitation of the respective powers of the Security Council and the General Assembly — of which Article 12 is one aspect — should lead the Court, in the circumstances of the present case, to decline to exercise its jurisdiction to render an advisory opinion is another matter (which the Court will consider in paragraphs 29 to 48 below).

25. It is also for the Court to satisfy itself that the question on which it is requested to give its opinion is a "legal question" within the meaning of Article 96 of the Charter and Article 65 of the Statute. In the present case, the question put to the Court by the General Assembly asks whether the declaration of independence to which it refers is "in accordance with international law". A question which expressly asks the Court whether or not a particular action is compatible with international law certainly appears to be a legal question; as the Court has remarked on a previous occasion, questions "framed in terms of law and raising problems of international law . . . are by their very nature susceptible of a reply based on law" (Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 18, para. 15) and therefore appear to be questions of a legal character for the purposes of Article 96 of the Charter and Article 65 of the Statute.

26. Nevertheless, some of the participants in the present proceedings have suggested that the question posed by the General Assembly is not, in reality, a legal question. According to this submission, international law does not regulate the act of making a declaration of independence, which should be regarded as a political act; only domestic constitutional law governs the act of making such a declaration, while the Court’s jurisdiction to give an advisory opinion is confined to questions of international law. In the present case, however, the Court has not been asked to give an opinion on whether the declaration of independence is in accordance with any rule of domestic law but only whether it is in accordance with international law. The Court can respond to that question by reference to international law without the need to enquire into any system of domestic law.

27. Moreover, the Court has repeatedly stated that the fact that a question has political aspects does not suffice to deprive it of its character as a legal question (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law. The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have (Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, p. 61, and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 234, para. 13).

28. The Court therefore considers that it has jurisdiction to give an advisory opinion in response to the request made by the General Assembly.

B. Discretion

29. The fact that the Court has jurisdiction does not mean, however, that it is obliged to exercise it:

"The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that 'The Court may give an advisory opinion ...' (emphasis added), should be interpreted to
mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met.”

(Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, para. 44.)


30. The Court is, nevertheless, mindful of the fact that its answer to a request for an advisory opinion “represents its participation in the activities of the Organization, and, in principle, should not be refused” (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I), pp. 78-79, para. 29; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, para. 44). Accordingly, the consistent jurisprudence of the Court has determined that only “compelling reasons” should lead the Court to refuse its opinion in response to a request falling within its jurisdiction (Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956, p. 86; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, para. 44).

31. The Court must satisfy itself as to the propriety of the exercise of its judicial function in the present case. It has therefore given careful consideration as to whether, in the light of its previous jurisprudence, there are compelling reasons for it to refuse to respond to the request from the General Assembly.

32. One argument, advanced by a number of participants in the present proceedings, concerns the motives behind the request. Those participants drew attention to a statement made by the sole sponsor of the resolution by which the General Assembly requested the Court’s opinion to the effect that “the Court’s advisory opinion would provide politically neutral, yet judicially authoritative, guidance to many countries still deliberating how to approach unilateral declarations of independence in line with international law.

“once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution” (I.C.J. Reports 1996 (I), p. 237, para. 16).

34. It was also suggested by some of those participating in the proceedings that resolution 63/3 gave no indication of the purpose for which the General Assembly needed the Court’s opinion and that there was nothing to indicate that the opinion would have any useful legal effect. This argument cannot be accepted. The Court has consistently made clear that it is for the organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions. In its Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, the Court rejected an argument that it
should refuse to respond to the General Assembly’s request on the ground that the General Assembly had not explained to the Court the purposes for which it sought an opinion, stating that “it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.” (I.C.J. Reports 1996 (I), p. 237, para. 16.)

Similarly, in the Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court commented that “[t]he Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly” (I.C.J. Reports 2004 (I), p. 163, para. 62).

35. Nor does the Court consider that it should refuse to respond to the General Assembly’s request on the basis of suggestions, advanced by some of those participating in the proceedings, that its opinion might lead to adverse political consequences. Just as the Court cannot substitute its own assessment for that of the requesting organ in respect of whether its opinion will be useful to that organ, it cannot — in particular where there is no basis on which to make such an assessment — substitute its own view as to whether an opinion would be likely to have an adverse effect. As the Court stated in its Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, in response to a submission that a reply from the Court might adversely affect disarmament negotiations, faced with contrary positions on this issue “there are no evident criteria by which it can prefer one assessment to another” (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 237, para. 17; see also Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 37, para. 73; and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), pp. 159-160, paras. 51-54).

36. An important issue which the Court must consider is whether, in view of the respective roles of the Security Council and the General Assembly in relation to the situation in Kosovo, the Court, as the principal judicial organ of the United Nations, should decline to answer the question which has been put to it on the ground that the request for the Court’s opinion has been made by the General Assembly rather than the Security Council.

37. The situation in Kosovo had been the subject of action by the Security Council, in the exercise of its responsibility for the maintenance of international peace and security, for more than ten years prior to the present request for an advisory opinion. The Council first took action specifically relating to the situation in Kosovo on 31 March 1998, when it adopted resolution 1160 (1998). That was followed by resolutions 1199 (1998), 1203 (1998) and 1239 (1999). On 10 June 1999, the Council adopted resolution 1244 (1999), which authorized the creation of an international military presence (subsequently known as “KFOR”) and an international civil presence (the United Nations Interim Administration Mission in Kosovo, “UNMIK”) and laid down a framework for the administration of Kosovo. By resolution 1367 (2001), the Security Council decided to terminate the prohibitions on the sale or supply of arms established by paragraph 8 of resolution 1160 (1998). The Security Council has received periodic reports from the Secretary-General on the activities of UNMIK. The dossier submitted to the Court by the Secretary-General records that the Security Council met to consider the situation in Kosovo on 29 occasions between 2000 and the end of 2008. Although the declaration of independence which is the subject of the present request was discussed by the Security Council, the Council took no action in respect of it (Security Council, provisional verbatim record, 18 February 2008, 3 p.m. (S/PV.5839); Security Council, provisional verbatim record, 11 March 2008, 3 p.m. (S/PV.5850)).

38. The General Assembly has also adopted resolutions relating to the situation in Kosovo. Prior to the adoption by the Security Council of resolution 1244 (1999), the General Assembly adopted five resolutions on the situation of human rights in Kosovo (resolutions 49/204, 50/190, 51/111, 52/139 and 53/164). Following resolution 1244 (1999), the General Assembly adopted one further resolution on the situation of human rights in Kosovo (resolution 54/183 of 17 December 1999) and 15 resolutions concerning the financing of UNMIK (resolutions 53/241, 54/245A, 54/245B, 55/227A, 55/227B, 55/295, 57/126, 58/305, 59/286A, 59/286B, 60/275, 61/285, 62/262, 63/295 and 64/279). However, the broader situation in Kosovo was not part of the agenda of the General Assembly at the time of the declaration of independence and it was therefore necessary in September 2008 to create a new agenda item for the consideration of the proposal to request an opinion from the Court.

39. Against this background, it has been suggested that, given the respective powers of the Security Council and the General Assembly, if the Court’s opinion were to be sought regarding whether the declaration of independence was in accordance with international law, the request should rather have been made by the Security Council and that this fact constitutes a compelling reason for the Court not to respond to the request from the General Assembly. That conclusion is said to follow both from the nature of the Security Council’s involvement and the fact that, in order to answer the question posed, the Court will necessarily have to interpret and apply Security Council resolution 1244 (1999) in order to determine whether or not the declaration of independence is in accordance with international law.

40. While the request put to the Court concerns one aspect of a situation which the Security Council has characterized as a threat to interna-
tional peace and security and which continues to feature on the agenda of the Council in that capacity, that does not mean that the General Assembly has no legitimate interest in the question. Articles 10 and 11 of the Charter, to which the Court has already referred, confer upon the General Assembly a very broad power to discuss matters within the scope of the activities of the United Nations, including questions relating to international peace and security. That power is not limited by the responsibility for the maintenance of international peace and security which is conferred upon the Security Council by Article 24, paragraph 1. As the Court has made clear in its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, paragraph 26, “Article 24 refers to a primary, but not necessarily exclusive, competence”. The fact that the situation in Kosovo is before the Security Council and the Council has exercised its Chapter VII powers in respect of that situation does not preclude the General Assembly from discussing any aspect of that situation, including the declaration of independence. The limit which the Charter places upon the General Assembly to protect the role of the Security Council is contained in Article 12 and restricts the power of the General Assembly to make recommendations following a discussion, not its power to engage in such a discussion.

Moreover, Article 12 does not bar all action by the General Assembly in respect of threats to international peace and security which are before the Security Council. The Court considered this question in some detail in paragraphs 26 to 27 of its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, in which the Court noted that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security and observed that it is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.

The Court’s examination of this subject in its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory was made in connection with an argument relating to whether or not the Court possessed the jurisdiction to give an advisory opinion, rather than whether it should exercise its discretion not to give an opinion. In the present case, the Court has already held that Article 12 of the Charter does not deprive it of the jurisdiction conferred by Article 96, paragraph 1 (paragraphs 23 to 24 above). It considers, however, that the analysis contained in the 2004 Advisory Opinion is also pertinent to the issue of discretion in the present case. That analysis demonstrates that the fact that a matter falls within the primary responsibility of the Security Council for situations which may affect the maintenance of international peace and security and that the Council has been exercising its powers in that respect does not preclude the General Assembly from discussing that situation or, within the limits set by Article 12, making recommendations with regard thereto. In addition, as the Court pointed out in its 2004 Advisory Opinion, General Assembly resolution 377A (V) (“Uniting for Peace”) provides for the General Assembly to make recommendations for collective measures to restore international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression and the Security Council is unable to act because of lack of unanimity of the permanent members (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 150, para. 30). These considerations are of relevance to the question whether the delimitation of powers between the Security Council and the General Assembly constitutes a compelling reason for the Court to decline to respond to the General Assembly’s request for an opinion in the present case.

It is true, of course, that the facts of the present case are quite different from those of the Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. The situation in the occupied Palestinian territory had been under active consideration by the General Assembly for several decades prior to its decision to request an opinion from the Court and the General Assembly had discussed the precise subject on which the Court’s opinion was sought. In the present case, with regard to the situation in Kosovo, it was the Security Council which had been actively seized of the matter. In that context, it discussed the future status of Kosovo and the declaration of independence (see paragraph 37 above).

However, the purpose of the advisory jurisdiction is to enable organs of the United Nations and other authorized bodies to obtain opinions from the Court which will assist them in the future exercise of their functions. The Court cannot determine what steps the General Assembly may wish to take after receiving the Court’s opinion or what effect that opinion may have in relation to those steps. As the preceding paragraphs demonstrate, the General Assembly is entitled to discuss the declaration of independence and, within the limits considered in paragraph 42, above, make recommendations in respect of that or other aspects of the situation in Kosovo without trespassing on the powers of the Security Council. That being the case, the fact that, hitherto, the declaration of independence has been discussed only in the Security Council and that the Council has been the organ which has taken action with regard to the situation in Kosovo does not constitute a compelling reason for the Court to refuse to respond to the request from the General Assembly.

Moreover, while it is the scope for future discussion and action which is the determining factor in answering this objection to the Court rendering an opinion, the Court also notes that the General Assembly has taken action with regard to the situation in Kosovo in the past. As stated in paragraph 38 above, between 1995 and 1999, the General
Assembly adopted six resolutions addressing the human rights situation in Kosovo. The last of these, resolution 54/183, was adopted on 17 December 1999, some six months after the Security Council had adopted resolution 1244 (1999). While the focus of this resolution was on human rights and humanitarian issues, it also addressed (in para. 7) the General Assembly’s concern about a possible “cantonization” of Kosovo. In addition, since 1999 the General Assembly has each year approved, in accordance with Article 17, paragraph 1, of the Charter, the budget of UNMIK (see paragraph 38 above). The Court observes therefore that the General Assembly has exercised functions of its own in the situation in Kosovo.

46. Further, in the view of the Court, the fact that it will necessarily have to interpret and apply the provisions of Security Council resolution 1244 (1999) in the course of answering the question put by the General Assembly does not constitute a compelling reason not to respond to that question. While the interpretation and application of a decision of one of the principal judicial organs of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, has also frequently been required to consider the interpretation and legal effects of such decisions. It has done so both in the exercise of its advisory jurisdiction (see for example, Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 175; and Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 2796 (1970), Advisory Opinion, I.C.J. Reports 1971, pp. 51-54, paras. 107-116), and in the exercise of its contentious jurisdiction (see for example, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 15, paras. 39-41; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, pp. 126-127, paras. 42-44).

47. There is, therefore, nothing incompatible with the integrity of the judicial function in the Court undertaking such a task. The question is, rather, whether it should decline to undertake that task unless it is the organ which has taken the decision that asks the Court to do so. In its Advisory Opinion on Certain Expenses of the United Nations, however, the Court responded to the question posed by the General Assembly, even though this necessarily required it to interpret a number of Security Council resolutions (namely, resolutions 143, 145 and 146 of 1960 and 161 and 169 of 1961) (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, pp. 175-177). The Court also notes that, in its Advisory Opinion on

II. SCOPE AND MEANING OF THE QUESTION

49. The Court will now turn to the scope and meaning of the question on which the General Assembly has requested that it give its opinion. The General Assembly has formulated that question in the following terms:

“Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”

50. The Court recalls that in some previous cases it has departed from the language of the question put to it where the question was not adequately formulated (see for example, Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16) or where the Court determined, on the basis of its examination of the background to the request, that the request did not reflect the “legal questions really in issue” (Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 89, para. 35). Similarly, where the question asked was unclear or vague, the Court has clarified the question before giving its opinion (Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, p. 348, para. 46).

51. In the present case, the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court’s opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State. The Court notes that, in past requests
for advisory opinions, the General Assembly and the Security Council, when they have wanted the Court’s opinion on the legal consequences of an action, have framed the question in such a way that this aspect is expressly stated (see, for example, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 136). Accordingly, the Court does not consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly. The Court accordingly sees no reason to reformulate the scope of the question.

52. There are, however, two aspects of the question which require comment. First, the question refers to “the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo” (General Assembly resolution 63/3 of 8 October 2008, single operative paragraph; emphasis added). In addition, the third preambular paragraph of the General Assembly resolution “[r]ecall[s] that on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia.” Whether it was indeed the Provisional Institutions of Self-Government of Kosovo which promulgated the declaration of independence was contested by a number of those participating in the present proceedings. The identity of the authors of the declaration of independence, as is demonstrated below (paragraphs 102 to 109), is a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law. It would be incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly.

53. Nor does the Court consider that the General Assembly intended to restrict the Court’s freedom to determine this issue for itself. The Court notes that the agenda item under which what became resolution 63/3 was discussed did not refer to the identity of the authors of the declaration and was entitled simply “Request for an advisory opinion of the International Court of Justice on whether the declaration of independence of Kosovo is in accordance with international law” (General Assembly resolution 63/3 of 8 October 2008; emphasis added). The wording of this agenda item had been proposed by the Republic of Serbia, the sole sponsor of resolution 63/3, when it requested the inclusion of a supplementary item on the agenda of the 63rd session of the General Assembly (Letter of the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General, 22 August 2008, A/63/195). That agenda item then became the title of the draft resolution and, in turn, of resolution 63/3. The common element in the agenda item and the title of the resolution itself is whether the declaration of independence is in accordance with international law. Moreover, there was no discussion of the identity of the authors of the declaration, or of the difference in wording between the title of the resolution and the question which it posed to the Court during the debate on the draft resolution (A/63/PV.22).

54. As the Court has stated in a different context:

“It is not to be assumed that the General Assembly would . . . seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion.” (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 157.)

This consideration is applicable in the present case. In assessing whether or not the declaration of independence is in accordance with international law, the Court must be free to examine the entire record and decide for itself whether that declaration was promulgated by the Provisional Institutions of Self-Government or some other entity.

55. While many of those participating in the present proceedings made reference to the opinion of the Supreme Court of Canada in Reference by the Governor in Council concerning Certain Questions relating to the Secession of Quebec from Canada ([1998] 2 Supreme Court Reporter (SCR) 217; 161 Dominion Law Reports (DLR) (4th) 385; 115 International Law Reports (ILR) 536), the Court observes that the question in the present case is markedly different from that posed to the Supreme Court of Canada.

The relevant question in that case was:

“Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?”

56. The question put to the Supreme Court of Canada inquired whether there was a right to “effect secession”, and whether there was a rule of international law which conferred a positive entitlement on any of the organs named. By contrast, the General Assembly has asked whether the declaration of independence was “in accordance with” international law. The answer to that question turns on whether or not the applicable international law prohibited the declaration of independence. If the Court concludes that it did, then it must answer the question put by saying that the declaration of independence was not in accordance with international law. It follows that the task which the Court is called upon to perform is
to determine whether or not the declaration of independence was adopted in violation of international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act — such as a unilateral declaration of independence — not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.

III. FACTUAL BACKGROUND

57. The declaration of independence of 17 February 2008 must be considered within the factual context which led to its adoption. The Court therefore will briefly describe the relevant characteristics of the framework put in place by the Security Council to ensure the interim administration of Kosovo, namely, Security Council resolution 1244 (1999) and the regulations promulgated thereunder by the United Nations Mission in Kosovo. The Court will then proceed with a brief description of the developments relating to the so-called “final status process” in the years preceding the adoption of the declaration of independence, before turning to the events of 17 February 2008.

A. Security Council Resolution 1244 (1999) and the Relevant UNMIK Regulations

58. Resolution 1244 (1999) was adopted by the Security Council, acting under Chapter VII of the United Nations Charter, on 10 June 1999. In this resolution, the Security Council, “determined to resolve the grave humanitarian situation” which it had identified (see the fourth preambular paragraph) and to put an end to the armed conflict in Kosovo, authorized the United Nations Secretary-General to establish an international civil presence in Kosovo in order to provide “an interim administration for Kosovo . . . which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions” (para. 10).

Paragraph 3 demanded:

“in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable”.

Pursuant to paragraph 5 of the resolution, the Security Council decided on the deployment in Kosovo, under the auspices of the United Nations, of international civil and security presences and welcomed the agreement of the Federal Republic of Yugoslavia to such presences. The powers and responsibilities of the security presence were further clarified in paragraphs 7 and 9. Paragraph 15 of resolution 1244 (1999) demanded that the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization. Immediately preceding the adoption of Security Council resolution 1244 (1999), various implementing steps had already been taken through a series of measures, including, inter alia, those stipulated in the Military Technical Agreement of 9 June 1999, whose Article 1.2 provided for the deployment of KFOR, permitting these to “operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission”.

The Military Technical Agreement also provided for the withdrawal of FRY ground and air forces, save for “an agreed number of Yugoslav and Serb military and police personnel” as foreseen in paragraph 4 of resolution 1244 (1999).

59. Paragraph 11 of the resolution described the principal responsibilities of the international civil presence in Kosovo as follows:

“(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);

(b) Performing basic civilian administrative functions where and as long as required;

(c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;

(d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo’s local provisional institutions and other peace-building activities;

(e) Facilitating a political process designed to determine Kosovo’s future status, taking into account the Rambouillet accords (S/1999/648);
In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement . . . “.

On 12 June 1999, the Secretary-General presented to the Security Council “a preliminary operational concept for the overall organization of the civil presence, which will be known as the United Nations Interim Administration Mission in Kosovo (UNMIK),” pursuant to paragraph 10 of resolution 1244 (1999), according to which UNMIK would be headed by a Special Representative of the Secretary-General, to be appointed by the Secretary-General in consultation with the Security Council (Report of the Secretary-General of 12 June 1999 (United Nations doc. S/1999/672, 12 June 1999)). The Report of the Secretary-General provided that there would be four Deputy Special Representatives working within UNMIK, each responsible for one of four major components (the so-called “four pillars”) of the UNMIK régime (para. 5): (a) interim civil administration (with a lead role assigned to the United Nations); (b) humanitarian affairs (with a lead role assigned to the Office of the United Nations High Commissioner for Refugees (UNHCR)); (c) institution building (with a lead role assigned to the Organization for Security and Co-operation in Europe (OSCE)); and (d) reconstruction (with a lead role assigned to the European Union).

On 25 July 1999, the first Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1, which provided in its Section 1.1 that “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.” Under Section 3 of UNMIK regulation 1999/1, the laws applicable in the territory of Kosovo prior to 24 March 1999 were to continue to apply only to the extent that these did not conflict with internationally recognized human rights standards and non-discrimination or the fulfillment of the mandate given to UNMIK under resolution 1244 (1999). Section 3 was repealed by UNMIK regulation 1999/25 promulgated by the Special Representative of the Secretary-General on 12 December 1999, with retroactive effect to 10 June 1999. Section 1.1 of UNMIK regulation 1999/24 of 12 December 1999 provides that “[t]he law applicable in Kosovo shall be: (a) the regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and (b) the law in force in Kosovo on 22 March 1989”. Section 4, entitled “Transitional Provision”, reads as follows:

“All legal acts, including judicial decisions, and the legal effects of events which occurred, during the period from 10 June 1999 up to the date of the present regulation, pursuant to the laws in force during that period under section 3 of UNMIK Regulation No. 1999/1 of 25 July 1999, shall remain valid, insofar as they do not conflict with the standards referred to in section 1 of the present regulation or any UNMIK regulation in force at the time of such acts.”

62. The powers and responsibilities thus laid out in Security Council resolution 1244 (1999) were set out in more detail in UNMIK regulation 2001/9 of 15 May 2001 on a Constitutional Framework for Provisional Self-Government (hereinafter “Constitutional Framework”), which defined the responsibilities relating to the administration of Kosovo between the Special Representative of the Secretary-General and the Provisional Institutions of Self-Government of Kosovo. With regard to the role entrusted to the Special Representative of the Secretary-General under Chapter 12 of the Constitutional Framework,

“[t]he exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the SRSG to ensure full implementation of UNSCR 1244 (1999), including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework”.

Moreover, pursuant to Chapter 2 (a), “[t]he Provisional Institutions of Self-Government and their officials shall . . . exercise their authorities consistent with the provisions of UNSCR 1244 (1999) and the terms set forth in this Constitutional Framework”. Similarly, according to the ninth preambular paragraph of the Constitutional Framework,

“the exercise of the responsibilities of the Provisional Institutions of Self-Government in Kosovo shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of UNSCR 1244 (1999)”.

In his periodical report to the Security Council of 7 June 2001, the Secretary-General stated that the Constitutional Framework contained “broad authority for my Special Representative to intervene and correct any actions of the provisional institutions of self-government that are inconsistent with Security Council resolution 1244 (1999), including the power to veto Assembly legislation, where necessary” (Report of the Secretary-General on the United Nations Interim
63. Having described the framework put in place by the Security Council to ensure the interim administration of the territory of Kosovo, the Court now turns to the relevant events in the final status process which preceded the declaration of independence of 17 February 2008.

B. The Relevant Events in the Final Status Process Prior to 17 February 2008

64. In June 2005, the Secretary-General appointed Kai Eide, Permanent Representative of Norway to the North Atlantic Treaty Organization, as his Special Envoy to carry out a comprehensive review of Kosovo. In the wake of the Comprehensive Review report he submitted to the Secretary-General (attached to United Nations doc. S/2005/635 (7 October 2005)), there was consensus within the Security Council that the final status process should be commenced:

“The Security Council agrees with Ambassador Eide’s overall assessment that, notwithstanding the challenges still facing Kosovo and the wider region, the time has come to move to the next phase of the political process. The Council therefore supports the Secretary-General’s intention to start a political process to determine Kosovo’s Future Status, as foreseen in Security Council resolution 1244 (1999).” (Statement by the President of the Security Council of 24 October 2005, United Nations doc. S/PRST/2005/51.)

65. In November 2005, the Secretary-General appointed Mr. Martti Ahtisaari, former President of Finland, as his Special Envoy for the future status process for Kosovo. This appointment was endorsed by the Security Council (see Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, United Nations doc. S/2005/709). Mr. Ahtisaari’s Letter of Appointment included, as an annex to it, a document entitled “Terms of Reference” which stated that the Special Envoy “is expected to revert to the Secretary-General at all stages of the process”. Furthermore, “[t]he pace and duration of the future status process will be determined by the Special Envoy on the basis of consultations with the Secretary-General, taking into account the co-operation of the parties and the situation on the ground” (Terms of Reference, dated 10 November 2005, as an appendix to the Letter of the Secretary-General to Mr. Martti Ahtisaari of 14 November 2005, United Nations dossier No. 198).

66. The Security Council did not comment on these Terms of Reference. Instead, the members of the Council attached to their approval of Mr. Ahtisaari’s appointment the Guiding Principles of the Contact Group (an informal grouping of States formed in 1994 to address the situation in the Balkans and composed of France, Germany, Italy, the Russian Federation, the United Kingdom and the United States). Members of the Security Council further indicated that the Guiding Principles were meant for the Secretary-General’s (and therefore also for the Special Envoy’s) “reference”. These Principles stated, inter alia, that

“[t]he Contact Group . . . welcomes the intention of the Secretary-General to appoint a Special Envoy to lead this process . . . A negotiated solution should be an international priority. Once the process has started, it cannot be blocked and must be brought to a conclusion. The Contact Group calls on the parties to engage in good faith and constructively, to refrain from unilateral steps and to reject any form of violence.

The Security Council will remain actively seized of the matter. The final decision on the status of Kosovo should be endorsed by the Security Council.” (Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo, as Annexed to the Letter Dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, United Nations doc. S/2005/709.)

67. Between 20 February and 8 September 2006, several rounds of negotiations were held, at which delegations of Serbia and Kosovo addressed, in particular, the decentralization of Kosovo’s governmental and administrative functions, cultural heritage and religious sites, economic issues, and community rights (Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, United Nations docs. S/2006/361, S/2006/707 and S/2006/906). According to the Reports of the Secretary-General, “the parties remain(ed) far apart on most issues” (Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/707; S/2006/906).

68. On 2 February 2007, the Special Envoy of the Secretary-General submitted a draft comprehensive proposal for the Kosovo status settlement to the parties and invited them to engage in a consultative process (recalled in the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, United Nations doc. S/2007/134, 9 March 2007). On 10 March 2007, a final round of negotiations was held in Vienna to discuss the settlement proposal. As reported by the Secretary-General, “the parties were unable to make any additional progress” at those negotiations (Report of the Secretary-General on the United Nations Administration Mission in Kosovo, United Nations doc. S/2007/707).
69. On 26 March 2007, the Secretary-General submitted the report of his Special Envoy to the Security Council. The Special Envoy stated that “after more than one year of direct talks, bilateral negotiations and expert consultations, it [had] become clear to [him] that the parties [were] not able to reach an agreement on Kosovo’s future status” (Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo’s future status, United Nations doc. S/2007/168, 26 March 2007). After emphasizing that his “mandate explicitly provides that [he] determine the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the co-operation of the parties and the situation on the ground” (ibid., para. 3), the Special Envoy concluded:

“It is my firm view that the negotiations’ potential to produce any mutually agreeable outcome on Kosovo’s status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse.

The time has come to resolve Kosovo’s status. Upon careful consideration of Kosovo’s recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community.” (Ibid., paras. 3 and 5.)

70. The Special Envoy’s conclusions were accompanied by his finalized Comprehensive Proposal for the Kosovo Status Settlement (United Nations doc. S/2007/168/Add. 1, 26 March 2007), which, in his words, set forth “international supervisory structures, [and] provided the foundations for a future independent Kosovo” (United Nations doc. S/2007/168, para. 5). The Comprehensive Proposal called for the immediate convening of a Constitutional Commission to draft a Constitution for Kosovo (ibid., Add. 1, 26 March 2007, Art. 10.1), established guidelines concerning the membership of that Commission (ibid., Art. 10.2), set numerous requirements concerning principles and provisions to be contained in that Constitution (ibid., Art. 1.3 and Ann. I), and required that the Assembly of Kosovo approve the Constitution by a two-thirds vote within 120 days (ibid., Art. 10.4). Moreover, it called for the expiry of the UNMIK mandate after a 120-day transition period, after which “all legislative and executive authority vested in UNMIK shall be transferred en bloc to the governing authorities of Kosovo, unless otherwise provided for in this Settlement” (ibid., Art. 15.1). It mandated the holding of general and municipal elections no later than nine months from the entry into force of the Constitution (UN doc. S/2007/168/Add. 1, 26 March 2007, Art. 11.1). The Court further notes that the Comprehensive Proposal for the Kosovo Status Settlement provided for the appointment of an International Civilian Representative (ICR), who would have the final authority in Kosovo regarding interpretation of the Settlement (ibid., Art. 12). The Comprehensive Proposal also specified that the mandate of the ICR would be reviewed “no later than two years after the entry into force of the Settlement, with a view to gradually reducing the scope of the powers of the ICR and the frequency of intervention” (ibid., Ann. IX, Art. 5.1) and that “[t]he mandate of the ICR shall be terminated when the International Steering Group [a body composed of France, Germany, Italy, the Russian Federation, the United Kingdom, the United States, the European Union, the European Commission and NATO] determine[d] that Kosovo ha[d] implemented the terms of [the] Settlement” (ibid., Art. 5.2).

71. The Secretary-General “fully support[ed] both the recommendation made by [his] Special Envoy in his report on Kosovo’s future status and the Comprehensive Proposal for the Kosovo Status Settlement” (Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, United Nations doc. S/2007/168). The Security Council, for its part, decided to undertake a mission to Kosovo (see Report of the Security Council mission on the Kosovo issue, United Nations doc. S/2007/256, 4 May 2007), but was not able to reach a decision regarding the final status of Kosovo. A draft resolution was circulated among the Council’s members (see draft resolution sponsored by Belgium, France, Germany, Italy, the United Kingdom and the United States, United Nations doc. S/2007/437 Prov., 17 July 2007) but was withdrawn after some weeks when it had become clear that it would not be adopted by the Security Council.

72. Between 9 August and 3 December 2007, further negotiations on the future status of Kosovo were held under the auspices of a Troika comprising representatives of the European Union, the Russian Federation and the United States. On 4 December 2007, the Troika submitted its report to the Secretary-General, which came to the conclusion that, despite intensive negotiations, “the parties were unable to reach an agreement on Kosovo’s status” and “[n]either side was willing to yield on the basic question of sovereignty” (Report of the European Union/United States/Russian Federation Troika on Kosovo, 4 December 2007, annexed to S/2007/7723).

73. On 17 November 2007, elections were held for the Assembly of Kosovo, 30 municipal assemblies and their respective mayors (Report of

C. The Events of 17 February 2008 and Thereafter

74. It is against this background that the declaration of independence was adopted on 17 February 2008. The Court observes that the original language of the declaration is Albanian. For the purposes of the present Opinion, when quoting from the text of the declaration, the Court has used the translations into English and French included in the dossier submitted on behalf of the Secretary-General.

In its relevant passages, the declaration of independence states that its authors were “[c]onvened in an extraordinary meeting on 17 February 2008, in Pristina, the capital of Kosovo” (first preambular paragraph); it “[r]ecall[ed] the years of internationally-sponsored negotiations between Belgrade and Pristina over the question of [Kosovo’s] future political status” and “[r]egrett[ed] that no mutually-acceptable status outcome was possible” (tenth and eleventh preambular paragraphs). It further declared that the authors were “[d]etermin[ed] to see [Kosovo’s] status resolved in order to give [its] people clarity about their future, move beyond the conflicts of the past and realise the full democratic potential of [its] society” (thirteenth preambular paragraph).

75. In its operative part, the declaration of independence of 17 February 2008 states:

“1. We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.

2. We declare Kosovo to be a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes.

5. We welcome the international community’s continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission.

9. We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) . . .

12. We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan . . . We declare publicly that all States are entitled to rely upon this declaration . . .”

76. The declaration of independence was adopted at a meeting held on 17 February 2008 by 109 out of the 120 members of the Assembly of Kosovo, including the Prime Minister of Kosovo and by the President of Kosovo (who was not a member of the Assembly). The ten members of the Assembly representing the Kosovo Serb community and one member representing the Kosovo Gorani community decided not to attend this meeting. The declaration was written down on two sheets of papyrus and read out, voted upon and then signed by all representatives present. It was not transmitted to the Special Representative of the Secretary-General and was not published in the Official Gazette of the Provisional Institutions of Self-Government of Kosovo.

77. After the declaration of independence was issued, the Republic of Serbia informed the Secretary-General that it had adopted a decision stating that that declaration represented a forceful and unilateral secession of a part of the territory of Serbia, and did not produce legal effects either in Serbia or in the international legal order (United Nations doc. S/PV.5839 : Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, United Nations doc. S/2008/211). Further to a request from Serbia, an emergency public meeting of the Security Council took place on 18 February 2008, in which Mr. Boris Tadić, the President of the Republic of Serbia, participated and denounced the declaration of independence as an unlawful act which had been declared null and void by the National Assembly of Serbia (United Nations doc. SPV.5839).
IV. THE QUESTION WHETHER THE DECLARATION OF INDEPENDENCE IS IN ACCORDANCE WITH INTERNATIONAL LAW

78. The Court now turns to the substance of the request submitted by the General Assembly. The Court recalls that it has been asked by the General Assembly to assess the accordance of the declaration of independence of 17 February 2008 with “international law” (resolution 63/3 of the General Assembly, 8 October 2008). The Court will first turn its attention to certain questions concerning the lawfulness of declarations of independence under general international law, against the background of which the question posed falls to be considered, and Security Council resolution 1244 (1999) is to be understood and applied. Once this general framework has been determined, the Court will turn to the legal relevance of Security Council resolution 1244 (1999), and determine whether the resolution creates special rules, and ensuing obligations, under international law applicable to the issues raised by the present request and having a bearing on the lawfulness of the declaration of independence of 17 February 2008.

A. General International Law

79. During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation (cf. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, pp. 31-32, paras. 52-53; East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 102, para. 29; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), pp. 171-172, para. 88). A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.

80. Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity. The Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4, which provides that:

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

In General Assembly resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations”, which reflects customary international law (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 101-103, paras. 191-193), the General Assembly reiterated “[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State”. This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that “[t]he participating States will respect the territorial integrity of each of the participating States” (Art. IV). Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States.

81. Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, inter alia, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska.

The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens). In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above
appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.

82. A number of participants in the present proceedings have claimed, although in almost every instance only as a secondary argument, that the population of Kosovo has the right to create an independent State either as a manifestation of a right to self-determination or pursuant to what they described as a right of “remedial secession” in the face of the situation in Kosovo.

The Court has already noted (see paragraph 79 above) that one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination. Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of “remedial secession” and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of “remedial secession” were actually present in Kosovo.

The Court considers that it is not necessary to resolve these questions in the present case. The General Assembly has requested the Court’s opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of “remedial secession”, however, concern the right to separate from a State. As the Court has already noted (see paragraphs 49 to 56 above), and as almost all participants agreed, that issue is beyond the scope of the question posed by the General Assembly. To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the lex specialis created by Security Council resolution 1244 (1999).

84. For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law. Having arrived at that conclusion, the Court now turns to the legal relevance of Security Council resolution 1244, adopted on 10 June 1999.

B. Security Council Resolution 1244 (1999) and the UNMIK Constitutional Framework Created Thereunder

85. Within the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law. The Court has had the occasion to interpret and apply such Security Council resolutions on a number of occasions and has consistently treated them as part of the framework of obligations under international law (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 15, paras. 39-41; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, pp. 126-127, paras. 42-44). Resolution 1244 (1999) was expressly adopted by the Security Council on the basis of Chapter VII of the United Nations Charter, and therefore clearly imposes international legal obligations. The Court notes that none of the participants has questioned the fact that resolution 1244 (1999), which specifically deals with the situation in Kosovo, is part of the law relevant in the present situation.

86. The Court notes that there are a number of other Security Council resolutions adopted on the question of Kosovo, notably Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1239 (1999); however, the Court sees no need to pronounce specifically on resolutions of the Security Council adopted prior to resolution 1244 (1999), which are, in any case, recalled in the second preambular paragraph of the latter.

87. A certain number of participants have dealt with the question whether regulations adopted on behalf of UNMIK by the Special Representative of the Secretary-General, notably the Constitutional Framework (see paragraph 62 above), also form part of the applicable international law within the meaning of the General Assembly’s request.

88. In particular, it has been argued before the Court that the Constitutional Framework is an act of an internal law rather than an interna-
général. Etant parvenue à cette conclusion, la Cour en vient maintenant à l'examen de la pertinence juridique de la résolution 1244 du Conseil de sécurité, adoptée le 10 juin 1999.

B. La résolution 1244 (1999) du Conseil de sécurité et le cadre constitutionnel de la MINUK établi en vertu de cette résolution


87. Un certain nombre de participants se sont intéressés à la question de savoir si les règlements adoptés au nom de la MINUK par le représentant spécial du Secrétaire général, notamment le cadre constitutionnel (voir paragraphe 62 ci-dessus), faisaient également partie du droit international applicable au sens de la demande de l’Assemblée générale.

88. Il a notamment été soutenu devant la Cour que le cadre constitutionnel était un acte de droit interne et non de droit international. Selon
cette argumentation, le cadre constitutionnel ne ferait pas partie du droit international applicable en la présente espèce et la question de la compatibilité de la déclaration d'indépendance avec celui-ci n'entrait dès lors pas dans le cadre de la demande de l'Assemblée générale.


89. La Cour observe que ce cadre constitutionnel constitue en même temps l'un des rouages de l'ordre juridique spécifique, créé en vertu de la résolution 1244 (1999), applicable seulement au Kosovo et destiné à réglementer, pendant la période intérimaire instituée par cette résolution, des questions qui relèvent habituellement du droit interne plutôt que du droit international. Le règlement n° 2001/9 commence par indiquer que le cadre constitutionnel a été promulgué « [a]fin de mettre en place un gouvernement autonome efficace, en attendant un règlement définitif, et de créer des institutions provisoires d'administration autonome dans les domaines législatif, exécutif et judiciaire grâce à la participation de la population du Kosovo à des élections libres et régulières ».

Le cadre constitutionnel s'est donc intégré dans l'ensemble de normes adopté aux fins de l'administration du Kosovo pendant la période intérimaire. Les institutions créées en vertu du cadre constitutionnel étaient habilitées par celui-ci à prendre des décisions produisant leurs effets au sein de cet ensemble de normes. En particulier, l'Assemblée du Kosovo était habilitée à adopter des textes ayant force de loi dans cet ordre juridique, sous réserve de l'autorité prépondérante du représentant spécial du Secrétaire général.

90. La Cour relève que, en vertu tant de la résolution 1244 (1999) du Conseil de sécurité que du cadre constitutionnel, le représentant spécial du Secrétaire général jouit de pouvoirs de supervision considérables à l'égard des institutions provisoires d'administration autonome établies sous l'autorité de la Mission d'administration intérimaire des Nations Unies au Kosovo. Ainsi qu'il a été rappelé ci-dessus (voir paragraphe 58), la résolution 1244 (1999) prévoit d'établir au Kosovo « une administration intérimaire … qui assurera une administration transitoire de même que la mise en place et la supervision des institutions d'auto-administration démocratiques provisoires » (par. 10). Celle-ci indique en outre que «les principales responsabilités de la présence internationale civile seront les suivantes … [c]rganiser et superviser la mise en place d'institutions cratic and autonomous self-government pending a political settlement, including the holding of elections” (paragraphe 11 (e)). Similarly, as described above (see paragraph 62), under the Constitutional Framework, the Provisional Institutions of Self-Government were to function in conjunction with and subject to the direction of the Special Representative of the Secretary-General in the implementation of Security Council resolution 1244 (1999).


92. In addition, the Special Representative of the Secretary-General continues to exercise his functions in Kosovo. Moreover, the Secretary-General has continued to submit periodic reports to the Security Council, as required by paragraph 20 of Security Council resolution 1244 (1999) (see the most recent quarterly Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2010/169, 6 April 2010, as well as the preceding Reports S/2008/692 of 24 Novem-
provisores pour une administration autonome et démocratique en attendant un règlement politique, notamment la tenue d’élections» (par. 11, al. c)). De même, ainsi que cela a été exposé ci-dessus (voir paragraphe 62), en vertu du cadre constitutionnel, les institutions provisoires d’administration autonome devaient exercer leurs fonctions conjointement avec le représentant spécial du Secrétaire général et sous la direction de celui-ci, aux fins de mettre en œuvre la résolution 1244 (1999) du Conseil de sécurité.


93. From the foregoing, the Court concludes that Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for the advisory opinion.

1. Interpretation of Security Council resolution 1244 (1999)

94. Before continuing further, the Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 54, para. 116), irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.

* *

95. The Court first notes that resolution 1244 (1999) must be read in conjunction with the general principles set out in annexes 1 and 2 thereto, since in the resolution itself, the Security Council: “1. Decide[d] that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2.” Those general principles sought to define the Kosovo crisis first by ensuring an end to the violence and repression in Kosovo and by the establishment of an interim administration. A
Déclaration unilatérale d'indépendance (avis consultatif) 442


93. La Cour conclut de ce qui précède que la résolution 1244 (1999) du Conseil de sécurité et le cadre constitutionnel font partie du droit international qu’il convient de considérer pour répondre à la question posée par l’Assemblée générale dans sa demande d’avis consultatif.

1. Interprétation de la résolution 1244 (1999) du Conseil de sécurité


95. La Cour fait tout d’abord observer que la résolution 1244 (1999) doit être lue conjointement avec les principes généraux énoncés dans ses annexes 1 et 2, puisque, dans le corps de la résolution, le Conseil de sécurité a «... décidé que la solution politique de la crise au Kosovo reposera...[t] sur les principes généraux énoncés à l’annexe 1 et les principes et conditions plus détaillés figurant à l’annexe 2 ». Ces principes généraux avaient pour objet de régler la crise du Kosovo, tout d’abord en faisant en sorte que cessent la violence et la répression, puis en mettant en place

443 Unilateral declaration of independence (advisory opinion)

longer-term solution was also envisaged, in that resolution 1244 (1999) was to initiate

“[a] political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA” (Security Council resolution 1244 (1999) of 10 June 1999, Ann. 1, sixth principle; ibid., Ann. 2, para. 8).

Further, it bears recalling that the tenth preambular paragraph of resolution 1244 (1999) also recalled the sovereignty and the territorial integrity of the Federal Republic of Yugoslavia.

96. Having earlier outlined the principal characteristics of Security Council resolution 1244 (1999) (see paragraphs 58 to 59), the Court next observes that three distinct features of that resolution are relevant for discerning its object and purpose.

97. First, resolution 1244 (1999) establishes an international civil and security presence in Kosovo with full civil and political authority and sole responsibility for the governance of Kosovo. As described above (see paragraph 60), on 12 June 1999, the Secretary-General presented to the Security Council his preliminary operational concept for the overall organization of the civil presence under UNMIK. On 25 July 1999, the Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1, deemed to have entered into force as of 10 June 1999, the date of adoption of Security Council resolution 1244 (1999). Under this regulation, “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary”, was vested in UNMIK and exercised by the Special Representative. Viewed together, resolution 1244 (1999) and UNMIK regulation 1999/1 therefore had the effect of superseding the legal order in force at that time in the territory of Kosovo and setting up an international territorial administration. For this reason, the establishment of civil and security presences in Kosovo deployed on the basis of resolution 1244 (1999) must be understood as an exceptional measure relating to civil, political and security aspects and aimed at addressing the crisis existing in that territory in 1999.

98. Secondly, the solution embodied in resolution 1244 (1999), namely, the implementation of an interim international territorial administration, was designed for humanitarian purposes; to provide a means for the stabilization of Kosovo and for the re-establishment of a basic public order in an area beset by crisis. This becomes apparent in the text of resolution 1244 (1999) itself which, in its second preambular paragraph, recalls Security Council resolution 1239, adopted on 14 May 1999, in which the Security Council had expressed “grave concern at the humanitarian crisis...

Il convient en outre de rappeler que le dixième alinéa du préambule de la résolution 1244 (1999) rappelait également la souveraineté et l’intégrité territoriale de la République fédérale de Yougoslavie.

96. Ayant, exposé plus haut les principales caractéristiques de la résolution 1244 (1999) du Conseil de sécurité (voir paragraphes 58 et 59), la Cour relève que trois d’entre elles sont pertinentes aux fins de déterminer l’objet et le but de cette résolution.


98. Deuxièmement, la solution énoncée dans la résolution 1244 (1999), à savoir la mise en place d’une administration territoriale internationale et intérimaire, visait des objectifs humanitaires. Elle devait être un moyen de stabiliser le Kosovo et de rétablir les bases de l’ordre public dans une zone en crise. Cela ressort de la résolution 1244 (1999) elle-même, qui, au deuxième alinéa de son préambule, rappelle la résolution 1239 du Conseil de sécurité, adoptée le 14 mai 1999, dans laquelle celui-ci s’était déclaré « gravement préoccupé par la catastrophe humanitaire qui s’était [sai] au
Kosovo... et aux alentours ». Les priorités énoncées au paragraphe 11 de la résolution 1244 (1999) ont été définies de façon plus détaillée dans les « quatre piliers » relatifs à la gestion des institutions d’administration autonome locales du Kosovo sous les auspices de la présence internationale intérimaire.

99. Troisièmement, la résolution 1244 (1999) établit clairement un régime intérimaire ; elle ne saurait être considérée comme instaurant un cadre institutionnel permanent sur le territoire du Kosovo. Elle ne visait pas la solution définitive de la question kosovare, mais à s’appliquer à la phase transitoire.

100. La Cour conclut donc que l’objet de la résolution 1244 (1999) était la mise en place d’une procédure de désarmement, de démobilisation et de réinsertion des forces de police kosovares, notamment pour préparer le territoire du Kosovo à la phase transitoire.

2. Question de la conformité de la déclaration d’indépendance à la résolution 1244 (1999) du Conseil de sécurité et aux mesures adoptées en vertu de celle-ci

101. La Cour examinera à présent la question de savoir si la déclaration d’indépendance adoptée le 17 février 2008 par l’Assemblée du Kosovo s’est effectivement produite conformément à la résolution 1244 (1999) du Conseil de sécurité.

a) L’identité des auteurs de la déclaration d’indépendance


b) L’équité de la déclaration d’indépendance

103. La déclaration d’indépendance reflète les aspirations de l’Assemblée du Kosovo et les efforts déployés pour résoudre la question kosovare. Elle est issue de la conclusion de l’Assemblée du Kosovo que les efforts de médiation et de dialogue ont échoué et que la solution par la paix et la conciliation est impossible. Elle a été adoptée en conformité avec les dispositions de la résolution 1244 (1999) du Conseil de sécurité.


ment au chapitre 9 du cadre constitutionnel, ou si ceux qui ont adopté cette déclaration agissaient en une autre qualité.

103. La Cour note que des vues différentes ont été exprimées à ce sujet. D’une part, il a été avancé dans le cadre de la procédure devant la Cour que la réunion au cours de laquelle la déclaration avait été adoptée était une séance de l’Assemblée du Kosovo, siégeant en tant qu’institution provisoire d’administration autonome dans les limites du cadre constitutionnel. Pour d’autres participants, en revanche, tant le libellé du document que les circonstances de son adoption indiquent clairement que la déclaration du 17 février 2008 n’était pas l’œuvre des institutions provisoires d’administration autonome et qu’elle n’a pas pris effet dans le cadre juridique créé aux fins de l’administration du Kosovo pendant la période intérimaire.

104. La Cour relève que, lorsqu’ils ont ouvert la réunion du 17 février 2008 à laquelle la déclaration d’indépendance a été adoptée, le président de l’Assemblée et le premier ministre du Kosovo ont fait référence à l’Assemblée du Kosovo et au cadre constitutionnel. La Cour estime cependant que la déclaration d’indépendance doit être envisagée dans son contexte plus général, compte tenu des événements qui ont précédé son adoption, en particulier ceux liés à ce qu’il est convenu d’appeler le « processus de détermination du statut final » (voir paragraphes 64 à 73). La résolution 1244 (1999) du Conseil de sécurité visait surtout à mettre en place un cadre provisoire pour l’administration autonome du Kosovo (voir paragraphe 58 ci-dessus). Si, lors de l’adoption de la résolution, la conviction prévalait que le statut final du Kosovo découlerait du cadre institutionnel établi par celle-ci et serait élaboré dans ce cadre, les contours précis et, a fortiori, l’issue du processus de détermination du statut final furent laissés en suspens dans la résolution 1244 (1999) du Conseil de sécurité. Ainsi, le paragraphe 11 de la résolution, tout particulièrement dans ses alinéas d), e) et f), ne traite-t-il de questions liées au statut final que dans la mesure où il inscrit au nombre des responsabilités de la MINUK celles de « faciliter un processus politique visant à déterminer le statut futur du Kosovo, en tenant compte des accords de Rambouillet et, à un stade final, [de] superviser le transfert des pouvoirs des institutions provisionnaires du Kosovo aux institutions qui auront été établies dans le cadre d’un règlement politique ».

105. Il ressort de la déclaration d’indépendance que ses auteurs avaient pris conscience de l’échec des négociations relatives au statut final et du tournant décisif auquel se trouvait le Kosovo. Dans son préambule, la déclaration fait référence aux « années de négociations sous l’égide de la communauté internationale entre Belgrade et Pristina sur la question [du] futur statut politique [du Kosovo] » et s’inscrit expressément dans le contexte de l’échec des négociations sur le statut final puisque, y est-il indiqué, « aucun accord n’a pu être trouvé concernant un statut acceptable pour les deux parties » (dixième et onzième alinéas du préambule). Partant de là, les auteurs de la déclaration d’indépendance soulignent qu’ils sont résolus à « trouver un règlement » à la question du statut du (thirteenth preambular paragraph). This language indicates that the authors of the declaration did not seek to act within the standard framework of interim self-administration of Kosovo, but aimed at establishing Kosovo “as an independent and sovereign State” (para. 1). The declaration of independence, therefore, was not intended by those who adopted it to take effect within the legal order created for the interim phase, nor was it capable of doing so. On the contrary, the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order.

106. This conclusion is reinforced by the fact that the authors of the declaration undertook to fulfill the international obligations of Kosovo, notably those created for Kosovo by UNMIK (para. 9), and expressly and solemnly declared Kosovo to be bound vis-à-vis third States by the commitments made in the declaration (para. 12). By contrast, under the régime of the Constitutional Framework, all matters relating to the management of the external relations of Kosovo were the exclusive prerogative of the Special Representative of the Secretary-General:

“... (m) concluding agreements with states and international organizations in all matters within the scope of UNSCR 1244 (1999);

(n) overseeing the fulfilment of commitments in international agreements entered into on behalf of UNMIK;

(o) external relations, including with States and international organizations ...” (Chap. 8.1 of the Constitutional Framework, “Powers and Responsibilities Reserved to the SRSG”),

with the Special Representative of the Secretary-General only consulting and co-operating with the Provisional Institutions of Self-Government in these matters.

107. Certain features of the text of the declaration and the circumstances of its adoption also point to the same conclusion. Nowhere in the original Albanian text of the declaration (which is the sole authentic text) is any reference made to the declaration being the work of the Assembly of Kosovo. The words “Assembly of Kosovo” appear at the head of the declaration only in the English and French translations contained in the dossier submitted on behalf of the Secretary-General. The language used in the declaration differs from that employed in acts of the Assembly of Kosovo in that the first paragraph commences with the phrase “We, the democratically-elected leaders of our people ...”, whereas acts of the Assembly of Kosovo employ the third person singular.
Kosovo et à donner au peuple kosovar « une vision claire de son avenir » (treizième alinéa du préambule). Les termes utilisés indiquent que les auteurs de la déclaration n’entendaient pas agir dans le cadre normal du régime intermédiaire d’administration autonome du Kosovo mais voulaient faire de ce dernier un « État souverain et indépendant » (ibid., par. 1). La déclaration d’indépendance n’était donc pas destinée, dans l’esprit de ceux qui l’ont adoptée, à prendre effet au sein de l’ordre juridique instauré aux fins de la phase intermédiaire — chose qui, d’ailleurs, aurait été impossible. Au contraire, la Cour considère que les auteurs de cette déclaration n’ont pas agi, et n’ont pas entendu agir, en qualité d’institution née de cet ordre juridique et habilitée à exercer ses fonctions dans ce cadre, mais qu’ils ont décidé d’adopter une mesure dont l’importance et les effets iraient au-delà.

106. Cette conclusion est renforcée par le fait que les auteurs de la déclaration se sont engagés à assumer les obligations internationales du Kosovo, notamment celles auxquelles la MINUK avait souscrit en son nom (ibid., par. 9), et qu’ils ont expressément et solennellement affirmé que le Kosovo serait lié, envers les États tiers, par les engagements pris dans la déclaration (ibid., par. 12). Or, selon le régime établi par le cadre constitutionnel, toutes les questions touchant à la direction des relations extérieures du Kosovo relevaient exclusivement du représentant spécial du Secrétariat général :

« m) conclusion d’accords avec les États et les organisations internationales dans tous les domaines relevant de la résolution 1244 (1999) du Conseil de sécurité;

n) contrôle du respect des engagements pris dans le cadre d’accords internationaux conclus au nom de la MINUK;

o) relations extérieures, notamment avec les États et les organisations internationales ... » (chapitre 8.1 du cadre constitutionnel, intitulé « Pouvoirs et attributions réservés au représentant spécial du Secrétariat général),

le représentant spécial du Secrétariat général se bornant à tenir des consultations et à coopérer avec les institutions provisoires d’administration autonome du Kosovo dans ces domaines.

107. Certaines particularités du texte de la déclaration et les circonstances dans lesquelles celle-ci a été adoptée mièvent également en faveur de cette conclusion. Dans le texte original albain (qui constitue le seul texte faisant foi), il n’est indiqué nulle part que la déclaration était faite en état d’émancipé de l’Assemblée du Kosovo. L’expression « Assemblée du Kosovo » n’apparaît en tête de la déclaration que dans les traductions française et anglaise contenus dans le dossier déposé au nom du Secrétariat général. Les termes employés dans la déclaration, dont le premier paragraphe commence par « Nous, dirigeants démocratiquement élus de notre peuple », différent de ceux qui sont utilisés dans les actes adoptés par l’Assemblée du Kosovo, où la troisième personne du singulier est d’usage.

108. Lors de la déclaration de l’indépendance, le représentant spécial du Secrétariat général a été en mesure d’estimer que la déclaration était sans effet. Le cadre constitutionnel a été signé le 17 février 2008. Le 28 mars 2008, l’Assemblée du Kosovo a voté la déclaration d’indépendance. Le représentant spécial a noté que la déclaration n’était pas conforme à la Constitution et a exprimé son souhait que les États membres de l’ONU n’aient pas reconnu l’indépendance du Kosovo. En réponse à la déclaration, le Secrétariat général a émis une déclaration nota, dans laquelle il a souligné que la déclaration n’était pas conforme à la Constitution et que les États membres de l’ONU ne reconnaissaient pas l’indépendance du Kosovo.

Le représentant spécial a également exprimé son souhait que les États membres de l’ONU n’aient pas reconnu l’indépendance du Kosovo.

109. Le représentant spécial a également exprimé son souhait que les États membres de l’ONU n’aient pas reconnu l’indépendance du Kosovo.

Moreover, the procedure employed in relation to the declaration differed from that employed by the Assembly of Kosovo for the adoption of legislation. In particular, the declaration was signed by all those present when it was adopted, including the President of Kosovo, who (as noted in paragraph 76 above) was not a member of the Assembly of Kosovo. In fact, the self-reference of the persons adopting the declaration of independence as “the democratically-elected leaders of our people” immediately precedes the actual declaration of independence within the text (“hereby declare Kosovo to be an independent and sovereign State”; para. 1). It is also noticeable that the declaration was not forwarded to the Special Representative of the Secretary-General for publication in the Official Gazette.

The Court accepts that the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, submitted to the Security Council on 28 March 2008, stated that “the Assembly of Kosovo held a session during which it adopted a ‘declaration of independence’, declaring Kosovo an independent and sovereign State” (United Nations doc. S/2008/211, para. 3). This was the normal periodic report on UNMIK activities, the purpose of which was to inform the Security Council about developments in Kosovo; it was not intended as a legal analysis of the declaration or the capacity in which those who adopted it had acted.

The Court thus arrives at the conclusion that, taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who

447 UNILATERAL DECLARATION OF INDEPENDENCE (ADVISORY OPINION)

Moreover, the procedure employed in relation to the declaration differed from that employed by the Assembly of Kosovo for the adoption of legislation. In particular, the declaration was signed by all those present when it was adopted, including the President of Kosovo, who (as noted in paragraph 76 above) was not a member of the Assembly of Kosovo. In fact, the self-reference of the persons adopting the declaration of independence as “the democratically-elected leaders of our people” immediately precedes the actual declaration of independence within the text (“hereby declare Kosovo to be an independent and sovereign State”; para. 1). It is also noticeable that the declaration was not forwarded to the Special Representative of the Secretary-General for publication in the Official Gazette.

108. The reaction of the Special Representative of the Secretary-General to the declaration of independence is also of some significance. The Constitutional Framework gave the Special Representative power to oversee and, in certain circumstances, annul the acts of the Provisional Institutions of Self-Government. On previous occasions, in particular in the period between 2002 and 2005, when the Assembly of Kosovo took initiatives to promote the independence of Kosovo, the Special Representative had qualified a number of acts as being incompatible with the Constitutional Framework on the grounds that they were deemed to be “beyond the scope of [the Assembly’s] competencies” (United Nations dossier No. 189, 7 February 2003) and therefore outside the powers of the Assembly of Kosovo.

The silence of the Special Representative of the Secretary-General in the face of the declaration of independence of 17 February 2008 suggests that he did not consider that the declaration was an act of the Provisional Institutions of Self-Government designed to take effect within the legal order for the supervision of which he was responsible. As the practice shows, he would have been under a duty to take action with regard to acts of the Assembly of Kosovo which he considered to be ultra vires.

The Court accepts that the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, submitted to the Security Council on 28 March 2008, stated that “the Assembly of Kosovo held a session during which it adopted a ‘declaration of independence’, declaring Kosovo an independent and sovereign State” (United Nations doc. S/2008/211, para. 3). This was the normal periodic report on UNMIK activities, the purpose of which was to inform the Security Council about developments in Kosovo; it was not intended as a legal analysis of the declaration or the capacity in which those who adopted it had acted.

The Court thus arrives at the conclusion that, taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who
En outre, la procédure suivie à l'égard de la déclaration différait de celle utilisée par l'Assemblée du Kosovo pour l'adoption des textes législatifs. En particulier, lorsqu'elle a été adoptée, la déclaration a été signée par l'ensemble des personnes présentes, y compris le président du Kosovo, qui (ainsi qu'indiqué au paragraphe 76 ci-dessus) n'était pas membre de l'Assemblée du Kosovo. En fait, le passage dans lequel les personnes ayant adopté la déclaration d'indépendance se présentent elles-mêmes comme les « dirigeants démocratiquement élus [du peuple] » précède immédiatement la déclaration d'indépendance dans le corps du texte (« déclarant par la présente que le Kosovo est un État souverain et indépendant »; par. 1). Il convient également de noter que la déclaration n'a pas été transmise au représentant spécial du Secrétaire général pour publication au Journal officiel.


Le silence du représentant spécial du Secrétaire général face à la déclaration d'indépendance du 17 février 2008 semble indiquer que celui-ci ne la considérait pas comme un acte des institutions provisoires d'administration autonome censé prendre effet dans le cadre de l'ordre juridique dont la supervision lui incombe. Il ressort de la pratique du représentant spécial qu'il aurait été de son devoir d'agir à l'encontre d'actes de l'Assemblée du Kosovo qui constitueraient, selon lui, un excès de pouvoir.

La Cour reconnaît que, dans son rapport sur la mission d'administration intérimaire des Nations Unies au Kosovo soumis au Conseil de sécurité le 28 mars 2008, le Secrétaire général indiquait que, « [...] lors d'une séance, l'Assemblée du Kosovo [avait] adopté une « déclaration d'indépendance » proclamant le Kosovo État indépendant et souverain » (Nations Unies, doc. S/2008/211, par. 3). Il s'agissait du rapport périodique normal consacré aux activités de la MINUK, dont le but était de tenir le Conseil de sécurité informé de l'évolution de la situation au Kosovo; ce rapport n'était pas censé constituer une analyse juridique de la déclaration ou de la qualité en laquelle avaient agi ceux qui l'avaient adoptée.

109. L'ensemble de ces éléments amène ainsi la Cour à conclure que la déclaration d'indépendance du 17 février 2008 n'est pas le fait de l'Assemblée du Kosovo en tant qu'institution provisoire d'administration autonome agissant dans les limites du cadre constitutionnel, mais...
est celui de personnes ayant agi de concert en leur qualité de représentants du peuple du Kosovo, en dehors du cadre de l'administration intérimaire.

b) La question de la violation éventuelle par les auteurs de la déclaration d'indépendance de la résolution 1244 (1999) du Conseil de sécurité ou des mesures adoptées en vertu de celle-ci

110. Ayant établi l'identité des auteurs de la déclaration d'indépendance, la Cour en vient à la question de savoir si, en prononçant la déclaration, ceux-ci sont allés à l'encontre d'une éventuelle interdiction contenue dans la résolution 1244 (1999) du Conseil de sécurité ou dans le cadre constitutionnel adopté en vertu de celle-ci.

111. La Cour rappelle que cette question a donné matière à controverse durant la présente procédure. Certains participants à celle-ci ont affirmé que la déclaration d'indépendance du 17 février 2008 constituait une tentative unilatérale de mettre un terme à la présence internationale établie par la résolution 1244 (1999) du Conseil de sécurité, ce que seule permettrait une décision du Conseil de sécurité lui-même. Il a également été soutenu qu'un règlement définitif de la question du statut du Kosovo ne pouvait être obtenu que par le moyen soit d'un accord de toutes les parties prenantes (c'est-à-dire, notamment, avec le consentement de la République de Serbie), soit d'une résolution expresse du Conseil de sécurité entérinant un statut final spécifique pour le Kosovo, ainsi qu'il est prévu dans les principes directeurs du groupe de contact. Selon ce point de vue, l'action unilatérale des auteurs de la déclaration d'indépendance serait incompatible avec la résolution 1244 (1999) du Conseil de sécurité et constituerait donc une violation de celle-ci.

112. D'autres participants ont soutenu devant la Cour que la résolution 1244 (1999) du Conseil de sécurité n'interdisait pas l'indépendance du Kosovo et n'en excluait pas la possibilité. Ils ont affirmé que la résolution régissait uniquement l'administration intérimaire du Kosovo, mais non le statut final ou permanent de ce dernier. En particulier, a-t-il été avancé, la résolution 1244 (1999) du Conseil de sécurité ne créait pas, en droit international, d'obligations faisant obstacle à une déclaration d'indépendance ou frappant une telle déclaration de nullité, et elle ne s'adresserait pas aux auteurs de la déclaration d'indépendance. Selon ce point de vue, si le Conseil de sécurité avait voulu exclure la possibilité d'une déclaration d'indépendance, il l'aurait indiqué en des termes clairs et dénués d'ambiguïté dans le texte de la résolution, comme il l'avait fait dans la résolution 787 (1992) concernant la République Srpska. En outre, il a été soutenu que les références, dans les annexes de la résolution 1244 (1999) du Conseil de sécurité, aux accords de Rambouillet et donc indirectement à la « volonté du peuple » du Kosovo (voir le chapitre §3 des accords de Rambouillet) étaient l'idée que, dans sa résolution 1244 (1999), le Conseil de sécurité non seulement n'était pas hostile à la déclaration d'indépendance,

113. The question whether resolution 1244 (1999) prohibits the authors of the declaration of 17 February 2008 from declaring independence from the Republic of Serbia can only be answered through a careful reading of this resolution (see paras. 94 et seq.).

114. First, the Court observes that Security Council resolution 1244 (1999) was essentially designed to create an interim régime for Kosovo, with a view to channelling the long-term political process to establish its final status. The resolution did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement.

In this regard the Court notes that contemporaneous practice of the Security Council shows that in situations where the Security Council has decided to establish restrictive conditions for the permanent status of a territory, those conditions are specified in the relevant resolution. For example, although the factual circumstances differed from the situation in Kosovo, only 19 days after the adoption of resolution 1244 (1999), the Security Council, in its resolution 1251 of 29 June 1999, reaffirmed its position that a “Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded” (para. 11). The Security Council thus set out the specific conditions relating to the permanent status of Cyprus.

By contrast, under the terms of resolution 1244 (1999) the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo.

Resolution 1244 (1999) thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level: unlike resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status of Kosovo.

Secondly, turning to the question of the addressees of Security Council resolution 1244 (1999), as described above (see paragraph 58), it sets out a general framework for the “deployment in Kosovo, under United Nations auspices, of international civil and security presences” (para. 5). It is mostly concerned with creating obligations and authorizations for United Nations Member States as well as for organs of the United Nations such as the Secretary-General and his Special Representative (see notably paras. 3, 5, 6, 7, 9, 10 and 11 of Security Council resolution 1244 (1999)). The only point at which resolution 1244 (1999)
mais allait même jusqu’à l’envisager. D’autres participants ont soutenu que, une fois épuisée la voie des négociations, la résolution 1244 (1999) ne faisait plus obstacle à une déclaration d’indépendance.

113. La réponse à la question de savoir si la résolution 1244 (1999) interdisait aux auteurs de la déclaration du 17 février 2008 de proclamer l’indépendance du Kosovo vis-à-vis de la République de Serbie passe nécessairement par une lecture attentive de cette résolution (voir par. 94 et suiv.).

114. En premier lieu, le Cour fait observer que la résolution 1244 (1999) visait essentiellement à instaurer un régime intérimaire pour le Kosovo, en vue d’encadrer le processus politique destiné à établir, à long terme, le statut final de celui-ci. Cette résolution ne contenait aucune disposition concernant le statut final du Kosovo ou les conditions aux quelles ce statut devait satisfaire.

A cet égard, la Cour relève que, au vu de la pratique suivie à l’époque par le Conseil de sécurité, lorsque celui-ci décidait de fixer des conditions restrictives quant au statut permanent d’un territoire, ces conditions étaient précisées dans la résolution pertinente. Dans le cas de Chypre, par exemple, même si les circonstances factuelles étaient différentes de celles du Kosovo, le Conseil a, dans sa résolution 1251 du 29 juin 1999 — soit dix-neuf jours seulement après l’adoption de la résolution 1244 (1999) —, réaffirmé sa position selon laquelle « le règlement du problème de Chypre devait être fondé sur un Etat de Chypre doté d’une souveraineté, d’une personnalité internationale et d’une citoyenneté uniques, son indépendance et son intégrité territoriale étant garanties » (par. 11). Le Conseil de sécurité a de la sorte énoncé les conditions spécifiques relatives au statut permanent de Chypre.


115. En second lieu, pour venir à la question des destinataires de la résolution 1244 (1999) du Conseil de sécurité, celle-ci, comme indiqué plus haut (voir paragraphe 58), établit un cadre général pour le « déploiement au Kosovo, sous l’égide de l’Organisation des Nations Unies, de présences internationales civile et de sécurité » (par. 5). Elle vise principalement à imposer certaines obligations et à conférer certaines autorisations aux États Membres de l’Organisation des Nations Unies ainsi qu’à des organes de l’Organisation tels que le Secrétariat général et son représentant spécial (voir, notamment, les paragraphes 3, 5, 6, 7, 9, 10 et 11 de la...
la résolution 1244 (1999) du Conseil de sécurité. La résolution 1244 (1999) ne fait expressément mention d’autres acteurs que lorsque le Conseil de sécurité exige, d’une part, « que l’ALK et les autres groupes armés d’Albanais du Kosovo mettent immédiatement fin à toutes opérateurs offensives et satisfont aux exigences en matière de démilitarisation » (par. 15) et que, d’autre part, « tous les intéressés, y compris la présence internationale de sécurité, apportent leur entière coopération au Tribunal international pour l’ex-Yougoslavie » (par. 14). Cette résolution n’indique nullement que le Conseil de sécurité ait entendu imposer en sus une obligation ou une interdiction d’agir spécifique à ces autres acteurs.


117. Une telle référence aux dirigeants albaniens du Kosovo ou à d’autres acteurs, nonobstant celle, relativement générale, à « tous les inté-

The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.” (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 53, para. 114.)

118. Bearing this in mind, the Court cannot accept the argument that Security Council resolution 1244 (1999) contains a prohibition, binding on the authors of the declaration of independence, against declaring independence; nor can such a prohibition be derived from the language of the resolution understood in its context and object and purpose. The language of Security Council resolution 1244 (1999) is at best ambiguous in this regard. The object and purpose of the resolution, as has been explained in detail (see paragraphs 96 to 100), is the establishment of an interim administration for Kosovo, without making any definitive determination on final status issues. The text of the resolution explains that the "main responsibilities of the international civil presence will include … [organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement]" (para. 11 (c) of the resolution; emphasis added).

The phrase "political settlement", often cited in the present proceedings, does not modify this conclusion. First, that reference is made within the context of enumerating the responsibilities of the international civil presence, i.e., the Special Representative of the Secretary-General in Kosovo and UNMIK, and not of other actors. Secondly, as the diverging views presented to the Court on this matter illustrate, the term "political settlement" is subject to various interpretations. The Court therefore con-
DECLARE CONCLUSION

La Cour a conclu que la déclaration d'indépendance de 17 février 2008, qui était un acte international illégal et contraire à la charte de l'ONU, ne violait pas la résolution 254 (1971). Cela a été déterminé sur la base de la jurisprudence précédente, en particulier les cas de la Somalie et du Mozambique.

La Cour a également conclu que la déclaration d'indépendance de 17 février 2008 était contraire aux principes fondamentaux de la communauté internationale, en particulier à l'article 1 de la charte de l'ONU. La Cour a donc confirmé que la déclaration d'indépendance de 17 février 2008 était illégale et contraire à la charte de l'ONU.

120. La Cour en vient donc à la question de savoir si la déclaration d’indépendance du 17 février 2008 a violé le cadre constitutionnel établi sous les auspices de la MINUK. Le chapitre 5 du cadre constitutionnel définit les pouvoirs des institutions provisoires d’administration auto- nome du Kosovo. Plutôt que de proclamer l’indépendance du Kosovo, les institutions de la MINUK ont exercé leurs pouvoirs dans le cadre constitutionnel.

121. Toutefois, la Cour a déjà dit que la déclaration d’indépendance du 17 février 2008 n’entraîne pas la fin des pouvoirs des institutions provisoires d’administration autonome, et que la déclaration d’indépendance ne peut pas être considérée comme une nouvelle constitution, même si elle prend l’aspect d’un acte constitutionnel.

V. CONCLUSION GÉNÉRALE


123. Par ces motifs,
La Cour,
1) A l’unanimité,
(2) By nine votes to five,
(3) By ten votes to four,

Finds that it has jurisdiction to give the advisory opinion requested;
Decides to comply with the request for an advisory opinion;
Is of the opinion that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-second day of July, two thousand and ten, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Hisashi Owada,
President.

Vice-President Tomka appends a declaration to the Advisory Opinion of the Court; Judge Koroma appends a dissenting opinion to the Advisory Opinion of the Court; Judges Shima, Keith, Sepúlveda-Amor, Abundu, Abrahams, Kaare, Buergenthal, Simma, Abraham, and Van den Borre append separate opinions to the Advisory Opinion of the Court; Judges Cançado Trindade and Yusuf append separate opinions to the Advisory Opinion of the Court.

(Initialled) Hisashi Owada,
President.

(Initialled) Philippe Couvreur, Registrar.
Dit qu'elle est compétente pour répondre à la demande d'avis consultatif;

2) Par neuf voix contre cinq,
Décide de donner suite à la demande d'avis consultatif;

POUR : M. Owada, président; MM. Al-Khasawneh, Buergenthal, Simma, Abraham, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood, juges;
CONTRE : M. Tomka, vice-président ; MM. Koroma, Keith, Bennouna, Skotnikov, juges;

3) Par dix voix contre quatre,
Est d'avis que la déclaration d'indépendance du Kosovo adoptée le 17 février 2008 n'a pas violé le droit international.

POUR : M. Owada, président; MM. Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood, juges;
CONTRE : M. Tomka, vice-président ; MM. Koroma, Bennouna, Skotnikov, juges.

Fait en anglais et en français, le texte anglais faisant foi, au Palais de la Paix, à La Haye, le vingt-deux juillet deux mille dix, en deux exemplaires, dont l'un restera déposé aux archives de la Cour et l'autre sera transmis au Secrétaire général de l'Organisation des Nations Unies.

Le président,
(Signé) Hisashi OWADA.

Le greffier,
(Signé) Philippe COUVREUR.

M. le juge TOMKA, vice-président, joint une déclaration à l'avis consultatif; M. le juge KOROMA joint à l'avis consultatif l'exposé de son opinion dissidente; M. le juge SIMMA joint une déclaration à l'avis consultatif; MM. les juges KEITH et SEPÚLVEDA-AMOR joignent à l'avis consultatif les exposés de leur opinion dissidente; MM. les juges BENNOUNA et SKOTNIKOV joignent à l'avis consultatif les exposés de leur opinion individuelle; MM. les juges CANÇADO TRINDADE et YUSUF joignent à l'avis consultatif les exposés de leur opinion individuelle.

(Paraphé) H.O.
(Paraphé) Ph.C.
International Court of Justice

Dissenting Opinion of Judge Koroma, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo
Advisory Opinion

I.C.J. Reports 2010
The unilateral declaration of independence of 17 February 2008 unlawful for failure to comply with laid down legal principles — In exercising its advisory jurisdiction, the Court may only reformulate the question posed so as to make it more closely correspond to the intent of the institution requesting the advisory opinion — The Court's conclusion that the declaration of independence was made by a body other than the Provisional Institutions of Self-Government of Kosovo is legally untenable because it is based on the Court's perceived intent of those authors — Security Council resolution 1244 (1999) constitutes the lex specialis to be applied in the present case — The declaration of independence contravenes resolution 1244 (1999), which calls for a negotiated settlement and a political solution based on respect for the integrity of the Federal Republic of Yugoslavia — The declaration of independence contravenes resolution 1244 (1999) because it is an attempt to bring to an end the international presence in Kosovo established by that resolution — The declaration of independence violated the Constitutional Framework and UNMIK regulations — The declaration of independence violated the principle of respect for the sovereignty and territorial integrity of States — The Court should have found that the unilateral declaration of independence of 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo is not in accordance with international law.

1. I have voted in favour of the decision to accede to the request for an advisory opinion, but I unfortunately cannot concur in the finding that the “declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law”, in view of the following.

2. The unilateral declaration of independence of 17 February 2008 was not intended to be without effect. It was unlawful and invalid. It failed to comply with laid down rules. It was the beginning of a process aimed at separating Kosovo from the State to which it belongs and creating a new State. Taking into account the factual circumstances surrounding the question put to the Court by the General Assembly, such an action violates Security Council resolution 1244 (1999) and general international law.

3. Although the Court in exercising its advisory jurisdiction is entitled to reformulate or interpret a question put to it, it is not free to replace the question asked of it with its own question and then proceed to answer that question, which is what the Court has done in this case, even though it states that it sees no reason to reformulate the question. As the Court states in paragraph 50 of the Advisory Opinion, its power to reformulate a request for an advisory opinion has been limited to three areas. First, the Court notes that in Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, its predecessor, the Permanent Court of International Justice, departed from the language of the question put to it because the wording did not adequately state what the Court believed to be the intended question (Advisory Opinion, para. 50, citing 1928, P.C.I.J., Series B, No. 16). Second, the Court points out that in Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, the request was reformulated because it did not reflect the “legal questions really in issue” (ibid., citing I.C.J. Reports 1980, p. 89, para. 35). This involved only slightly broadening the question but not changing the meaning from what had been intended. Finally, the Court observes that in Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, it clarified a question considered unclear or vague (ibid., citing I.C.J. Reports 1982, p. 348, para. 46). In all of these cases, the Court reformulated the question in an effort to make that question more closely correspond to the intent of the institution requesting the advisory opinion. Never before has it reformulated a question to such an extent that a completely new question results, one clearly distinct from the original question posed and which, indeed, goes against the intent of the body asking it. This is what the Court has done in this case by, without explicitly reformulating the question, concluding that the authors of the declaration of independence were distinct from the Provisional Institutions of Self-Government of Kosovo and that the answer to the question should therefore be developed on this presumption. The purpose of the question posed by the General Assembly is to enlighten the Assembly as to how to proceed in the light of the unilateral declaration of independence, and the General Assembly has clearly stated that it views the unilateral declaration of independence as having been made by the Provisional Institutions of Self-Government of Kosovo. The Court does not have the power to reformulate the question — implicitly or explicitly — to such an extent that it answers a question about an entity other than the Provisional Institutions of Self-Government of Kosovo.

4. Moreover, the Court’s conclusion that the declaration of independence of 17 February 2008 was made by a body other than the Provisional Institutions of Self-Government of Kosovo and thus did not violate international law is legally untenable, because it is based on the Court’s perceived intent of those authors. International law does not confer a right on ethnic, linguistic or religious groups to break away from the territory of a State of which they form part, without that State’s consent, merely by expressing their wish to do so. To accept otherwise, to allow any ethnic, linguistic or religious group to declare independence and break away from the territory of the State of which it forms part, outside the context of decolonization, creates a very dangerous precedent. Indeed, it amounts to nothing less than announcing to any and all dissenting groups around the world that they are free to circumvent international law simply by acting in a certain way and crafting a unilateral declaration of independence, using certain terms. The Court’s Opinion will serve as a
guide and instruction manual for secessionist groups worldwide, and that declaration of independence is therefore not in accordance with international law.

5. It is also important to note that the unilateral declaration of independence is in violation of the Charter of the United Nations, and it is thus binding pursuant to Article 2(7) of the Charter, which states that member states are to act in accordance with the Charter and the principles of the United Nations. The act of unilateral declaration of independence is thus not in accordance with the Charter.

6. In the case before the Court, it should be noted that the Special Representative of the Secretary-General had previously described such acts as being incompatible with the Constitutional Court of Kosovo. The author of the unilateral declaration of independence was the Provisional Institutions of Self-Government. The author is also subject to the substantive and procedural rules of international law, which include the provisions of the UN Charter and the Rome Statute. The Court has the authority to determine the legal validity of the unilateral declaration of independence and to interpret and apply Security Council resolution 1244 (1999). The Court has the authority to determine the legal validity of the unilateral declaration of independence and to interpret the provisions of Security Council resolution 1244 (1999).

7. As the Court has recognized in paragraph 97 of its Advisory Opinion, resolution 1244 (1999) and UNMIK regulation 1999/1 constitute the legal order in force at that time in the territory of Kosovo. Any act, such as the unilateral declaration of independence, is thus subject to the provisions of Security Council resolution 1244 (1999) and UNMIK regulation 1999/1. The Court has the authority to determine the legal validity of the unilateral declaration of independence and to apply Security Council resolution 1244 (1999) and UNMIK regulation 1999/1.

8. The declaration of independence is thus not in accordance with international law. The Court has the authority to determine the legal validity of the unilateral declaration of independence and to apply Security Council resolution 1244 (1999) and UNMIK regulation 1999/1. The Court has the authority to determine the legal validity of the unilateral declaration of independence and to apply Security Council resolution 1244 (1999) and UNMIK regulation 1999/1.
The language of a resolution should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in the particular circumstances that might assist in determining the legal consequences of the resolution of the Security Council. (Advisory Opinion, I.C.J. Reports 1971, p. 53, para. 114.)

In this regard, resolution 1244 (1999) reaffirms "the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and the other principles of international law". (ibid., p. 2). It further provides in operative paragraph 1 that "a political solution to the Kosovo crisis shall be based on the principles in annex 1 and as further elaborated in the principles in annex 2. And in operative paragraph 2, the Security Council "welcome[d] the acceptance by the Federal Republic of Yugoslavia of the principles and other required elements referred to in paragraph 1" (ibid., p. 2).

Resolution 1244 (1999) also calls for the establishment of a political process in Kosovo based on "full account of the principles and other required elements referred to in paragraph 1, including the principle of full respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia" (ibid., p. 5). Whether these provisions are considered separately or together, it is self-evident that resolution 1244 (1999) does not provide for unilateral secession of Kosovo from the Federal Republic of Yugoslavia without the latter's consent. On the contrary, the resolution reaffirms the sovereignty of Kosovo as a component part. Moreover, the resolution provides for "substantial autonomy for the people of Kosovo within the Federal Republic of Yugoslavia" (ibid., p. 9).

Although the Security Council recommended the establishment of an international presence in Kosovo, it did not provide for any such presence in the resolution. Consequently, the international civil presence that has been established in Kosovo is without the agreement of the Federal Republic of Yugoslavia. The resolution provides for "substantial autonomy within the Federal Republic of Yugoslavia" (ibid., p. 9).

That the unilateral declaration of independence by one of the entities of the Provisional Institutions of Self-Government of Kosovo contrary to the Security Council resolution 1244 (1999), is an unlawful act, contrary to the principles of international law. The declaration is null and void by operation of law (ex injuria non oritur jus).

The international civil presence called for in paragraph 11 of resolution 1244 (1999) was established in Kosovo with the agreement of the Federal Republic of Yugoslavia. The international presence was not established as a result of the unilateral declaration of independence. The international civil presence in Kosovo was established in accordance with the terms of the resolution, and it is therefore valid under international law.
travels both the text and spirit of resolution 1244 (1999) is also evident
from operative paragraph 10 of the resolution, providing for the establish-
ment of "an interim administration for Kosovo under which the people
of Kosovo can enjoy substantial autonomy within the Federal Repub-
lic of Yugoslavia" (emphasis added). The use of the word "within" is a fur-
ther recognition of the sovereignty of the Federal Republic of Yugo-
slavia (Serbia) and does not allow for the alteration of the territorial extent of the Federal Republic of Yugoslavia (Serbia).

16. Nor is the unilateral declaration of independence consistent with
the recognition of Kosovo by the Federal Republic of Yugoslavia, which has supported the position of Kosovo as an integral part of Yugoslavia. The reference to a future "settlement" of the conflict, in my view, excludes the possibility of a settlement without the agreement of Kosovo, which is a prerequisite for such a settlement. The reference to a settlement in the context of resolution 1244 (1999) and the position of the Security Council is similar to the position of the European Union, which has stated that any solution that is unilateral would be unacceptable. There will be no changes in the current territory of Kosovo, which is under the control of the interim administration established under resolution 1244 (1999) without the consent of Kosovo. The territorial integrity and regional stability, including the status of Kosovo, will be fully respected.

17. Finally, it should be recalled that paragraph 91 of the Opinion
of the International Court of Justice (ICJ) states that resolution 1244 (1999) is in force and the Security Council has taken no steps to rescind it. The status of Kosovo cannot be changed unilaterally, and the unilateral declaration of independence by the self-declared "government" of Kosovo is contrary to resolution 1244 (1999) and the Constitutional Framework of Kosovo (UN, 1999, 473, para. 20).

18. In the light of the foregoing, the conclusion is therefore inescap-
able that resolution 1244 (1999) does not allow for a unilateral declaration of independence from Kosovo without the consent of Serbia.

19. In addition to resolution 1244 (1999), the Court has considered
whether the unilateral declaration of independence has violated certain
derivative law promulgated pursuant to it, notably the Constitutional
Framework and other UNMIK regulations. It concludes that the declaration of independence is a threat to the Constitutional Framework because it goes beyond what has been agreed by the Security Council. The declaration of independence is a threat to the Constitutional Framework and the UNMIK regulations, which are binding on Kosovo.

20. In addition to examining resolution 1244 (1999) and the law prom-
lugated pursuant to it, the Court, in considering the question put before it by the General Assembly, had to apply the rules and principles of international law. The Court has acknowledged that the question posed by the General Assembly is a legal question and that resolution 1244 (1999) is the lex specialis and applicable in this case.
with regard to a specific unilateral declaration of independence which took place in a specific factual and legal context against which its accordance with international law can be judged. The Declaration further stipulates that “the territorial integrity of an existing State without its consent, as in this case under consideration, is a matter of international law.”

21. The truth is that international law upholds the territorial integrity of a State. One of the fundamental principles of international law is that a State has the right to exercise sovereignty over its territory and that the territorial integrity of a State is inviolable. The Declaration further emphasizes that “the territorial integrity and political independence of the State are inviolable.”

22. The Declaration thus leaves no doubt that the principles of sovereignty and territorial integrity of States prevail over the principle of self-determination. The principle of respect for territorial integrity is also reflected in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Purposes of the United Nations, which provides: “All Members shall refrain from 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.”

23. According to the finding made by the Supreme Court of Canada, which has already considered a matter similar to the one before the Court, “international law does not specifically grant a component part of a State the right to secede unilaterally from their parent State.” The Court, therefore, concluded that “the question of the right of a regional or sub-national part of a State to secede unilaterally is a matter of international law.”

24. The question now before the Court is whether international law gives the National Assembly of Quebec the right to effect the secession of Quebec from Canada unilaterally. In this regard, is there a right to self-determination under international law that would the National Assembly of Quebec from Canada unilaterally. In this regard, is there a right to self-determination under international law that would prevail over the principle of territorial integrity?

25. The unilateral declaration of independence involves a claim to a territory which is part of the Federal Republic of Yugoslavia (Serbia), to secede from the United Nations. The principle of territorial integrity of States is enshrined in Article 2, paragraph 4, of the Charter of the United Nations, which provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

26. The Court, therefore, must determine whether the unilateral declaration of independence has caused a violation of the territorial integrity of the Federal Republic of Yugoslavia (Serbia) as a Member of the United Nations.

27. The Court, in my view, correctly refers to the present state of the law with respect to the question the Supreme Court of Canada was asked, namely, “Does international law give the National Assembly of Quebec the right to effect the secession of Quebec from Canada unilaterally?” In this regard, the Court, in response to the specific questions asked, should have made clear that international law does not grant a right to secede unilaterally. This Court has already considered a matter similar to the one before it and concluded that international law does not specifically grant a component part of a State the right to secede unilaterally from their parent State.
law in the case before the Court contains rules and principles explicitly preventing the declaration of independence and secession. The unilateral declaration of independence of 17 February 2008 was tantamount to an attempt to secede from Serbia and proclaim Kosovo a sovereign independent State created out of the latter’s territory. The applicable international law in this case, together with resolution 1244 (1999), prohibits such a proclamation and cannot recognize its validity.

24. At the time resolution 1244 (1999) was adopted, the Federal Republic of Yugoslavia was, and it still is, an independent State exercising full and complete sovereignty over Kosovo. Neither the Security Council nor the Provisional Institutions of Self-Government of Kosovo, which are creations of the Council, are entitled to dismember the Federal Republic of Yugoslavia (Serbia) or impair totally or in part its territorial integrity or political unity without its consent.

25. It is for these reasons that the Court should have found that the unilateral declaration of independence of 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo is not in accordance with international law.

(Signed) Abdul G. Koroma.
International Court of Justice

Separate Opinion of Judge Yusuf, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion

*I.C.J. Reports 2010*
SEPARATE OPINION OF JUDGE YUSUF

The Court overly restricted the scope of the question put to it by the General Assembly — Declarations of independence per se are not regulated by international law — It is the claims they express and the processes they trigger that may be of interest to international law — The Court could have used this opportunity to clarify the scope and normative contents of the right to self-determination, in its post-colonial conception — International law disfavours the fragmentation of existing States but also confers certain rights to peoples, groups and individuals including the right of self-determination — The right of self-determination, in its post-colonial conception, is reflected in important acts and conventions — Self-determination is to be exercised mainly inside the boundaries of existing States — International law may support a claim to external self-determination in certain exceptional circumstances — The Court should have assessed whether the specific situation in Kosovo may qualify as exceptional circumstances — Other fora have not shied away from analysing the conditions to be met by claims of external self-determination — The criteria to be considered include the existence of discrimination, persecution, and the denial of autonomous political structures — These acts must be directed against a racially or ethnically distinctive group — A decision by the Security Council to intervene could be an additional criterion — All possible remedies for the realization of internal self-determination must be exhausted before external self-determination can be exercised.

The legislative powers vested in the SRSG are not for the enactment of international legal rules and principles — UNMIK’s regulations remain part of a territorially-based legislation enacted solely for the administration of that territory — The Constitutional Framework is not part of international law — A declaration of independence by the PISG could only be considered as ultra vires in respect of the domestic law of Kosovo.

I. INTRODUCTION

1. Although I am in general agreement with the Court’s Opinion and have voted in favour of all the paragraphs of the operative clause, I have serious reservations with regard to the Court’s reasoning on certain important aspects of the Opinion.

2. First, in interpreting the question put to it by the United Nations General Assembly, the Court states that “[t]he answer to that question turns on whether or not the applicable international law prohibited the declaration of independence” (para. 56). This constitutes, in my view, an overly restrictive and narrow reading of the question of the General Assembly. The declaration of independence of Kosovo is the expression of a claim to separate statehood and part of a process to create a new State. The question put to the Court by the General Assembly concerns the accordance with international law of the action undertaken by the representatives of the people of Kosovo with the aim of establishing such a new State without the consent of the parent State. In other words, the Court was asked to assess whether or not the process by which the people of Kosovo were seeking to establish their own State involved a violation of international law, or whether that process could be considered consistent with international law in view of the possible existence of a positive right of the people of Kosovo in the specific circumstances which prevailed in that territory. Thus, the restriction of the scope of the question to whether international law prohibited the declaration of independence as such voids it of much of its substance. I will elaborate on these issues in Section II below.

3. My second reservation relates to the inclusion by the Court of the Constitutional Framework established under the auspices of the United Nations Interim Administration Mission in Kosovo (UNMIK) in the category of the applicable international legal instruments under which the legality of the declaration of independence of Kosovo of 17 February 2008 is to be assessed. It is my view that the Constitutional Framework for the Interim Administration of Kosovo is not part of international law. In enacting legislation for the provisional administration of Kosovo, the Special Representative of the Secretary-General (SRSG) may have derived his authority from resolution 1244 of the United Nations Security Council, but he was primarily acting as a surrogate territorial administrator laying down regulations that concerned exclusively the territory of Kosovo and produced legal effects at the domestic level. I will examine these issues further in Section III below.

II. THE SCOPE AND MEANING OF THE QUESTION PUT TO THE COURT

4. The Court has interpreted the question posed by the General Assembly as not requiring it

“to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it” (Advisory Opinion, para. 56).

Surely, the Court was not asked to pronounce itself on the second point, which is of a general character; but it is regrettable, for the reasons indicated below, that the Court decided not to address the first point, par-
 Particularly in the sense of assessing the possible existence of a right to self-determination, particularly in its post-colonial conception, is one of those rights.

5. Firstly, since a declaration of independence is not per se regulated by international law, there is no point assessing its legality, as such, under international law. It is what the ICJ referred to as a situation of self-determination, particularly in its post-colonial conception, is one of those rights.

6. Thirdly, claims to separate statehood by ethnic groups or other entities within a State can create situations of armed conflict and thus pose threats not only to regional stability but also to their own States. The right of self-determination, particularly in its post-colonial conception, is one of those rights.

7. In this post-colonial conception, the right of self-determination has neither become a legal notion of mere historical interest nor has it exhausted its role in international law. It has, instead, acquired renewed significance following the end of colonialism in the two covenants on human rights, the 1970 Declaration on the Rights of People and Nations to Independence and self-Determination, the 1966 International Covenants on Human Rights, the 1966 Human Rights Committee, the 1966 International Covenants on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, and the 1993 UN Declaration on Indigenous Peoples.

8. In this post-colonial conception, the right of self-determination operates inside the boundaries of existing States in various forms and guises, particularly within their own States or territories. It offers a variety of entitlements to the concerned peoples within the borders of the State without threatening their sovereignty.

9. In contrast, claims to external self-determination by such ethnically or racially distinct groups pose a challenge to international law as well as to their own States and, often, to the wider community of States. The right of self-determination, particularly in its post-colonial conception, is one of those rights.
favour of the peoples of non-self-governing territories and peoples under alien subjugation, domination and exploitation. Thus, a racially or ethnically distinct group within a State, even if it qualifies as a people for the purposes of self-determination, does not have the right to unilateral secession simply because it wishes to create its own separate State, though this might be the wish of the entire group. The availability of such a general right in international law would reduce to naught the territorial sovereignty and integrity of States and would lead to interminable conflicts and chaos in international relations.

11. This does not, however, mean that international law turns a blind eye to the plight of such groups, particularly in those cases where the State not only denies them the exercise of their internal right of self-determination (as described above), but also subjects them to discrimination, persecution and egregious violations of human rights or humanitarian law. Under such exceptional circumstances, the right of peoples to self-determination may support a claim to separate statehood provided it meets the conditions prescribed by international law, in a specific situation, taking into account the historical context. Such conditions may be gleaned from various instruments, including the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, which, as stated by the Court in paragraph 80 of the Advisory Opinion, reflects customary international law. The Declaration contains, under the principle of equal rights and self-determination of peoples, the following saving clause:

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

12. This provision makes it clear that so long as a sovereign and independent State complies with the principle of equal rights and self-determination of peoples, its territorial integrity and national unity should neither be impaired nor infringed upon. It therefore primarily protects, and gives priority to, the territorial preservation of States and seeks to avoid their fragmentation or disintegration due to separatist forces. However, the saving clause in its latter part implies that if a State fails to comport itself in accordance with the principle of equal rights and self-determination of peoples, an exceptional situation may arise whereby the ethnically or racially distinct group denied internal self-determination may claim a right of external self-determination or separation from the State which could effectively put into question the State’s territorial unity and sovereignty.

13. Admittedly, the Kosovo situation is special in many ways. It is in the context of its distinctive character and history that the question posed by the General Assembly should have been analysed. The violent break-up of Yugoslavia, the removal of the autonomy of Kosovo by the Serbian authorities, the history of ethnic cleansing and crimes against humanity in Kosovo described in the Mladicv. iteration of the ICTY (Prosecutor v. Milan Mladic et al., Judgement of 26 February 2009), and the extended period of United Nations administration of Kosovo which de facto separated it from Serbia to protect its population and provide it with institutions of self-government, are specific features that may not be found elsewhere. The Court itself had occasion, in June 1999, to refer to the “human tragedy, the loss of life, and the enormous suffering in Kosovo...” (Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I), p. 131, para. 16). Given this specific context there was, in my view, sufficient material before the Court to allow it to assess whether the situation in Kosovo reflected the type of exceptional circumstances that may transform an entitlement to internal self-determination into a right to claim separate statehood from the parent State.

14. This question has been considered in other fora. For example, the absence of such exceptional circumstances in the case of Katanga (DRC) was described by the African Commission of Human and Peoples’ Rights as follows in the Katangese Peoples’ Congress v. Zaire:

“In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13 (1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.” (Case 75/92, Katangese Peoples’ Congress v. Zaire, p. 1.)

In other words, the Commission held that the Katangese people should exercise their right to self-determination internally unless it could be clearly demonstrated that their human rights were egregiously violated by the Government of Zaire and that they were denied the right to participate in government.

15. Similarly, the Canadian Supreme Court in the Reference re. Secession of Quebec, while admitting that there may be a right to external self-
determination where a people is denied any meaningful exercise of its right to self-determination internally, concluded as follows:

"A State whose government represents the whole of the people or peoples resident in its territory, on a basis of equality and without discrimination, and respects the principles of...have been denied meaningful access to government to pursue their political, economic, cultural and social development." (Reference by the Governor in Council concerning Certain Questions relating to the Secession of Quebec from Canada (1998) 2 SCR 217, 161 DLR (4th) 385; 115 ILR 536, para. 154.)

16. To determine whether a specific situation constitutes an exceptional case which may legitimize a claim to external self-determination, certain criteria have to be considered. For example, it is generally recognized that the existence of discrimination, in political, economic, social and cultural contexts, is one of the criteria which might lead to the conclusion that the right of self-determination is not being respected.

17. In the specific case of Kosovo, the General Assembly has sought the advisory opinion of the Court on the question of whether the United Nations could lawfully employ its right to undertake a declaration of independence without the consent of its parent State. The Court concluded that it had no authority to declare independence for Kosovo in the absence of such a declaration. In the view of the Court, it was not within its purview to determine the possibility of a separate state being created in the absence of an agreement between the parent State and the breakaway region. The Court further held that it was not within its jurisdiction to declare that a breakaway region was entitled to independence, unless the parent State had agreed to such a declaration in accordance with its own national law and international law.

18. The Constitutional Framework, as established by the Special Representative of the Secretary-General of the United Nations (UNMIK), consists of two main sources of law: (a) the regulations promulgated by the Special Representative of the Secretary-General of the United Nations (UNMIK), and (b) the law in force in Kosovo on 22 March 1989. The General Assembly has sought the advice of the Court on the question of whether the UNMIK regulations are part of the constitutional law of Kosovo. The Court concluded that the regulations are not part of the constitutional law of Kosovo, but rather are subordinate to the laws of the parent State (Yugoslavia/Serbia).

19. The General Assembly has also asked the Court to provide advice on the question of whether Kosovo has the right to exercise self-determination. The Court has held that the issue of self-determination is a matter within the exclusive jurisdiction of the United Nations. The General Assembly has also asked the Court to provide advice on the question of whether Kosovo has the right to exercise self-determination. The Court has held that the issue of self-determination is a matter within the exclusive jurisdiction of the United Nations.
the administration of that territory. This is made clear by the interface with pre-existing Yugoslav/Serbian legislation enacted before 1989 which is also still in force in Kosovo.

20. The question put to the Court by the General Assembly concerns the accordance of the declaration of independence of Kosovo with international law. The Constitutional Framework enacted by the SRSG is not part of international law. Even if the declaration of independence was adopted by the PISG in violation of the Constitutional Framework, such action could only be considered as *ultra vires* in respect of the domestic law of Kosovo, and would have to be dealt with by the SRSG, in his quality as administrator of the territory, or by the Supreme Court of Kosovo. Thus, there was no need for the Court to state that the “authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration” (para. 109).

It is also a very unpersuasive argument.

21. The question on which the General Assembly requested the Advisory Opinion explicitly referred to the “Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo”. Moreover, the Court was not requested to give an advisory opinion on the compatibility of the declaration of independence with the Constitutional Framework which, in my view, is not part of international law, and should not have therefore been taken into account in assessing the accordance of the declaration of independence of Kosovo with international law.

*(Signed)* Abdulqawi A. Yusuf.
Guide to Practice on Reservations to Treaties

1. Definitions

1.1 Definition of reservations
1. “Reservation” means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, … , whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.2 Definition of interpretative declarations
“Interpretative declaration” means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.

1.4 Conditional interpretative declarations
1. A conditional interpretative declaration is a unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof.
2. Conditional interpretative declarations are subject to the rules applicable to reservations.

2.3 Late formulation of reservations
A State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty, unless the treaty otherwise provides or none of the other contracting States and contracting organizations opposes the late formulation of the reservation.

2.4.4 Time at which an interpretative declaration may be formulated
Without prejudice to the provisions of guidelines 1.4 and 2.4.7, an interpretative declaration may be formulated at any time.

2.6.1 Definition of objections to reservations
“Objection” means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation formulated by another State or international organization, whereby the former State or organization purports to preclude the reservation from having its intended effects or otherwise opposes the reservation.

2.6.12 Time period for formulating objections
Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation within a period of twelve months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

2.8.1 Forms of acceptance of reservations
The acceptance of a reservation may arise from a unilateral statement to this effect or from silence of a contracting State or contracting organization during the periods specified in guideline 2.6.12.

2.8.8 Acceptance of a reservation to the constituent instrument of an international organization
When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.
2.8.11 Acceptance of a reservation to a constituent instrument that has not yet entered into force

In the case set forth in guideline 2.8.8 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation within a period of twelve months after they were notified of that reservation. Such a unanimous acceptance, once obtained, is final.

3.1.5 Incompatibility of a reservation with the object and purpose of the treaty

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the raison d'être of the treaty.

3.1.5.1 Determination of the object and purpose of the treaty

The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.

3.1.5.2 Vague or general reservations

A reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess in particular its compatibility with the object and purpose of the treaty.

3.2.1 Competence of the treaty monitoring bodies to assess the permissibility of reservations

1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.

2. The assessment made by such a body in the exercise of this competence has no greater legal effect than that of the act which contains it.

4.3.1 Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation

An objection by a contracting State or by a contracting organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, except in the case mentioned in guideline 4.3.5.

4.3.6 Effect of an objection on treaty relations

1. When a State or an international organization objecting to a valid reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.

4.5.1 Nullity of an invalid reservation

A reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of any legal effect.

4.5.2 Reactions to a reservation considered invalid

1. The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.

2. Nevertheless, a State or an international organization which considers that a reservation is invalid should formulate a reasoned objection as soon as possible.

4.5.3 Status of the author of an invalid reservation in relation to the treaty

1. The status of the author of an invalid reservation in relation to a treaty depends on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by the treaty.

2. Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting
organization without the benefit of the reservation.
3. Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may express
at any time its intention not to be bound by the treaty without the benefit of the reservation.
4. If a treaty monitoring body expresses the view that a reservation is invalid and the
reserving State or international organization intends not to be bound by the treaty without the
benefit of the reservation, it should express its intention to that effect within a period of twelve
months from the date at which the treaty monitoring body made its assessment.

4.7.1 Clarification of the terms of the treaty by an interpretative declaration
1. An interpretative declaration does not modify treaty obligations.
International Court of Justice

Dispute regarding Navigational and Related Rights
(Costa Rica v. Nicaragua)
Judgment

*I.C.J. Reports 2009*, paras. 1-84
INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

DISPUTE REGARDING NAVIGATIONAL
AND RELATED RIGHTS

(COSTA RICA v. NICARAGUA)

JUDGMENT OF 13 JULY 2009

2009

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

DIFFÉREND RELATIF À DES DROITS
DE NAVIGATION ET DES DROITS CONNEXES

(COSTA RICA c. NICARAGUA)

ARRÊT DU 13 JUILLET 2009

Official citation:
Dispute regarding Navigational and Related Rights

Mode officiel de citation:
Différend relatif à des droits de navigation et des droits connexes
(Costa Rica c. Nicaragua), arrêt, C.I.J. Recueil 2009, p. 213

ISSN 0074-4441
ISBN 978-92-1-071068-8

Sales number
N° de vente: 959
TABLE OF CONTENTS

Paragraphs

CHRONOLOGY OF THE PROCEDURE 1-14

I. GEOGRAPHICAL AND HISTORICAL CONTEXT AND ORIGIN OF THE DISPUTE 15-29

II. COSTA RICA'S RIGHT OF FREE NAVIGATION ON THE SAN JUAN RIVER 30-84

1. The legal basis of the right of free navigation 32-41
   (a) The meaning and scope of the expression “libre navegación... con objetos de comercio” 43-71
      (i) Preliminary observations 47-49
      (ii) The meaning of the phrase “con objetos” 50-56
      (iii) The meaning of the word “commerce” 57-71
   (b) The activities covered by the right of free navigation belonging to Costa Rica 72-84
      (i) Private navigation 73-79
      (ii) “Official vessels” 80-84

III. NICARAGUA'S POWER OF REGULATION OF NAVIGATION 85-133

1. General observations 86-101
   (a) Characteristics 87-90
   (b) Notification 91-97
   (c) The factual context 98-101

2. The legality of the specific Nicaraguan measures challenged by Costa Rica 102-133
   (a) Requirement to stop and identification 103-107
   (b) Departure clearance certificates 108-110
   (c) Visas and tourist cards 111-119
   (d) Charges 120-124
   (e) Timetabling 125-129
   (f) Flags 130-132
   (g) Conclusion 133

IV. SUSTAINABLE FISHING 134-144

V. THE CLAIMS MADE BY THE PARTIES IN THEIR FINAL SUBMISSIONS 145-155

1. The claims of Costa Rica 145-150
2. The claims of Nicaragua 151-155

OPERATIVE CLAUSE 156
INTERNATIONAL COURT OF JUSTICE

YEAR 2009

13 July 2009

DISPUTE REGARDING NAVIGATIONAL AND RELATED RIGHTS

(COSTA RICA v. NICARAGUA)

Geographical and historical context and origin of the dispute.


Costa Rica's right of free navigation on the San Juan River.

Legal basis of the right of free navigation — No need for the Court to decide whether the San Juan is an “international river” — The 1858 Treaty is sufficient to settle the question of the extent of Costa Rica’s right of free navigation — Costa Rica’s right of free navigation mainly based on Article VI of the 1858 Treaty — Relevance of the Cleveland Award, the 1916 decision of the Central American Court of Justice and the Fournier-Sevilla Agreement.

Disagreement between the Parties as to the types of navigation covered by the 1858 Treaty — Interpretation of the expression “con objetos de comercio” in Article VI of the Treaty — Treaty provisions establishing limitations on sovereignty — General rules of interpretation applicable — No intention by authors of 1858 Treaty to establish any hierarchy as between Nicaragua’s sovereignty over the San Juan and Costa Rica’s right of free navigation — None of the points under examination in the case was settled by the Cleveland Award of 1888 or by the decision of the Central American Court of Justice of 1916.

Meaning of the phrase “con objetos” — Necessity to be able to give the sentence coherent meaning — Additional arguments — Meaning of the word “objetos” in Article VIII of the 1858 Treaty — 1857 “Catalina-Martínez” Peace Treaty — English translations of the 1858 Treaty submitted by each Party to President Cleveland — The expression “con objetos de comercio” means “for the purposes of commerce”.

Meaning of the word “commerce” — Evolving meaning of generic terms in a treaty — Present meaning of the notion of “commerce” must be accepted for purposes of applying the Treaty — The right of free navigation applies to the transport of persons as well as the transport of goods — Navigation by vessels used in the performance of governmental activities or to provide public services which are not commercial in nature cannot be regarded as falling within the “purposes of commerce” under Article VI.

Types of navigation covered by the right of free navigation “for the purposes of commerce” pursuant to Article VI of the 1858 Treaty — Navigation of vessels belonging to Costa Rican riparians in order to meet the basic requirements of everyday life does not fall within the scope of Article VI of the Treaty — Navigation covered by other provisions of the Treaty — Population inhabiting the south bank of the San Juan Costa Rican commonly used the river for travel at the time of the conclusion of the Treaty — Presumption that the Parties intended to preserve the right of riparians to use the river to meet their essential requirements — Right to be inferred from the provisions of the Treaty as a whole.

No special régime for “official vessels” established in Article VI of the 1858 Treaty — “Official vessels” navigating for the “purposes of commerce” — “Official vessels” used for public order activities — Question of revenue service vessels settled by the 1888 Cleveland Award — Navigation of official Costa Rican vessels used for public order activities and public services lies outside the scope of Article VI of the 1858 Treaty — Right of navigation of certain Costa Rican official vessels for the purpose of providing services to population is inferred from the provisions of the Treaty as a whole.

Nicaragua’s power of regulation of navigation on the San Juan River.

Characteristics of regulations — Environmental protection as a legitimate purpose of a regulation — Lack of any specific provision in the Treaty relating to notification of regulatory measures — Factors imposing an obligation of notification — 1956 Agreement — Particular situation of a river in which two States have rights — Notification implicit in the nature of regulation — Obligation of Nicaragua to notify Costa Rica of regulations — Costa Rica’s obligation to establish unreasonableness and allegedly disproportionate impact of regulations.

Requirement to stop and identification — Right of Nicaragua to know the identity of persons entering and leaving its territory — Nicaraguan requirement that vessels stop on entering and leaving the San Juan is lawful — No legal justification for the requirement to stop at any intermediate point — Failure of Costa Rica to show that the regulation is unreasonable.

Departure clearance certificates — Purposes invoked by Nicaragua are legitimate — Requirement for departure clearance certificates does not appear to...
have imposed any significant impediment to freedom of navigation — No suggestion from Costa Rica that it would be in a position to issue departure clearance certificates — No instance of navigation being impeded by an arbitrary refusal of a certificate.

Visas and tourist cards — Distinction to be made between requiring visas and requiring tourist cards — The power of a State to issue or refuse visas entails discretion — Titleholder and beneficiaries of the right of free navigation — Nicaragua may not impose a visa requirement on persons who benefit from Costa Rica’s right of free navigation — Imposition of a visa requirement constitutes a breach of the Treaty right — Legal situation remains unaffected even if no impediment to the freedom of navigation resulting from visa requirement — Tourist cards are not intended to facilitate control over entry into the San Juan River — No legitimate purpose — Purchase of tourist cards is inconsistent with the freedom of navigation.

Charges — No service provided by issuance of departure clearance certificates — Requirement to pay is unlawful.

Timetabling — Prohibition of night time navigation — Measure is not impediment to the freedom of navigation — Purpose pursued is legitimate — Unreasonableness not established.

Flags — Nicaragua may require certain Costa Rican vessels to fly its flag — No impediment to the exercise of the freedom of navigation — No evidence that Costa Rican vessels have been prevented from navigation on the San Juan River as a result of this requirement.

* Subsistence fishing by riparians of the Costa Rican bank.

Question of admissibility raised by Nicaragua — The Court’s power of appreciation — The alleged interferences by Nicaragua with the claimed right of subsistence fishing post-date the filing of the Application — A sufficiently close connection exists between the claim relating to subsistence fishing and the Application — Nicaragua has not been disadvantaged by Costa Rica’s failure to give notice of the claim in the Application — Nor has the Court been disadvantaged in its understanding of the issues — Objection to admissibility cannot be upheld.

Merits of the claim — Dispute solely concerns subsistence fishing — Practice long established — Failure of Nicaragua to deny existence of a right arising from such a practice — Costa Rica has a customary right — Nicaragua may take regulatory measures adopted for proper purposes — Customary right does not extend to fishing from vessels on the river.

* Claims made by the Parties in their final submissions.

The claims of Costa Rica upheld or dismissed in the operative part of the Judgment — A finding of wrongfulness regarding the conduct of a State entails an obligation to cease that conduct — Cessation of a violation of a continuing character and the consequent restoration of the legal situation constitute a form of reparation — No evidence that Costa Rica has suffered a financially assess-
The Court, composed as above, after deliberation, delivers the following Judgment: 1. On 29 September 2005 the Republic of Costa Rica (hereinafter “Costa Rica”) filed in the Registry of the Court an Application of the same date, instituting proceedings against the Republic of Nicaragua (hereinafter “Nicaragua”) in regard to a dispute concerning navigational and related rights of Costa Rica on the San Juan River.

In its Application, Costa Rica seeks to found the jurisdiction of the Court on the declaration it made on 20 February 1973 under Article 36, paragraph 2, of the Statute, as well as on the declaration made on 24 September 1979 under Article 36, paragraph 2, of the Statute, which Article 36, paragraph 1, of the Statute, as amended by Article 36, paragraph 2, of the Statute, and the American Treaty on Pacific Settlement, officially designated, according to Article LX thereof, as the “Pact of Bogotá”.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Registrar immediately communicated a certified copy of the Application to the Government of Nicaragua; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notifications provided for in Article 63, paragraph 3, of the Rules of Court.

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise its right conferred by Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case. Costa Rica chose Mr. Antônio Cançado Trindade and Nicaragua Mr. Gilbert Guillaume. Mr. Cançado Trindade was subsequently elected as a Member of the Court.

5. On 20 February 1973, Nicaragua acceded unilaterally to the Pact of Bogotá. Pursuant to Article 1, paragraph 2, of the Statute, the Government of Nicaragua had the right to challenge the jurisdiction of the Court on the basis of the declaration made by Costa Rica under Article 36, paragraph 2, of the Statute. Pursuant to Article 44, paragraph 3, of the Statute, the Registrar promptly communicated a copy of the declaration to the Government of Nicaragua and to Costa Rica.

6. In accordance with paragraph 2 of Article 44 of the Rules of Court, the Registrar duly notified the Government of Nicaragua of the intention of Costa Rica to found the jurisdiction of the Court on the declaration made under Article 36, paragraph 2, of the Statute. Pursuant to paragraph 3 of that Article, the Registrar promptly communicated to each of the Parties a certified copy of the Application, which was filed in the Registry of the Court on 29 September 2005.

7. Pursuant to Article 56 of the Statute, the Government of Nicaragua had the right to challenge the jurisdiction of the Court on the basis of the declaration made by Costa Rica under Article 36, paragraph 2, of the Statute. Pursuant to paragraph 2 of Article 56 of the Rules of Court, the Registrar promptly communicated a copy of the Application to the Government of Nicaragua.

8. Pursuant to Article 57, paragraph 1, of the Rules of Court, the Registrar promptly communicated to each of the Parties a certified copy of the Application, which was filed in the Registry of the Court on 29 September 2005.

9. Pursuant to Article 63, paragraph 3, of the Rules of Court, the Registrar promptly communicated to each of the Parties a certified copy of the Application, which was filed in the Registry of the Court on 29 September 2005.
5. By an Order dated 29 November 2005, the Court fixed 29 August 2006 and 29 May 2007, respectively, as the time-limits for the filing of the Memorial of Costa Rica and the Counter-Memorial of Nicaragua; those pleadings were duly filed within the time-limits so prescribed.

6. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of the Republic of Ecuador and the Government of the Republic of Colombia respectively asked to be furnished with copies of the pleadings and documents annexed. Having ascertained the views of the Parties pursuant to that Article, the Court decided not to grant these requests. The Registrar communicated the Court's decision to the Government of the Republic of Ecuador and the Government of the Republic of Colombia, as well as to the Parties.

7. By an Order of 9 October 2007, the Court authorized the submission of a Reply by Costa Rica and a Rejoinder by Nicaragua, and fixed 15 January 2008 and 15 July 2008 as the respective time-limits for the filing of those pleadings. The Reply and the Rejoinder were duly filed within the time-limits so prescribed.

8. By letter of 27 November 2008, the Agent of Costa Rica expressed his Government's desire to produce five new documents, in accordance with Article 56 of the Rules of Court. As provided for in paragraph 1 of that Article, those documents were communicated to Nicaragua. By letter of 10 December 2008, the Agent of Nicaragua informed the Court that his Government did not give its consent to the production of the requested documents.

The Court decided, pursuant to Article 56, paragraph 2, of the Rules, to authorize the production of four of the five documents submitted by Costa Rica, it being understood that Nicaragua would have the opportunity, pursuant to paragraph 3 of that Article, to comment subsequently thereon and to submit documents in support of those comments. That decision was communicated to the Parties by letters from the Registrar dated 18 December 2008.

9. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after ascertaining the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

10. Public hearings were held between 2 and 12 March 2009, at which the Court heard the oral arguments and replies of:

For Costa Rica: H.E. Mr. Edgar Ugalde-Alvarez, Mr. Arnoldo Brenes, Mr. Sergio Ugalde, Mr. Lucius Callisch, Mr. Marcelo G. Kohen, Mr. James Crawford, Ms. Kate Parlett.

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez, Mr. Ian Brownlie, Mr. Antonio Remiro Brotons, Mr. Alain Pellet, Mr. Paul Reichler, Mr. Stephen C. McCaffrey.

11. At the hearings, Members of the Court put questions to the Parties, to which replies were given in writing, within the time-limit fixed by the President in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, each of the Parties submitted comments on the written replies provided by the other.

12. In its Application, the following claims were made by Costa Rica:

“For these reasons, and reserving the right to supplement, amplify or amend the present Application, as well as to request the Court to establish provisional measures which might be necessary to protect its rights and to prevent the aggravation of the dispute, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations as referred to in paragraph 1 of this Application in denying to Costa Rica the free exercise of its rights of navigation and associated rights on the San Juan River. In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has violated:

(a) the obligation to facilitate and expedite traffic on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888;
(b) the obligation to allow Costa Rican boats and their passengers to navigate freely and without impediment on the San Juan River for commercial purposes, including the transportation of passengers and tourism;
(c) the obligation to allow Costa Rican boats and their passengers while engaged in such navigation to moor freely on any of the San Juan River banks without paying any charges, unless expressly agreed by both Governments;
(d) the obligation not to require Costa Rican boats and their passengers to stop at any Nicaraguan post along the river;
(e) the obligation not to impose any charges or fees on Costa Rican boats and their passengers for navigating on the river;
(f) the obligation to allow Costa Rica the right to navigate the river in accordance with Article Second of the Cleveland Award;
(g) the obligation to allow Costa Rica the right to navigate the San Juan River in official boats for supply purposes, exchange of personnel of the border posts along the right bank of the San Juan River, with their official equipment, including the necessary arms and ammunition, and for the purposes of protection, as established in the pertinent instruments;
(h) the obligation to collaborate with Costa Rica in order to carry out those undertakings and activities which require a common effort by both States in order to facilitate and expedite traffic in the San Juan River within the terms of the Treaty of Limits and its interpretation given by the Cleveland Award, and other pertinent instruments;
(i) the obligation not to aggravate and extend the dispute by adopting
measures against Costa Rica, including unlawful economic sanctions contrary to treaties in force or general international law, or involving further changes in the regime of navigation and associated rights on the San Juan River not permitted by the instruments referred to above.

Further, the Court is requested to determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to in paragraph 10 above.”

Paragraph 10 of the Application reads as follows:

“Costa Rica seeks the cessation of this Nicaraguan conduct which prevents the free and full exercise and enjoyment of the rights that Costa Rica possesses on the San Juan River, and which also prevents Costa Rica from fulfilling its responsibilities under Article II of the 1956 Agreement and otherwise. In the event that Nicaragua imposes the economic sanctions referred to above, or any other unlawful sanctions, or otherwise takes steps to aggravate and extend the present dispute, Costa Rica further seeks the cessation of such conduct and full reparation for losses suffered.”

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

**On behalf of the Government of Costa Rica,**
in the Memorial and in the Reply:

“1. For these reasons, and reserving the right to supplement, amplify or amend the present submissions, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations in denying to Costa Rica the free exercise of its rights of navigation and related rights on the San Juan.

2. In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has violated:

(a) the obligation to allow all Costa Rican vessels and their passengers to navigate freely on the San Juan for purposes of commerce, including communication and the transportation of passengers and tourism;

(b) the obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the River;

(c) the obligation not to require persons exercising the right of free navigation on the River to carry passports or obtain Nicaraguan visas;

(d) the obligation not to require Costa Rican vessels and their passengers to stop at any Nicaraguan post along the River;

(e) the obligation not to impose other impediments on the exercise of the right of free navigation, including timetables for navigation and conditions relating to flags;

(f) the obligation to allow Costa Rican vessels and their passengers while engaged in such navigation to land on any part of the bank where navigation is common without paying any charges, unless expressly agreed by both Governments;

(g) the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular Article 2 of the Cleveland Award;

(h) the obligation to facilitate and expedite traffic on the San Juan, within the terms of the Treaty of 15 April 1858 and its interpretation by the Cleveland Award of 1888, in accordance with Article 1 of the bilateral Agreement of 9 January 1956;

(i) the obligation to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes.

3. Further, the Court is requested to adjudge and declare that by reason of the above violations, Nicaragua is obliged:

(a) immediately to cease all the breaches of obligations which have a continuing character;

(b) to make reparation to Costa Rica for all injuries caused to Costa Rica by the breaches of Nicaragua’s obligations referred to above, in the form of the restoration of the situation prior to the Nicaraguan breaches and compensation in an amount to be determined in a separate phase of these proceedings; and

(c) to give appropriate assurances and guarantees that it shall not repeat its unlawful conduct, in such form as the Court may order.”

**On behalf of the Government of Nicaragua,**
in the Counter-Memorial:

“On the basis of the facts and legal considerations set forth in the Counter-Memorial, the Court is requested:

To adjudge and declare that the requests of Costa Rica in her Memorial are rejected, on the following bases:

(a) either because there is no breach of the provisions of the Treaty of 15 April 1858 on the facts;

(b) or, as appropriate, because the obligation breach of which is alleged is not included in the provisions of the Treaty of 15 April 1858.

Moreover, the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section 2 of Chapter 7.”

The relevant part of Section 2 of Chapter 7 of the Counter-Memorial reads as follows:

“Finally, in view of the above considerations, and in particular those indicated in Chapter 2 (E), Nicaragua requests the Court to declare that:

(i) Costa Rica is obliged to comply with the regulations for navigation (and landing) in the San Juan imposed by Nicaraguan authorities in particular related to matters of health and security;

(ii) Costa Rica has to pay for any special services provided by Nicara-
guan in the use of the San Juan either for navigation or landing on the Nicaraguan banks;

(iii) Costa Rica has to comply with all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858;

(iv) revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty;

(v) Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other present day recipients of this flow such as the Colorado River.”

in the Rejoinder:

“On the basis of the facts and legal considerations set forth in the Counter-Memorial and the Rejoinder, the Court is requested:
To adjudge and declare that the requests of Costa Rica in her Memorial and Reply are rejected in general, and in particular, on the following bases:
(a) either because there is no breach of the provisions of the Treaty of Limits of 15 April 1858 or any other international obligation of Nicaragua;
(b) or, as appropriate, because the obligation breach of which is alleged, is not an obligation under the provisions of the Treaty of Limits of 15 April 1858 or under general international law.

Moreover, the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section II of Chapter VII of her Counter-Memorial and reiterated in Chapter VI, Section I, of her Rejoinder.”

The relevant part of Chapter VI, Section I, of the Rejoinder reads as follows:

“(i) Costa Rica is obliged to comply with the regulations for navigation (and landing) in the San Juan imposed by Nicaraguan authorities in particular related to matters of health and security;

(ii) Costa Rica has to pay for any special services provided by Nicaragua in the use of the San Juan either for navigation or landing on the Nicaraguan banks;

(iii) Costa Rica has to comply with all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858;

(iv) revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty;

(v) Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other present day recipients of this flow such as the Colorado River.”

14. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Costa Rica,
at the hearing of 9 March 2009:

“Having regard to the written and oral pleadings and to the evidence submitted by the Parties, may it please the Court to adjudge and declare that, by its conduct, the Republic of Nicaragua has violated:

(a) the obligation to allow all Costa Rican vessels and their passengers to navigate freely on the San Juan for purposes of commerce, including communication and the transportation of passengers and tourism;

(b) the obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the River;

(c) the obligation not to require persons exercising the right of free navigation on the River to carry passports or obtain Nicaraguan visas;

(d) the obligation not to require Costa Rican vessels and their passengers to stop at any Nicaraguan post along the River;

(e) the obligation not to impose other impediments on the exercise of the right of free navigation, including timetables for navigation and conditions relating to flags;

(f) the obligation to allow Costa Rican vessels and their passengers while engaged in such navigation to land on any part of the bank where navigation is common without paying any charges, unless expressly agreed by both Governments;

(g) the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular the Second article of the Cleveland Award;

(h) the obligation to facilitate and expedite traffic on the San Juan, within the terms of the Treaty of 15 April 1858 and its interpretation by the Cleveland Award of 1888, in accordance with Article 1 of the bilateral Agreement of 9 January 1956;

(i) the obligation to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes.

Further, the Court is requested to adjudge and declare that by reason of the above violations, Nicaragua is obliged:

(a) immediately to cease all the breaches of obligations which have a continuing character;

(b) to make reparation to Costa Rica for all injuries caused to Costa Rica by the breaches of Nicaragua’s obligations referred to above, in the form of the restoration of the situation prior to the Nicaraguan breaches and compensation in an amount to be determined in a separate phase of these proceedings; and

(c) to give appropriate assurances and guarantees that it shall not repeat its unlawful conduct, in such form as the Court may order.
The Court is requested to reject Nicaragua’s request for a declaration.”

On behalf of the Government of Nicaragua,
at the hearing of 12 March 2009:

“On the basis of the facts and legal considerations set forth in the Counter-Memorial, Rejoinder and oral pleadings,

May it please the Court to adjudge and declare that:

The requests of Costa Rica in her Memorial, Reply and oral pleadings are rejected in general, and in particular, on the following bases:

(a) either because there is no breach of the provisions of the Treaty of Limits of 15 April 1858 or any other international obligation of Nicaragua;

(b) or, as appropriate, because the obligation breach of which is alleged, is not an obligation under the provisions of the Treaty of Limits of 15 April 1858 or under general international law.

Moreover the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section II of Chapter VII of her Counter-Memorial, in Section I, Chapter VI, of her Rejoinder and as reiterated in these oral pleadings.”

* * *

I. GEOGRAPHICAL AND HISTORICAL CONTEXT
AND ORIGIN OF THE DISPUTE

15. The San Juan River runs approximately 205 kilometres from Lake Nicaragua to the Caribbean Sea (see sketch-maps Nos. 1 and 2). Some 19 kilometres from the Caribbean Sea it divides into two branches: the San Juan itself continues as the northerly of the two branches and empties into the Caribbean Sea at the bay of San Juan del Norte; the Colorado River is the southern and larger of the two branches and runs entirely within Costa Rica reaching the Caribbean Sea at Barra de Colorado.

16. Part of the border between Costa Rica and Nicaragua runs along the right bank (i.e. the Costa Rican side) of the San Juan River from a point three English miles below Castillo Viejo, a small town in Nicaragua, to the end of Punta de Castilla, where the river enters the Caribbean Sea. Between Lake Nicaragua and the point below Castillo Viejo, the river runs entirely through Nicaraguan territory.

17. Both Costa Rica and Nicaragua, which had been under Spanish colonial rule, became independent States in 1821. Shortly after independence, Costa Rica and Nicaragua, together with El Salvador, Guatemala and Honduras, decided to constitute the Federal Republic of Central America. In 1824 the people living in the district of Nicoya on the Pacific coast, originally within Nicaragua, opted by plebiscite to become part of
Costa Rica. On 9 December 1825 the Federal Congress of Central America issued a decree which provided that Nicoya would be “for the time being...separated from the State of Nicaragua and annexed to that of Costa Rica”. The situation regarding Nicoya remained unchanged at the time of the dissolution of the Federal Republic of Central America in 1839. Thereafter, Nicaragua did not however recognize Nicoya as belonging to Costa Rica.

18. During the mid-1850s, Nicaragua underwent a period of internal conflict which involved a group of American adventurers, known as “filibusters” (“filibusteros”), led by William Walker. The Government of Costa Rica as well as those of El Salvador, Guatemala and Honduras joined Nicaragua’s efforts to defeat the filibusters. In May 1857, Walker capitulated and abandoned Nicaraguan territory. Following the defeat of the filibusters, war broke out between Costa Rica and Nicaragua. At the end of those hostilities, the two countries engaged in negotiations to settle outstanding bilateral matters between them, relating, inter alia, to their common boundary, to the navigational régime on the San Juan River, and to the possibility of building an inter-oceanic canal across the Central American isthmus.

19. On 6 July 1857 a Treaty of Limits was signed, dealing with territorial limits and the status of the San Juan River, but was not ratified by Costa Rica. On 8 December 1857 a Treaty of Peace was signed by the Parties but was not ratified by either Costa Rica or Nicaragua. Through the mediation of the Salvadoran Minister for Foreign Affairs, the Governments of Costa Rica and Nicaragua reached agreement on 15 April 1858 on a Treaty of Limits, which was ratified by Costa Rica on 16 April 1858 and by Nicaragua on 26 April 1858. The 1858 Treaty of Limits fixed the course of the boundary between Costa Rica and Nicaragua from the Pacific Ocean to the Caribbean Sea. According to the boundary thus drawn the district of Nicoya lay within the territory of Costa Rica. Between a point three English miles from Castillo Viejo and the Caribbean Sea, the Treaty fixed the boundary along the right bank of the San Juan River. It established Nicaragua’s dominion and sovereign jurisdiction over the waters of the San Juan River, but at the same time affirmed Costa Rica’s navigational rights “con objetos de comercio” on the lower course of the river (Article VI). The 1858 Treaty established other rights and obligations for both parties, including, inter alia, an obligation to contribute to the defence of the common bays of San Juan del Norte and Salinas as well as to the defence of the San Juan River in case of external aggression (Article IV), an obligation on behalf of Nicaragua to consult with Costa Rica before entering into any canalization or transit agreements regarding the San Juan River (Article VIII) and an obligation not to commit acts of hostility against each other (Article IX).

20. Following challenges by Nicaragua on various occasions to the validity of the 1858 Treaty, the Parties submitted the question to arbitration by the President of the United States. The Parties agreed in addition that if the 1858 Treaty were found to be valid, President Cleveland...
should also decide whether Costa Rica could navigate the San Juan River with vessels of war or of the revenue service. In his Award rendered on 22 March 1888, President Cleveland held that the 1858 Treaty was valid. He further stated, with reference to Article VI of the 1858 Treaty, that Costa Rica did not have the right of navigation on the San Juan River with vessels of war, but that it could navigate with such vessels of the Revenue Service as may be connected to navigation “for the purposes of commerce”.

21. Following the Cleveland Award, a boundary commission was established to demarcate the boundary line. An engineer, Mr. Edward Alexander, was charged with the task of resolving any “disputed point or points” which might arise in the field during the demarcation process, which began in 1897 and was concluded in 1900. Mr. Alexander rendered five awards to this end.

22. On 5 August 1914, Nicaragua signed a treaty with the United States (the Chamorro-Bryan Treaty) which granted the United States perpetual and “exclusive proprietary rights” for the construction and maintenance of an inter-oceanic canal through the San Juan River. On 24 March 1916 Costa Rica filed a case against Nicaragua before the Central American Court of Justice claiming that Nicaragua had breached its obligation to consult with Costa Rica prior to entering into any canalization project in accordance with Article VIII of the 1858 Treaty. On 30 September 1916, the Central American Court of Justice ruled that, by not consulting Costa Rica, Nicaragua had violated the rights guaranteed to the latter by the 1858 Treaty of Limits and the 1888 Cleveland Award.

23. On 9 January 1956 Costa Rica and Nicaragua concluded an Agreement (the Fournier-Sevilla Agreement) according to the terms of which the Parties agreed to facilitate and expedite traffic in particular through the San Juan River and agreed to co-operate to safeguard the common border.

24. In the 1980s various incidents started to occur relating to the navigational régime of the San Juan River. During that period Nicaragua introduced certain restrictions on Costa Rican navigation on the San Juan River which it justified as temporary, exceptional measures to protect Nicaragua’s national security in the context of an armed conflict. Some of the restrictions were suspended when Costa Rica protested. During the mid-1990s further measures were introduced by Nicaragua, including the charging of fees for passengers travelling on Costa Rican vessels navigating on the San Juan River and the requirement for Costa Rican vessels to stop at Nicaraguan Army posts along the river.

25. On 8 September 1995 the Commander-in-Chief of the Nicaraguan Army and the Costa Rican Minister of Public Security signed a document, known as the Cuadra-Castro Joint Communiqué, which provided for the co-ordination of operations in the border areas of the two States against the illegal trafficking of persons, vehicles and contraband.

26. In July 1998 further disagreements between the Parties regarding the extent of Costa Rica’s navigational rights on the San Juan River led to the adoption by Nicaragua of certain measures. In particular, on 14 July 1998, Nicaragua prohibited the navigation of Costa Rican vessels that transported members of Costa Rica’s police force. On 30 July 1998, the Nicaraguan Minister of Defence and the Costa Rican Minister of Public Security signed a document, known as the Cuadra-Lizano Joint Communiqué. The text allowed for Costa Rican armed police vessels to navigate on the river to re-supply their boundary posts on the Costa Rican side, provided that the Costa Rican agents in those vessels only carried their service arms and prior notice was given to the Nicaraguan authorities, which could decide on whether the Costa Rican vessels should be accompanied by a Nicaraguan escort. On 11 August 1998, Nicaragua declared that it considered the Cuadra-Lizano Joint Communiqué to be legally null and void. Costa Rica did not accept this unilateral declaration. Differences regarding the navigational régime on the San Juan River persisted between the Parties.

27. On 24 October 2001, Nicaragua made a reservation to its declaration accepting the jurisdiction of the Court (see paragraph 1 above), according to which it would no longer accept the jurisdiction of the Court in regard to “any matter or claim based on interpretations of treaties or arbitral awards that were signed and ratified or made, respectively, prior to 31 December 1901”. Under the Tovar-Caldera Agreement, signed by the Parties on 26 September 2002, Nicaragua agreed to a three year moratorium with regard to the reservation it had made in 2001 to its declaration accepting the jurisdiction of the Court. For its part, Costa Rica agreed that during the same three year period it would not initiate any action before the International Court of Justice nor before any other authority on any matter or protest mentioned in treaties or agreements currently in force between both countries.

28. Once the agreed three year period had elapsed without the Parties having been able to settle their differences, Costa Rica, on 29 September 2005, instituted proceedings before the Court against Nicaragua with regard to its disputed navigational and related rights on the San Juan River (see paragraph 1 above). Nicaragua has not raised any objections to the jurisdiction of the Court to entertain the case.

29. Taking account of the subject of the dispute as summarized above and of the Parties’ submissions and arguments, the Court will proceed in the following manner.

It will first determine the extent of Costa Rica’s right of free navigation on the San Juan River (II).

It will next ascertain whether, and to what extent, within the ambit of
the right thus defined, Nicaragua has the power to regulate navigation by Costa Rican boats and whether the specific measures it has decided and put into effect to this end during the period of the dispute are compatible with Costa Rica’s rights (III).

It will then consider the question of the right which Costa Rica claims for inhabitants of the Costa Rican bank of the river to engage in subsistence fishing (IV).

Finally, in the light of its reasoning on the preceding points, it will consider the Parties’ claims as presented to it in their final submissions, in respect in particular of the appropriate remedies (V).

II. COSTA RICA’S RIGHT OF FREE NAVIGATION ON THE SAN JUAN RIVER

30. The Parties agree that Costa Rica possesses a right of free navigation on the section of the San Juan River where the right bank, i.e. the Costa Rican side, marks the border between the two States by virtue of the Treaty of Limits (the Jerez-Cañas Treaty) concluded between them on 15 April 1858. This is the part of the river which runs from a point three English miles below Castillo Viejo, a town in Nicaraguan territory, to the mouth of the river at the Caribbean Sea (see paragraph 16 above).

Upstream from the point referred to above, the San Juan flows entirely in Nicaraguan territory from its source in Lake Nicaragua, in the sense that both its banks belong to Nicaragua. The section of the river in which the right bank belongs to Costa Rica, the section at issue in this dispute, is some 140 kilometres long.

31. While it is not contested that the section of the river thus defined belongs to Nicaragua, since the border lies on the Costa Rican bank, with Costa Rica possessing a right of free navigation, the Parties differ both as to the legal basis of that right and, above all, as to its precise extent, in other words as to the types of navigation which it covers.

I. The Legal Basis of the Right of Free Navigation

32. According to Costa Rica, its right of free navigation on the part of the San Juan River that is in dispute derives on the one hand from certain treaty provisions in force between the Parties, primarily but not exclusively the Treaty of Limits of 15 April 1858, and on the other hand from the rules of general international law that are applicable, even in the absence of treaty provisions, to navigation on “international rivers”. The San Juan is said to fall into this category, at least as regards the section whose course follows the border, with Costa Rica thus possessing a customary right of free navigation in its capacity as a riparian State.

33. According to Nicaragua, on the contrary, the San Juan is not an “international river”, since it flows entirely within the territory of a single country by virtue of the provisions of the 1858 Treaty of Limits, which establish the border in such a way that no part of the river falls under the sovereignty of a State other than Nicaragua. Moreover, Nicaragua challenges the existence of a general régime that might be applicable, under customary international law, to rivers whose course, or one of whose banks, constitutes the border between two States, and more widely to “international rivers”. Lastly, according to Nicaragua, even if such a régime were to exist, it would be superseded in this case by the treaty provisions which define the status of the San Juan River and govern the riparian States’ right of navigation. It is these special provisions which should be applied in order to settle the present dispute, in any event that part of it relating to the right of navigation on the river.

34. The Court does not consider that it is required to take a position in this case on whether and to what extent there exists, in customary international law, a régime applicable to navigation on “international rivers”, either of universal scope or of a regional nature covering the geographical area in which the San Juan is situated. Nor does it consider, as a result, that it is required to settle the question of whether the San Juan falls into the category of “international rivers”, as Costa Rica maintains, or is a national river which includes an international element, that being the argument of Nicaragua.

35. Indeed, even if categorization as an “international river” would be legally relevant in respect of navigation, in that it would entail the application of rules of customary international law to that question, such rules could only be operative, at the very most, in the absence of any treaty provisions that had the effect of excluding them, in particular because those provisions were intended to define completely the régime applicable to navigation, by the riparian States on a specific river or a section of it.

36. That is precisely the case in this instance. The 1858 Treaty of Limits completely defines the rules applicable to the section of the San Juan River that is in dispute in respect of navigation. Interpreted in the light of the other treaty provisions in force between the Parties, and in accordance with the arbitral or judicial decisions rendered on it, that Treaty is sufficient to settle the question of the extent of Costa Rica’s right of free navigation which is now before the Court. Consequently, the Court has no need to consider whether, if these provisions did not exist, Costa Rica could nevertheless have relied for this purpose on rules derived from international, universal or regional custom.

37. The main provision which founds Costa Rica’s right of free navi-
gation is contained in Article VI of the 1858 Treaty (see paragraphs 43 and 44 below); this has been the focus of the arguments exchanged between the Parties as to the extent of the right of navigation on the San Juan.

Article VI, after conferring on Nicaragua full and exclusive sovereignty ("exclusivamente el dominio y sumo imperio") over the whole of the San Juan, from its source in the lake to its mouth at the sea, grants Costa Rica, on the section of the river which follows the border between the two States (see paragraph 30 above), a perpetual right ("los derechos perpetuos") of free navigation "con objetos de comercio", according to the terms of the Spanish version of the Treaty, which is the only authoritative one, the meaning of which the Court will be required to return to below. In addition, Article VI gives vessels of both riparian countries the right to land freely on either bank without being subject to any taxes ("ninguna clase de impuestos"), unless agreed by both Governments.

38. Other provisions of the 1858 Treaty, though of less importance for the purposes of the present case, are not without relevance as regards the right of navigation on the river. This applies in particular to Article IV, which obliges Costa Rica to contribute to the security of the river "for the part that belongs to her of the banks", to Article VIII, which obliges Nicaragua to consult Costa Rica before entering into any agreements with a third State for canalization or transit on the river, and of course to Article II, which establishes the border as the Costa Rican bank on the section of the river which is at issue in this dispute.

39. Besides the 1858 Treaty, mention should be made, among the treaty instruments likely to have an effect on determining the right of navigation on the river and the conditions for exercising it, of the agreement concluded on 9 January 1956 between the two States (known as the Fournier-Sevilla Agreement), whereby the Parties agreed to collaborate to the best of their ability, in particular in order to facilitate and expedite traffic on the San Juan in accordance with the 1858 Treaty and the Arbitral Award made by President Cleveland in 1888 (for the text of the relevant provision of the 1956 Agreement, see paragraph 94 below).

40. Costa Rica has also invoked before the Court the joint ministerial communiqués published on 8 September 1995 (known as the Cuadra-Castro Joint Communiqué; see paragraph 25 above) and 30 July 1998 (known as the Cuadra-Lizano Joint Communiqué; see paragraph 26 above). In the Court’s view, however, these statements issued by the ministers responsible, on each side, for matters of defence and public security, cannot be included in the conventional basis of the right of free navigation granted to Costa Rica. Rather, these are practical arrangements, in part aimed at implementing previous treaty commitments, including in particular the obligation of co-operation referred to in the Agreement of 9 January 1956 (see paragraph 23 above and paragraph 94 below). The legal effects of such arrangements are more limited than the

conventional acts themselves: modalities for co-operation which they put in place are likely to be revised in order to suit the Parties. Furthermore, the second of them was promptly declared null and void by Nicaragua (see paragraph 26 above).

41. The above-mentioned treaty instruments must be understood in the light of two important decisions which settled differences that emerged between the Parties in determining their respective rights and obligations: the Arbitral Award made by the President of the United States on 22 March 1888 (known as the Cleveland Award); and the decision rendered, on the application of Costa Rica, by the Central American Court of Justice on 30 September 1916.

The first of these two decisions settled several questions concerning the interpretation of the 1858 Treaty which divided the Parties in that case; the second found that Nicaragua, by concluding an agreement with the United States permitting the construction and maintenance of an interoceanic canal through the San Juan River, had disregarded Costa Rica’s right under Article VIII of that Treaty to be consulted before the conclusion of any agreement of that nature.

Although neither of these decisions directly settles the questions that are now before the Court, they contain certain indications which it will be necessary to take into account for the purposes of the present case.

2. The Extent of the Right of Free Navigation Attributed to Costa Rica

42. Having thus defined the legal basis of the right which Costa Rica argues has been partly disregarded by Nicaragua, the Court must now determine its precise extent, in other words, its field of application. The Parties disagree considerably over the definition of this field of application, i.e., as to the types of navigation which are covered by the "perpetual right" granted to Costa Rica by the 1858 Treaty. Their difference essentially concerns the interpretation of the words "libre navegación... con objetos de comercio" in Article VI of the Treaty of Limits; this brings with it a major disagreement as to the definition of the activities covered by the right in question and of those which, not being thus covered, are subject to Nicaragua’s sovereign power to authorize and regulate as it sees fit any activity that takes place on its territory, of which the river forms part.

(a) The meaning and scope of the expression "libre navegación... con objetos de comercio"

43. In its Spanish version, which is the only authoritative one, Article VI of the Treaty of Limits of 1858 reads as follows:

"La República de Nicaragua tendrá exclusivamente el dominio y
sumo imperio sobre las aguas del río de San Juan desde su salida del Lago, hasta su desembocadura en el Atlántico; pero la República de Costa Rica tendrá en dichas aguas los derechos perpetuos de libre navegación, desde la expresa desembocadura hasta tres millas inglesas antes de llegar al Castillo Viejo, con objetos de comercio, ya sea con Nicaragua ó al interior de Costa Rica por los ríos de San Carlos ó Sarapiquí, ó cualquiera otra vía procedente de la parte que en la ríbera del San Juan se establece corresponder á esta República. Las embarcaciones de uno ó otro país podrán indistintamente atracar en las riberas del río, en la parte en que la navegación es común, sin cobrarse ninguna clase de impuestos, á no ser que se establezcan de acuerdo entre ambos Gobiernos."

44. Leaving aside for the moment the phrase whose interpretation, and indeed translation into English and French, divides the Parties, this article may be translated thus:

"The Republic of Nicaragua shall have exclusive dominium and imperium over the waters of the San Juan River from its origin in the lake to its mouth at the Atlantic Ocean; the Republic of Costa Rica shall however have a perpetual right of free navigation on the said waters between the mouth of the river and a point located three English miles below Castillo Viejo, [con objetos de comercio], whether with Nicaragua or with the interior of Costa Rica by the rivers San Carlos or Sarapiquí or any other waterway starting from the section of the bank of the San Juan established as belonging to that Republic. The vessels of both countries may land indiscriminately on either bank of the section of the river where navigation is common, without paying any taxes, unless agreed by both Governments." [Translation by the Court.]

45. The Parties’ disagreement is greatest on the meaning of the words “con objetos de comercio”. For Nicaragua, this expression must be translated into French as “avec des marchandises de commerce” and into English as “with articles of trade”; in other words, the “objetos” in question here are objects in the concrete and material sense of the term. Consequently, the freedom of navigation guaranteed to Costa Rica by Article VI relates only to the transport of goods intended to be sold in a commercial exchange. For Costa Rica, on the contrary, the expression means in French “à des fins de commerce” and in English “for the purposes of commerce”; the “objetos” in the original text are therefore said to be objects in the abstract sense of ends and purposes. Consequently, according to Costa Rica, the freedom of navigation given to it by the Treaty must be attributed the broadest possible scope, and in any event encompasses not only the transport of goods but also the transport of passengers, including tourists.

46. Before directly addressing the question which has been submitted to it, the Court will make three preliminary observations of a more general nature. It will then consider what is to be understood by “con objetos” and then by “comercio” within the meaning of Article VI, since there is in fact a twofold disagreement between the Parties.

(i) Preliminary observations

47. In the first place, it is for the Court to interpret the provisions of a treaty in the present case. It will do so in terms of customary international law on the subject, as reflected in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, as the Court has stated on several occasions (see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I), pp. 109-110, para. 160; see also Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, pp. 21-22, para. 41.) Consequently, neither the circumstance that Nicaragua is not a party to the Vienna Convention on the Law of Treaties nor the fact that the treaty which is to be interpreted here considerably pre-dates the drafting of the said Convention has the effect of preventing the Court from referring to the principles of interpretation set forth in Articles 31 and 32 of the Vienna Convention.

48. In the second place, the Court is not convinced by Nicaragua’s argument that Costa Rica’s right of free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river conferred by the Treaty on Nicaragua, that being the most important principle set forth by Article VI.

While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted a priori in a restrictive way. A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e. in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.

A simple reading of Article VI shows that the Parties did not intend to establish any hierarchy as between Nicaragua’s sovereignty over the river and Costa Rica’s right of free navigation, characterized as “perpetual”, with each of these affirmations counter-balancing the other. Nicaragua’s sovereignty is affirmed only to the extent that it does not prejudice the substance of Costa Rica’s right of free navigation in its domain, the establishment of which is precisely the point at issue; the right of free navigation, albeit “perpetual”, is granted only on condition that it does not prejudice the key prerogatives of territorial sovereignty.
There are thus no grounds for supposing, a priori, that the words “libre navegación... con objetos de comercio” should be given a specially restrictive interpretation, any more than an extensive one.

49. Lastly, the Court observes that none of the points under examination in this case was settled by the Cleveland Award of 1888 or by the decision of the Central American Court of Justice of 1916. Each of the Parties has sought to use these previous decisions as an argument to support its own case. However, these attempts do not convince the Court one way or the other.

The Cleveland Award confined itself to settling the questions of interpretation which the Parties had expressly submitted to the arbitrator. Those questions did not concern the meaning of the words “con objetos de comercio”; it is therefore futile to seek in the Award the answer to a question that was not put before the arbitrator. Consequently, while the Award declares that Costa Rica does not have the right, under the Treaty, to navigate on the San Juan with vessels of war, whereas it does have the right to do so with vessels of its revenue service, there is nothing to be inferred from this with regard to vessels belonging to the State and not falling into either of those two categories. Likewise, while the arbitrator used the words “for the purposes of commerce” and placed them in quotation marks, it may be supposed that this was simply because that was the English translation of the words “con objetos de comercio” which both Parties had supplied to the arbitrator, who did not wish, in his interpretation of the Treaty, to go beyond the questions which had been put before him.

As for the decision of the Central American Court of Justice of 1916, however important this might be, its operative part was based only on the application of the express provisions of Article VIII of the Treaty, which are not at issue in the present case.

(ii) The meaning of the phrase “con objetos”

50. It is now appropriate to consider the issue of the meaning of the phrase “con objetos de” as used in Article VI of the 1858 Treaty, specifically whether it means “for the purposes of” — as Costa Rica contends — or “with articles of” — as Nicaragua contends.

51. It should first be observed that the Spanish word “objetos” can, depending on its context, have either of the two meanings put forward. Thus, the context must be examined to ascertain the meaning to be ascribed here. The two meanings — one concrete and the other abstract — are sufficiently different that examination of the context will generally allow for a firm conclusion to be reached.

52. Having conducted this examination, the Court is of the view that the interpretation advocated by Nicaragua cannot be upheld.

The main reason for this is that ascribing the meaning “with goods” or “with articles” to the phrase “con objetos” results in rendering meaningless the entire sentence in which the phrase appears.
Nicaragua contends that it is important to give the words used in the
Treaty the meaning they had at the time the Treaty was concluded, not
only way to retain the true meaning of the draftsman of the Treaty; and
that the two terms used must not be defined to mean the same thing.

For their part, Costa Rica argues that "commerce" as used in the
Treaty to President Cleveland for use in the arbitration proceedings. He
was asked to conduct, even though their translations were not identical on all
points, they all use the same phrase to denote the original "con объектs de comercio", and in the
translation. This is the meaning accepted by the Court.

Finally, the Court also considers it significant that in 1887, when
the two Parties each submitted an English translation of the 1858 Treaty
to the Court, it observed that "commerce" is a broad concept, which
includes not only the transport of goods, but also the transport of
goods to and from places, and the transport of goods to and from places
of persons or peoples in contact. It follows, argues Costa Rica, that the
use of the term "commerce" includes movement and contact between inhabitants of
the river on purposes of navigation by Costa Rican public officials, pro-
viding the local population with essential services in areas such as health,
and security.

The Court can subscribe to neither the particularly broad interpre-
tation advanced by Nicaragua nor the excessively narrow one put for-
dward by Costa Rica. The Court observes that, were it to be
accepted, the result would be to bring within the ambit of "navigation for
the purposes of commerce" all, or virtually all, the forms of navigation
that exist in the area in question. Thus, the language in Article VI does not result in restricting the
right of free navigation to that which the Parties intended to guarantee.
The Court cannot adopt an interpretation that would exclude the exercise
of rights or activities that were open to the Parties at the time the Treaty
was concluded. The Court is of the view that the phrase "for the purposes of commerce"
should not be interpreted as excluding all other purposes, but should be
interpreted as allowing the exercise of rights and activities that were open to
the Parties at the time the Treaty was concluded.

The Court can also subscribe to neither the particularly narrow inter-
pretation advocated by Costa Rica nor the excessively broad one put for-
dward by Nicaragua. The Court observes that, were it to be
accepted, the result would be to add virtually all rights to the ambit of "navigation for
the purposes of commerce". Thus, the language in Article VI does not result in restricting the
right of free navigation to that which the Parties intended to guarantee.
The Court cannot adopt an interpretation that would exclude the exercise
of rights or activities that were open to the Parties at the time the Treaty
was concluded. The Court is of the view that the phrase "for the purposes of commerce"
should not be interpreted as excluding all other purposes, but should be
interpreted as allowing the exercise of rights and activities that were open to
the Parties at the time the Treaty was concluded.
the Court observes that it is supported mainly by two arguments: the first is based on the Respondent’s interpretation of the phrase “con objetos”, which has just been rejected; the second is based on the assertion that “commerce” should be given the narrow meaning it had when the Treaty was entered into.

63. The Court does not agree with this second argument. It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties’ common intention, which is, by definition, contemporaneous with the treaty’s conclusion. That may lead a court seised of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties’ common intention. The Court has so proceeded in certain cases requiring it to interpret a term whose meaning had evolved since the conclusion of the treaty at issue, and in those cases the Court adhered to the original meaning (to this effect, see, for example, the Judgment of 27 August 1952 in the case concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America) (I.C.J. Reports 1952, p. 176), on the question of the meaning of “dispute” in the context of a treaty concluded in 1836, the Court having determined the meaning of this term in Morocco when the treaty was concluded; the Judgment of 13 December 1999 in the case concerning Kasikili/Sedudu Island (Botswana/Namibia) (I.C.J. Reports 1999 (II), p. 1062, para. 25) in respect of the meaning of “centre of the main channel” and “thalweg” when the Anglo-German Agreement of 1890 was concluded).

64. This does not however signify that, where a term’s meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it. On the one hand, the subsequent practice of the parties, within the meaning of Article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties’ common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.

65. A good illustration of this reasoning is found in the Judgment handed down by the Court on 18 December 1978 in the case concerning Aegean Sea Continental Shelf (Greece v. Turkey) (I.C.J. Reports 1978, p. 3). Called upon to interpret a State’s reservation to a treaty excluding from the Court’s jurisdiction “disputes relating to territorial status” of that State, where the meaning of “territorial status” was contested, the Court stated:

“Once it is established that the expression ‘the territorial status of Greece’ was used in Greece’s instrument of accession [to the General Act of 1928] as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like ‘domestic jurisdiction’ and ‘territorial status’ were intended to have a fixed content regardless of the subsequent evolution of international law.” (Aegean Sea Continental Shelf (Greece v. Turkey), Judgment, I.C.J. Reports 1978, p. 32, para. 77.)

66. Though adopted in connection with the interpretation of a reservation to a treaty, the Court’s reasoning in that case is fully transposable for purposes of interpreting the terms themselves of a treaty.

It is founded on the idea that, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is “of continuing duration”, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.

67. This is so in the present case in respect of the term “comercio” as used in Article VI of the 1858 Treaty. First, this is a generic term, referring to a class of activity. Second, the 1858 Treaty was entered into for an unlimited duration; from the outset it was intended to create a legal régime characterized by its perpetuity.

68. This last observation is buttressed by the object itself of the Treaty, which was to achieve a permanent settlement between the parties of their territorial disputes. The territorial rules laid down in treaties of this type are, by nature, particularly marked in their permanence, for, as the Court has recently recalled:

“[I]t is a principle of international law that a territorial régime established by treaty ‘achieves a permanence which the treaty itself does not necessarily enjoy’ and the continued existence of that régime is not dependent upon the continuing life of the treaty under which the régime is agreed” (Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, I.C.J. Reports 2007 (II), p. 861, para. 89).
69. This is true as well of the right of free navigation guaranteed to Costa Rica by Article VI. This right, described as “perpetual”, is so closely linked with the territorial settlement defined by the Treaty — to such an extent that it can be considered an integral part of it — that it is characterized by the same permanence as the territorial régime stricto sensu itself.

70. The Court concludes from the foregoing that the terms by which the extent of Costa Rica’s right of free navigation has been defined, including in particular the term “comercio”, must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning.

Thus, even assuming that the notion of “commerce” does not have the same meaning today as it did in the mid-nineteenth century, it is the present meaning which must be accepted for purposes of applying the Treaty.

71. Accordingly, the Court finds that the right of free navigation in question applies to the transport of persons as well as the transport of goods, as the activity of transporting persons can be commercial in nature nowadays. This is the case if the carrier engages in the activity for profit-making purposes. A decisive consideration in this respect is whether a price (other than a token price) is paid to the carrier — the boat operator — by the passengers or on their behalf. If so, then the carrier’s activity is commercial in nature and the navigation in question must be regarded as “for the purposes of commerce” within the meaning of Article VI. The Court sees no persuasive reason to exclude the transport of tourists from this category, subject to fulfilment of the same condition.

On the other hand, any navigation not carried out either to transport goods intended to form the subject of commercial transactions or to transport passengers in exchange for money paid by them or on their behalf cannot be regarded as falling within the “purposes of commerce” under Article VI. That is the case, in particular, of navigation by vessels used in the performance of governmental activities or to provide public services which are not commercial in nature.

(b) The activities covered by the right of free navigation belonging to Costa Rica

72. Based on the foregoing, the Court is now in a position to determine with greater precision the types of activities which are covered by Costa Rica’s right of free navigation, and those which are not.

For the sake of convenience, the Court, in addressing this issue, will distinguish between private navigation — that is to say navigation by vessels belonging to private owners — and that of “official (or public) vessels” — that is to say vessels which are the property of the Republic of Costa Rica including all its public authorities —, although this distinction, as will be explained below, is of only limited relevance.

(i) Private navigation

73. As has just been said, two types of private navigation are certainly covered by the right of free navigation pursuant to Article VI of the 1858 Treaty: the navigation of vessels carrying goods intended for commercial transactions; and that of vessels carrying passengers who pay a price other than a token price (or for whom a price is paid) in exchange for the service thus provided.

In the first instance, the commercial activity is conducted by persons who are the owners of the goods intended for sale. These persons may themselves be carried on the vessel; they can also entrust their goods for carriage to the vessel’s operator for an agreed price or free of charge. This last aspect is of no relevance: in any event, navigation which is carried out in order to transport goods intended for sale, or goods that have just been purchased, in the context of a commercial exchange must be regarded as taking place “for the purposes of commerce”, whether or not the owner of the goods is onboard the vessel, and whether or not the vessel’s operator has been paid to provide carriage. It is understood that navigation “for the purposes of commerce” also includes the return journey of persons who have transported goods intended for sale.

In the second instance, however, the fact that the vessel’s owner receives payment for his activity is critical. Indeed, if the carriage of passengers is considered, it is not the passengers themselves who are exercising a commercial activity (unless they are travelling in order to transport goods, in which case the journey falls under the previous instance), it is the carrier, provided that he does so to make a profit.

74. The question was raised as to whether the navigation of vessels belonging to the inhabitants of the villages on the Costa Rican bank of the river in order to meet the basic requirements of everyday life, such as taking children to school or in order to give or receive medical treatment, was protected by the right of free navigation when it is carried out free of charge. The Parties discussed the issue: according to Nicaragua the answer is no, since the Respondent considers that only the carriage of goods benefits from the guarantee provided by Article VI of the Treaty; according to Costa Rica the answer is yes, based on the particularly broad definition of “commerce” adopted by the Applicant.

75. The Court has already indicated that it could not subscribe to a definition of the word “commerce” as broad as the one put forward by Costa Rica. It has also indicated (in paragraph 71 above) that the carriage of passengers free of charge, or the movement of persons on their
own vessels for purposes other than the conduct of commercial transactions, could not fall within the scope of “navigation for the purposes of commerce” within the meaning of Article VI of the 1858 Treaty.

76. It does not necessarily follow that such activities are not at all covered by freedom of navigation: other provisions of the 1858 Treaty may have the effect of guaranteeing the right of the inhabitants of the Costa Rican bank to navigate on the river, within certain limits, even when they are not doing so within the context of commercial activities.

77. In this regard, the Court is of the opinion that there is reason to take into account the provisions of the Treaty as a whole, especially those fixing the boundary between the two States, in order to draw, if need be, certain necessary implications. In other words, even if no provision expressly guaranteeing a right of non-commercial navigation to the inhabitants of the Costa Rican bank can be found in the Treaty, the question must be asked whether such a right does not flow from other provisions with a different purpose, but of which it may, to a certain extent, be the necessary consequence.

78. As has been said, the two States decided, by the Treaty of Limits, to fix their common boundary on the south bank of the San Juan River along the whole stretch of the river running from its mouth to a point located three English miles downstream from Castillo Viejo. This was decided in Article II of the 1858 Treaty. At the time, there was already a population inhabiting the Costa Rican side of the boundary thus defined, that is to say living on the bank of the river or not far from it. In view of the great difficulty of travelling inland, due to the limited inland communications network, that population commonly used and still uses the river for travel for the purpose of meeting the essential needs of everyday life which require expeditious transportation, such as transport to and from school or for medical care.

79. The Court is of the opinion that it cannot have been the intention of the authors of the 1858 Treaty to deprive the inhabitants of the Costa Rican bank of the river, where that bank constitutes the boundary between the two States, of the right to use the river to the extent necessary to meet their essential requirements, even for activities of a non-commercial nature, given the geography of the area. While choosing, in Article II of the Treaty, to fix the boundary on the river bank, the parties must be presumed, in view of the historical background to the conclusion of this Treaty and of the Treaty’s object and purpose as defined by the Preamble and Article I, to have intended to preserve for the Costa Ricans living on that bank a minimal right of navigation for the purposes of continuing to live a normal life in the villages along the river. The Court considers that while such a right cannot be derived from the express language of Article VI, it can be inferred from the provisions of the Treaty as a whole and, in particular, the manner in which the boundary is fixed.

80. It is clear that the 1858 Treaty does not establish, in its Article VI, any special régime for “official” (or “public”) vessels.

The only criterion provided for by Article VI is based not on the public or private ownership of the vessel but on the purpose of navigation: either it is undertaken for the “purposes of commerce” and benefits from the freedom established; or it is undertaken for purposes other than “commerce” and it does not. From this point of view the distinction between public and private vessels is devoid of legal significance. In the same way that a part of private navigation is not covered by the “perpetual right of free navigation” (in the case of pleasure craft for example), conversely, it is not inconceivable that “public vessels” might sail for the “purposes of commerce”, if they met the conditions on which such a characterization depends.

81. In reality, when debating the question of “official vessels” the Parties particularly had in mind those used by the Costa Rican authorities for the exercise of public order activities — such as the police and customs — or for the provision of public services having no object of financial gain and therefore no commercial character.

82. As has already been noted (paragraph 49 above), the Cleveland Award only came to a decision regarding Costa Rican vessels of war and revenue service vessels, by denying the former the right to navigate on the San Juan and authorizing the navigation of the latter “as may be related and connected to her enjoyment of the ‘purposes of commerce’ accorded to her in said article [Article VI] or as may be necessary to the protection of said enjoyment”. Nothing can thus be inferred from this regarding the navigation of other Costa Rican official vessels.

83. In the light of the foregoing, the Court is of the opinion that, as a general rule, the navigation of Costa Rican vessels for the purposes of public order activities and public services with no object of financial gain, in particular police vessels, lies outside the scope of Article VI of the 1858 Treaty, with the exception of revenue service vessels, the question of which was settled by the 1888 arbitration. Further, it is not convinced that a right for Costa Rica to sail such vessels can be inferred from Article IV of the Treaty, according to which “Costa Rica shall also be obliged, for the part that belongs to her of the banks of the San Juan River ... to contribute to the security thereof in the same manner as the two Republics shall contribute to its defence in case of aggression from abroad”. This provision, contrary to what Costa Rica contends, does not accord it any right of navigation in ordinary circumstances. It places an obligation upon it to “safeguard” the river from within its own territory.

Moreover, the Court considers that, in any event, Costa Rica has not proved its assertion that river transport is the only means to supply its police posts located along the river bank or to carry out the relief of the personnel stationed in them. Indeed, the materials in the case file show
that the posts in question are accessible, for example, by using the Costa Rican rivers communicating with the San Juan, in proximity of which they are located.

Lastly, for the reasons set out above (paragraph 40), Costa Rica cannot invoke the “Cuadra-Lizano” Joint Communiqué of 30 July 1998 in order to claim a right to navigate with official vessels which are armed or transporting arms.

84. Nonetheless, the Court is of the opinion that the reasons given above (in paragraphs 78 and 79) with regard to private vessels which navigate the river in order to meet the essential requirements of the population living on the river bank, where expeditious transportation is a condition for meeting those requirements, are also valid for certain Costa Rican official vessels which in specific situations are used solely for the purpose of providing that population with what it needs in order to meet the necessities of daily life, as defined in paragraph 78 above.

Consequently, this particular aspect of navigation by “official vessels” is covered by the right of navigation defined in paragraph 79 above: this right is not guaranteed by Article VI of the Treaty but is inferred from the provisions of the Treaty as a whole, in particular from the fixing of the boundary along the river bank.

III. NICARAGUA’S POWER OF REGULATION OF NAVIGATION

85. In this part of the Judgment the Court addresses the power of Nicaragua to regulate the navigation of that part of the San Juan River in which Costa Rica has the right of navigation as determined in Part II of the Judgment. In respect of matters lying outside the scope of Costa Rica’s right of free navigation, and in respect of other parts of the river, which are not subject to the régime of the 1858 Treaty, Nicaragua, as sovereign, has complete power of regulation.

1. General Observations

86. In their written pleadings, the Parties disagreed about the extent or even the very existence of the power of Nicaragua to regulate the use of the river so far as Costa Rica was concerned. In the course of the oral proceedings that difference of positions largely disappeared. However, the Parties continue to disagree on the extent of the regulatory power of Nicaragua and on certain measures which Nicaragua has adopted and continues to apply.

In the first part of the oral proceedings, Nicaragua states that whatever the precise nature and extent of Costa Rica’s rights within the provisions of the Treaty of Limits and the Cleveland Award, Nicaragua “must have the exclusive competence to exercise the following regulatory powers: (a) the protection and maintenance of the right of navigation, that is to say, the power to maintain public order and standards of safety in respect of navigation; (b) the protection of the border, including resort to immigration procedures in respect of foreign nationals navigating in Nicaragua’s territorial waters; (c) the exercise of normal police powers; (d) the protection of the environment and natural resources; and (e) the maintenance of the treaty provisions prescribing the conditions of navigation in accordance with the Treaty”.

Costa Rica, while accepting that Nicaragua does have a power of regulation, asserts that Nicaragua’s sovereignty over the San Juan must be seen as a part — an important part — of the fluvial régime established in 1858 and that the regulations enacted by Nicaragua must not infringe Costa Rica’s perpetual right of free navigation. It states that the regulations must be lawful, public, reasonable, non-arbitrary and non-discriminatory and adopted to fulfil a legitimate public purpose. Nicaragua accepts Costa Rica’s statement of principle.

The Parties disagree whether Nicaragua is obliged to notify Costa Rica about the regulations it has made or to consult Costa Rica in advance about proposed regulations. The Court rules on these differences in the course of this part of the Judgment.

(a) Characteristics

87. For essentially the reasons given by the Parties, the Court concludes that Nicaragua has the power to regulate the exercise by Costa Rica of its right to freedom of navigation under the 1858 Treaty. That power is not unlimited, being tempered by the rights and obligations of the Parties. A regulation in the present case is to have the following characteristics:

(1) it must only subject the activity to certain rules without rendering impossible or substantially impeding the exercise of the right of free navigation;

(2) it must be consistent with the terms of the Treaty, such as the prohibition on the unilateral imposition of certain taxes in Article VI;

(3) it must have a legitimate purpose, such as safety of navigation, crime prevention and public safety and border control;

(4) it must not be discriminatory and in matters such as timetabling must apply to Nicaraguan vessels if it applies to Costa Rican ones;

(5) it must not be unreasonable, which means that its negative impact on the exercise of the right in question must not be manifestly excessive.
International Court of Justice

Gabčikovo-Nagymaros Project (Hungary/Slovakia) Judgment

*I.C.J. Reports 1997*, paras. 15-20, 46-115
Czechoslovakia and with regard to which the Slovak Republic is the successor State, has never ceased to be in force and so remains, and that the notification of 20 May 1992 of purported termination of the Treaty by the Republic of Hungary was without legal effect.

2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčíkovo Project for which the Treaty attributes responsibility to the Republic of Hungary;

3. That the Czech and Slovak Federal Republic was entitled, in November 1991, to proceed with the provisional solution and to put this system into operation from October 1992, and that the Slovak Republic was, and remains, entitled to continue the operation of this system;

4. That the Republic of Hungary shall therefore cease forthwith all conduct which impedes the bona fide implementation of the 1977 Treaty and shall take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty, subject to any amendments which may be agreed between the Parties;

5. That the Republic of Hungary shall give appropriate guarantees that it will not impede the performance of the Treaty, and the continued operation of the system;

6. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary shall, in addition to immediately resuming performance of its Treaty obligations, pay to the Slovak Republic full compensation for the loss and damage, including loss of profits, caused by these breaches together with interest thereon;

7. That the Parties shall immediately begin negotiations with a view, in particular, to adopting a new timetable and appropriate measures for the implementation of the Treaty by both Parties, and to fixing the amount of compensation due by the Republic of Hungary to the Slovak Republic; and that, if the Parties are unable to reach an agreement within six months, either one of them may request the Court to render an additional judgment to determine the modalities for executing its judgment.

* * *

15. The present case arose out of the signature, on 16 September 1977, by the Hungarian People's Republic and the Czechoslovak People's Republic, of a treaty “concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks” (hereinafter called the “1977 Treaty”). The names of the two contracting States have varied over the years; hereinafter they will be referred to as Hungary and Czechoslovakia. The 1977 Treaty entered into force on 30 June 1978. It provides for the construction and operation of a System of Locks by the parties as a “joint investment”. According to its Preamble, the barrage system was designed to attain

the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water

resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties”.

The joint investment was thus essentially aimed at the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube and the protection of the areas along the banks against flooding. At the same time, by the terms of the Treaty, the contracting parties undertook to ensure that the quality of water in the Danube was not impaired as a result of the Project, and that compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks would be observed.

16. The Danube is the second longest river in Europe, flowing along or across the borders of nine countries in its 2,860-kilometre course from the Black Forest eastwards to the Black Sea. For 142 kilometres, it forms the boundary between Slovakia and Hungary. The sector with which this case is concerned is a stretch of approximately 200 kilometres, between Bratislava in Slovakia and Budapest in Hungary. Below Bratislava, the river gradient decreases markedly, creating an alluvial plain of gravel and sand sediment. This plain is delimited to the north-east, in Slovak territory, by the Malý Danube and to the south-west, in Hungarian territory, by the Mosoni Danube. The boundary between the two States is constituted, in the major part of that region, by the main channel of the river. The area lying between the Malý Danube and that channel, in Slovak territory, constitutes the Zitný Ostrov; the area between the main channel and the Mosoni Danube, in Hungarian territory, constitutes the Szegőkő. Cunovo and, further downstream, Gabčíkovo, are situated in this sector of the river on Slovak territory. Cunovo on the right bank and Gabčíkovo on the left. Further downstream, after the confluence of the various branches, the river enters Hungarian territory and the topography becomes hilly. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Szentendre before reaching Budapest (see sketch-map No. 1, p. 19 below).
Only by international co-operation could action be taken to alleviate these problems. Water management projects along the Danube have frequently sought to combine navigational improvements and flood protection with the production of electricity through hydroelectric power plants. The potential of the Danube for the production of hydroelectric power has been extensively exploited by some riparian States. The history of attempts to harness the potential of the particular stretch of the river at issue in these proceedings extends over a 25-year period culminating in the signature of the 1977 Treaty.

18. Article 1, paragraph 1, of the 1977 Treaty describes the principal works to be constructed in pursuance of the Project. It provided for the building of two series of locks, one at Gabčíkovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute "a single and indivisible operational system of works" (see sketch-map No. 2, p. 21 below). The Court will subsequently have occasion to revert in more detail to those works, which were to comprise, inter alia, a reservoir upstream of Dunakiliti, in Hungarian and Czechoslovak territory; a dam at Dunakiliti, in Hungarian territory; a bypass canal, in Czechoslovak territory, on which was to be constructed the Gabčíkovo System of Locks (together with a hydroelectric power plant with an installed capacity of 720 megawatts (MW)); the deepening of the bed of the Danube downstream of the place at which the bypass canal was to rejoin the old bed of the river; a reinforcement of flood-control works along the Danube upstream of Nagymaros; the Nagymaros System of Locks, in Hungarian territory (with a hydroelectric power plant of a capacity of 158 MW); and the deepening of the bed of the Danube downstream.

Article 1, paragraph 4, of the Treaty further provided that the technical specifications concerning the system would be included in the "Joint Contractual Plan" which was to be drawn up in accordance with the Agreement signed by the two Governments for this purpose on 6 May 1976; Article 4, paragraph 1, for its part, specified that the joint investment [would] be carried out in conformity with the joint contractual plan.

According to Article 3, paragraph 1:

"Operations connected with the realization of the joint investment and with the performance of tasks relating to the operation of the System of Locks shall be directed and supervised by the Governments of the Contracting Parties through . . . ( . . . 'government delegates')."

Those delegates had, inter alia, "to ensure that construction of the System of Locks is . . . carried out in accordance with the approved joint contractual plan and the project work schedule". When the works were brought into operation, they were moreover "To establish the operating
and operational procedures of the System of Locks and ensure compliance therewith."

Article 4, paragraph 4, stipulated that:

"Operations relating to the joint investment [should] be organized by the Contracting Parties in such a way that the power generation plants [would] be put into service during the period 1986-1990."

Article 5 provided that the cost of the joint investment would be borne by the contracting parties in equal measure. It specified the work to be carried out by each one of them. Article 8 further stipulated that the Dunakiliti dam, the bypass canal and the two series of locks at Gabčíkovo and Nagymaros would be "jointly owned" by the contracting parties "in equal measure". Ownership of the other works was to be vested in the State on whose territory they were constructed.

The parties were likewise to participate in equal measure in the use of the system put in place, and more particularly in the use of the base-load and peak-load power generated at the hydroelectric power plants (Art. 9).

According to Article 10, the works were to be managed by the State on whose territory they were located, "in accordance with the jointly-agreed operating and operational procedures"; while Article 12 stipulated that the operation, maintenance (repair) and reconstruction costs of jointly owned works of the System of Locks were also to be borne jointly by the contracting parties in equal measure.

According to Article 14,

"The discharge specified in the water balance of the approved joint contractual plan shall be ensured in the bed of the Danube [between Dunakiliti and Sap] unless natural conditions or other circumstances temporarily require a greater or smaller discharge."

Paragraph 3 of that Article was worded as follows:

"In the event that the withdrawal of water in the Hungarian-Czechoslovak section of the Danube exceeds the quantities of water specified in the water balance of the approved joint contractual plan and the excess withdrawal results in a decrease in the output of electric power, the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced."

Article 15 specified that the contracting parties

"shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks".
Article 16 set forth the obligations of the contracting parties concerning the maintenance of the bed of the Danube.

Article 18, paragraph 1, provided as follows:

“The Contracting Parties, in conformity with the obligations previously assumed by them, and in particular with article 3 of the Convention concerning the regime of navigation on the Danube, signed at Belgrade on 18 August 1948, shall ensure uninterrupted and safe navigation on the international fairway both during the construction and during the operation of the System of Locks.”

It was stipulated in Article 19 that:

“The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks.”

Article 20 provided for the contracting parties to take appropriate measures, within the framework of their national investments, for the protection of fishing interests in conformity with the Convention concerning Fishing in the Waters of the Danube, signed at Bucharest on 29 January 1958.

According to Article 22, paragraph 1, of the Treaty, the contracting parties had, in connection with the construction and operation of the System of Locks, agreed on minor revision to the course of the State frontier between them as follows:

“(d) In the Dunakiliti-Hrušov head-water area, the State frontier shall run from boundary point 161.V.O.d. to boundary stone No. 1.5. in a straight line in such a way that the territories affected, to the extent of about 10-10 hectares shall be offset between the two States.”

It was further provided, in paragraph 2, that the revision of the State frontier and the exchange of territories so provided for should be effected “by the Contracting Parties on the basis of a separate treaty”. No such treaty was concluded.

Finally, a dispute settlement provision was contained in Article 27, worded as follows:

1. The settlement of disputes in matters relating to the realization and operation of the System of Locks shall be a function of the government delegates.

2. If the government delegates are unable to reach agreement on the matters in dispute, they shall refer them to the Governments of the Contracting Parties for decision.”

19. The Joint Contractual Plan, referred to in the previous paragraph, set forth, on a large number of points, both the objectives of the system and the characteristics of the works. In its latest version it specified in paragraph 6.2 that the Gabčíkovo bypass canal would have a discharge capacity of 4,000 cubic metres per second (m³/s). The power plant would include “Eight . . . turbines with 9,20 m diameter running wheels” and would “mainly operate in peak-load time and continuously during high water”. This type of operation would give an energy production of 2,650 gigawatt-hours (GWh) per annum. The Plan further stipulated in paragraph 4.4.2:

“The low waters are stored every day, which ensures the peak-load time operation of the Gabčíkovo hydropower plant . . . a minimum of 50 m³/s additional water is provided for the old bed of the Danube besides the water supply of the branch system.”

The Plan further specified that, in the event that the discharge into the bypass canal exceeded 4,000-4,500 m³/s, the excess amounts of water would be channelled into the old bed. Lastly, according to paragraph 7.7 of the Plan:

“The common operational regulation stipulates that concerning the operation of the Dunakiliti barrage in the event of need during the growing season 200 m³/s discharge must be released into the old Danube bed, in addition to the occasional possibilities for raising the bed.”

The Joint Contractual Plan also contained “Preliminary Operating and Maintenance Rules”, Article 23 of which specified that “The final operating rules [should] be approved within a year of the setting into operation of the system.” (Joint Contractual Plan, Summary Documentation, Vol. O-I-A.)

Nagymaros, with six turbines, was, according to paragraph 6.3 of the Plan, to be a “hydropower station . . . type of a basic power-station capable of operating in peak-load time for five hours at the discharge interval between 1,000-2,500 m³/s per day. The intended annual production was to be 1,025 GWh (i.e., 38 percent of the production of Gabčíkovo, for an installed power only equal to 21 percent of that of Gabčíkovo).

20. Thus, the Project was to have taken the form of an integrated joint project with the two contracting parties on an equal footing in respect of the financing, construction and operation of the works. Its single and indivisible nature was to have been realized through the Joint Contractual Plan which complemented the Treaty. In particular, Hungary would have had control of the sluices at Dunakiliti and the works at Nagymaros, whereas Czechoslovakia would have had control of the works at Gabčíkovo.

21. The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977, at
tion of the provisions of Article 27 of the 1977 Treaty (see paragraph 18 above), which it submits required prior recourse to the machinery for dispute settlement provided for in that Article.

* * *

46. The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62 (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports, 1971, p. 47,* and *Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 18,* see also *Interpretation of the Agreement of 23 March 1934 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980,* pp. 95-96.)*

Neither has the Court lost sight of the fact that the Vienna Convention is in any event applicable to the Protocol of 6 February 1989 whereby Hungary and Czechoslovakia agreed to accelerate completion of the works relating to the Gabčíkovo-Nagymaros Project.

47. Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.

Thus the Vienna Convention of 1969 on the Law of Treaties confines itself to defining — in a limitative manner — the conditions in which a treaty may lawfully be denounced or suspended; while the effects of a denunciation or suspension seen as not meeting those conditions are, on the contrary, expressly excluded from the scope of the Convention by operation of Article 73. It is moreover well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect (cf. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1980,* p. 228; and see Article 17 of the Draft Articles on State Responsibility provisionally adopted by the International Law Commission on first reading, *Yearbook of the International Law Commission, 1980, Vol. II, Part 2,* p. 32).

48. The Court cannot accept Hungary’s argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary’s conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as “single and indivisible”.

The Court moreover observes that, when it invoked the state of necessity in an effort to justify that conduct, Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful. The state of necessity claimed by Hungary — supposing it to have been established — thus could not permit of the conclusion that, in 1989, it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did. Lastly, the Court points out that Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.

* * *

49. The Court will now consider the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments.

50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading. That provision is worded as follows:

“Article 33. State of Necessity

I. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law, or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity.” (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 34.)

In its Commentary, the Commission defined the “state of necessity” as being

“the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State” (ibid., para. 1).

I concluded that “the notion of state of necessity is... deeply rooted in general legal thinking” (ibid., p. 49, para. 31).

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft

“in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception — and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness...” (ibid., p. 51, para. 40).

Thus, according to the Commission, the state of necessity 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.

52. In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an “essential interest” of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a “grave and imminent peril”; the act being challenged must have been the “only means” of safeguarding that interest; that act must not have “seriously impair[ed] an essential interest” of the State towards which the obligation existed; and the State which is the author of that act must not have “contributed to the occurrence of the state of necessity.” Those conditions reflect customary international law.

The Court will now endeavour to ascertain whether those conditions had been met at the time of the suspension and abandonment, by Hungary, of the works that it was to carry out in accordance with the 1977 Treaty.

53. The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an “essential interest” of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.

The Commission, in its Commentary, indicated that one should not, in that context, reduce an “essential interest” to a matter only of the “existence” of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, “a grave danger to... the ecological preservation of all or some of [the] territory [of a State]” (ibid., p. 55, para. 3); and specified, with reference to State practice, that “It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an ‘essential interest’ of all States.” (ibid., p. 39, para. 14.)

The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:

“the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.” (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, pp. 241-242, para. 29.)

54. The verification of the existence, in 1989, of the “peril” invoked by Hungary, of its “grave and imminent” nature, as well as of the absence of any “means” to respond to it, other than the measures taken by Hungary to suspend and abandon the works, are all complex processes.
As the Court has already indicated (see paragraphs 33 et seq.), Hungary on several occasions expressed, in 1989, its "uncertainties" as to the ecological impact of putting in place the Gabčíkovo-Nagymaros barrage system, which is why it asked insistently for new scientific studies to be carried out.

The Court considers, however, that, serious though these uncertainties might have been, they could not, alone, establish the objective existence of a "peril" in the sense of a component element of a state of necessity. The word "peril" certainly evokes the idea of "risk"; that is precisely what distinguishes "peril" from material damage. But a state of necessity could not exist without a "peril" duly established at the relevant point in time; the mere apprehension of a possible "peril" could not suffice in that respect. It could moreover hardly be otherwise, when the "peril" constituting the state of necessity has at the same time to be "grave" and "imminent." "Imminence" is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility." As the International Law Commission emphasized in its commentary, the "extremely grave and imminent" peril must "have been a threat to the interest at the actual time" (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.

The Hungarian argument on the state of necessity could not convince the Court unless it was at least proven that a real, "grave" and "imminent" "peril" existed in 1989 and that the measures taken by Hungary were the only possible response to it. Both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments. The Court has given most careful attention to this material, in which the Parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that, as will be shown below, it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.

The Court will begin by considering the situation at Nagymaros. As has already been mentioned (see paragraph 40), Hungary maintained that, if the works at Nagymaros had been carried out as planned, the environment — and in particular the drinking water resources — in the area would have been exposed to serious dangers on account of problems linked to the upstream reservoir on the one hand and, on the other, the risks of erosion of the riverbed downstream.

The Court notes that the dangers ascribed to the upstream reservoir were mostly of a long-term nature and, above all, that they remained uncertain. Even though the Joint Contractual Plan envisaged that the Gabčíkovo power plant would "mainly operate in peak-load time and continuously during high water", the final rules of operation had not yet been determined (see paragraph 19 above); however, any dangers associated with the putting into service of the Nagymaros portion of the Project would have been closely linked to the extent to which it was operated in peak mode and to the modalities of such operation. It follows that, even if it could have been established — which, in the Court's appreciation of the evidence before it, was not the case — that the reservoir would ultimately have constituted a "grave peril" for the environment in the area, one would be bound to conclude that the peril was not "imminent" at the time at which Hungary suspended and then abandoned the works relating to the dam.

With regard to the lowering of the riverbed downstream of the Nagymaros dam, the danger could have appeared at once more serious and more pressing, in so far as it was the supply of drinking water to the city of Budapest which would have been affected. The Court would however point out that the bed of the Danube in the vicinity of Szentendre had already been deepened prior to 1980 in order to extract building materials, and that the river had from that time attained, in that sector, the depth required by the 1977 Treaty. The peril invoked by Hungary had thus already materialized to a large extent for a number of years, so that it could not, in 1989, represent a peril arising entirely out of the project.

The Court would stress, however, that, even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. It could, for example, have proceeded regularly to discharge gravel out of the river in the downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The two Parties expressly recognized that the possibility remained open even though — and this is not determinative of the state of necessity — the purification of the river water, like the other measures envisaged, clearly would have been a more costly technique.

The Court now comes to the Gabčíkovo sector. It will recall that Hungary's concerns in this sector related on the one hand to the quality of the surface water in the Dunakiliti reservoir, with its effects on the quality of the groundwater in the region, and on the other hand, more generally, to the level, movement and quality of both the surface water and the groundwater in the whole of the Széchető, with their effects on the fauna and flora in the alluvial plain of the Danube (see paragraph 40 above).

Whether in relation to the Dunakiliti site or to the whole of the Széchető, the Court finds here again, that the peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. As Hungary itself acknowledges, the damage that it appre-
hended had primarily to be the result of some relatively slow natural processes, the effects of which could not easily be assessed.

Even if the works were more advanced in this sector than at Nagymaros, they had not been completed in July 1989 and, as the Court explained in paragraph 34 above, Hungary expressly undertook to carry on with them, early in June 1989. The report dated 23 June 1989 by the ad hoc Committee of the Hungarian Academy of Sciences, which was also referred to in paragraph 35 of the present Judgment, does not express any awareness of an authenticated peril — even in the form of a definite peril, whose realization would have been inevitable in the long term — when it states that:

“The measuring results of an at least five-year monitoring period following the completion of the Gabčíkovo construction are indispensable to the trustworthy prognosis of the ecological impacts of the barrage system. There is undoubtedly a need for the establishment and regular operation of a comprehensive monitoring system, which must be developed more than at present. The examination of biological indicator objects that can sensibly indicate the changes happening in the environment, neglected till today, have to be included.”

The report concludes as follows:

“It can be stated, that the environmental, ecological and water quality impacts were not taken into account properly during the design and construction period until today. Because of the complexity of the ecological processes and lack of the measured data and the relevant calculations the environmental impacts cannot be evaluated.

The data of the monitoring system newly operating on a very limited area are not enough to forecast the impacts probably occurring over a longer term. In order to widen and to make the data more frequent a further multi-year examination is necessary to decrease the further degradation of the water quality playing a dominant role in this question. The expected water quality influences equally the aquatic ecosystems, the soils and the recreational and tourist land-use.”

The Court also notes that, in these proceedings, Hungary acknowledged that, as a general rule, the quality of the Danube waters had improved over the past 20 years, even if those waters remained subject to hypotrophic conditions.

However “grave” it might have been, it would accordingly have been difficult, in the light of what is said above, to see the alleged peril as sufficiently certain and therefore “imminent” in 1989.

The Court moreover considers that Hungary could, in this context also, have resorted to other means in order to respond to the dangers that it apprehended. In particular, within the framework of the original Project, Hungary seemed to be in a position to control at least partially the diversion of the water between the bypass canal, the old bed of the Danube and the side-arms. It should not be overlooked that the Dunakiliti dam was located in Hungarian territory and that Hungary could construct the works needed to regulate flows along the old bed of the Danube and the side-arms. Moreover, it should be borne in mind that Article 14 of the 1977 Treaty provided for the possibility that each of the parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan, while making it clear that, in such an event, “the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced”.

57. The Court concludes from the foregoing that, with respect to both Nagymaros and Gabčíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they “imminent”, and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation “characterized so aptly by the maxim summum jus summum injuria” (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 31).

Moreover, the Court notes that Hungary decided to conclude the 1977 Treaty, a Treaty which — whatever the political circumstances prevailing at the time of its conclusion — was treated by Hungary as valid and in force until the date declared for its termination in May 1992. As can be seen from the material before the Court, a great many studies of a scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under the Treaty. Hungary contended before the Court that those studies had been inadequate and that the state of knowledge at that time was not such as to make possible a complete evaluation of the ecological implications of the Gabčíkovo-Nagymaros Project. It is nonetheless the case that, although the principal object of the 1977 Treaty was the construction of a System of Locks for the production of electricity, improvement of navigation on the Danube and protection against flooding, the need to ensure the protection of the environment had not escaped the parties, as can be seen from Articles 15, 19 and 20 of the Treaty.

What is more, the Court cannot fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. In 1983, Hungary asked that the works under the Treaty should go forward more slowly,
for reasons that were essentially economic but also, subsidiarily, related to ecological concerns. In 1989, when, according to Hungary itself, the state of scientific knowledge had undergone a significant development, it asked for the works to be speeded up, and then decided, three months later, to suspend them and subsequently to abandon them. The Court is not however unaware that profound changes were taking place in Hungary in 1989, and that, during that transitory phase, it might have been more than usually difficult to co-ordinate the different points of view prevailing from time to time.

The Court infers from all these elements that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

58. It follows that the Court has no need to consider whether Hungary, by proceeding as it did in 1989, "seriously impaired an essential interest" of Czechoslovakia, within the meaning of the aforementioned Article 33 of the Draft of the International Law Commission — a finding which does not in any way prejudice the damage Czechoslovakia claims to have suffered on account of the position taken by Hungary.

Nor does the Court need to examine the argument put forward by Hungary, according to which certain breaches of Articles 15 and 19 of the 1977 Treaty, committed by Czechoslovakia even before 1989, contributed to the purported state of necessity; and neither does it have to reach a decision on the argument advanced by Slovakia, according to which Hungary breached the provisions of Article 27 of the Treaty, in 1989, by taking unilateral measures without having previously had recourse to the machinery of dispute settlement for which that Article provides.

* * *

59. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (a), of the Special Agreement (see paragraph 27 above), finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

* * *

60. By the terms of Article 2, paragraph 1 (b), of the Special Agreement, the Court is asked in the second place to decide whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course)."

61. The Court will recall that, as soon as Hungary suspended the works at Nagymaros on 13 May 1989 and extended that suspension to certain works to be carried out at Dunakilili, Czechoslovakia informed Hungary that it would feel compelled to take unilateral measures if Hungary were to persist in its refusal to resume the works. This was inter alia expressed as follows in Czechoslovakia's Note Verbale of 30 October 1989 to which reference is made in paragraph 37 above:

"Should the Republic of Hungary fail to meet its liabilities and continue unilaterally to breach the Treaty and related legal documents then the Czechoslovak party will be forced to commence a provisional, substitute project on the territory of the Czechoslovak Socialist Republic in order to prevent further losses. Such a provisional project would entail directing as much water into the Gabčíkovo dam as agreed in the Joint Construction Plan."

As the Court has already indicated (see paragraph 23), various alternative solutions were contemplated by Czechoslovakia. In September 1990, the Hungarian authorities were advised of seven hypothetical alternatives defined by the firm of Hydroconsult of Bratislava. All of these solutions implied an agreement between the parties, with the exception of one variant, subsequently known as "Variant C", which was presented as a provisional solution which could be brought about without Hungarian co-operation. Other contacts between the parties took place, without leading to a settlement of the dispute. In March 1991, Hungary acquired information according to which perceptible progress had been made in finalising the planning of Variant C; it immediately gave expression to the concern this caused.

62. Inter-governmental negotiation meetings were held on 22 April and 15 July 1991. On 22 April 1991, Hungary proposed the suspension, until September 1993, of all the works begun on the basis of the 1977 Treaty, on the understanding that the parties undertook to abstain from any unilateral action, and that joint studies would be carried out in the interval. Czechoslovakia maintained its previous position according to which the studies contemplated should take place within the framework of the 1977 Treaty and without any suspension of the works.

On 15 July 1991, Czechoslovakia confirmed its intention of putting the
Gabcikovo power plant into service and indicated that the available data enabled the effects of four possible scenarios to be assessed, each of them requiring the co-operation of the two Governments. At the same time, it proposed the setting up of a tripartite committee of experts (Hungary, Czechoslovakia, European Communities) which would help in the search for technical solutions to the problems arising from the entry into operation of the Gabcikovo sector. Hungary, for its part, took the view that:

"In the case of a total lack of understanding the so-called C variation or 'theoretical opportunity' suggested by the Czechoslovak party as a unilateral solution would be such a grave transgression of Hungarian territorial integrity and International Law for which there is no precedent even in the practices of the formerly socialist countries for the past 30 years";

It further proposed the setting up of a bilateral committee for the assessment of environmental consequences, subject to work on Czechoslovak territory being suspended.

63. By a letter dated 24 July 1991, the Government of Hungary communicated the following message to the Prime Minister of Slovakia:

"Hungarian public opinion and the Hungarian Government anxiously and attentively follows the [Czechoslovakian] press reports of the unilateral steps of the Government of the Slovak Republic in connection with the barrage system.

The preparatory works for diverting the water of the Danube near the Dunakiliti dam through unilaterally are also alarming. These steps are contrary to the 1977 Treaty and to the good relationship between our nations."

On 30 July 1991 the Slovak Prime Minister informed the Hungarian Prime Minister of

"the decision of the Slovak Government and of the Czech and Slovak Federal Government to continue work on the Gabcikovo power plant, as a provisional solution, which is aimed at the commencement of operations on the territory of the Czech and Slovak Federal Republic".

On the same day, the Government of Hungary protested, by a Note Verbale, against the filling of the headrace canal by the Czechoslovak construction company, by pumping water from the Danube. By a letter dated 9 August 1991 and addressed to the Prime Minister of Slovakia, the Hungarian authorities strenuously protested against "any unilateral step that would be in contradiction with the interests of our [two] nations and international law" and indicated that they considered it "very important [to] receive information as early as possible on the details of the provisional solution". For its part, Czechoslovakia, in a Note Verbale dated 27 August 1991, rejected the argument of Hungary that the continuation of the works under those circumstances constituted a violation of international law, and made the following proposal:

"Provided the Hungarian side submits a concrete technical solution aimed at putting into operation the Gabcikovo system of locks and a solution of the system of locks based on the 1977 Treaty in force and the treaty documents related to it, the Czechoslovak side is prepared to implement the mutually agreed solution."

64. The construction permit for Variant C was issued on 30 October 1991. In November 1991 construction of a dam started at Cunovo, where both banks of the Danube are on Czechoslovak (now Slovak) territory.

In the course of a new inter-governmental negotiation meeting, on 2 December 1991, the parties agreed to entrust the task of studying the whole of the question of the Gabcikovo-Nagymaros Project to a Joint Expert Committee which Hungary agreed should be complemented with an expert from the European Communities. However, whereas, for Hungary, the work of that Committee would have been meaningless if Czechoslovakia continued construction of Variant C, for Czechoslovakia, the suspension of the construction, even on a temporary basis, was unacceptable.

That meeting was followed by a large number of exchanges of letters between the parties and various meetings between their representatives at the end of 1991 and early in 1992. On 23 January 1992, Czechoslovakia expressed its readiness "to stop work on the provisional solution and continue the construction upon mutual agreement" if the tripartite committee of experts whose constitution it proposed, and the results of the test operation of the Gabcikovo part, were to "confirm that negative ecological effects exceed its benefits". However, the positions of the parties were by then comprehensively defined, and would scarcely develop any further. Hungary considered, as it indicated in a Note Verbale of 14 February 1992, that Variant C was in contravention

"of [the Treaty of 1977] ... and the convention ratified in 1976 regarding the water management of boundary waters.

... with the principles of sovereignty, territorial integrity, with the inviolability of State borders, as well as with the general customary norms on international rivers and the spirit of the 1948 Belgrade Danube Convention";

and the suspension of the implementation of Variant C was, in its view, a prerequisite. As for Czechoslovakia, it took the view that recourse to Variant C had been rendered inevitable, both for economic and ecologi-
of independent experts, and it should be emphasized that, according to the Special Agreement, "Variant C" must be taken to include the consequences "on water and navigation course" of the dam closing off the bed of the Danube.

In the section headed "Variant C Structures and Status of Ongoing Work", one finds, in the report of the Working Group, the following passage:

"In both countries the original structures for the Gabčíkovo scheme are completed except for the closure of the Danube river at Dunakiliti and the

(1) Completion of the hydropower station (installation and testing of turbines) at Gabčíkovo.

Variant C consists of a complex of structures, located in Czechoslovakia... The construction of these are planned for two phases. The structures include:

(2) By-pass weir controlling the flow into the river Danube.
(3) Dam closing the Danubian river bed.
(4) Floodplain weir (weir in the inundation).
(5) Intake structure for the Mosoni Danube.
(6) Intake structure in the power canal.
(7) Earth barrages/dykes connecting structures.
(8) Ship lock for smaller ships (15 m x 80 m).
(9) Spillway weir.
(10) Hydropower station.

The construction of the structures 1-7 are included in Phase 1, while the remaining 8-10 are a part of Phase 2 scheduled for construction 1993-1995."

* * *

67. Czechoslovakia had maintained that proceeding to Variant C and putting it into operation did not constitute internationally wrongful acts. Slovakia adopted this argument. During the proceedings before the Court, Slovakia contended that Hungary's decision to suspend and subsequently abandon the construction of works at Dunakiliti had made it impossible for Czechoslovakia to carry out the works as initially contemplated by the 1977 Treaty and that the latter was therefore entitled to proceed with a solution which was as close to the original Project as possible. Slovakia invoked what it described as a "principle of approximate application" to justify the construction and operation of Variant C. It explained that this was the only possibility remaining to it "of fulfilling not only the purposes of the 1977 Treaty, but the continuing obligation to implement it in good faith".

68. Slovakia also maintained that Czechoslovakia was under a duty to mitigate the damage resulting from Hungary's unlawful actions. It claimed
that a State which is confronted with a wrongful act of another State is under an obligation to minimize its losses and, thereby, the damages claimable against the wrongdoer State. It argued furthermore that “Mitigation of damages is also an aspect of the performance of obligations in good faith.” For Slovakia, these damages would have been immense in the present case, given the investments made and the additional economic and environmental prejudice which would have resulted from the failure to complete the works at Dunajská Streda and to put the system into operation. For this reason, Czechoslovakia was not only entitled, but even obliged, to implement Variant C.

69. Although Slovakia maintained that Czechoslovakia’s conduct was lawful, it argued in the alternative that, even were the Court to find otherwise, the putting into operation of Variant C could still be justified as a countermeasure.

70. Hungary for its part contended that Variant C was a material breach of the 1977 Treaty. It considered that Variant C also violated Czechoslovakia’s obligations under other treaties, in particular the Convention of 31 May 1938 on the Regulation of Water Management Issues of Boundary Waters concluded at Budapest, and its obligations under general international law.

71. Hungary contended that Slovakia’s arguments rested on an erroneous presentation of the facts and the law. Hungary denied, inter alia, having committed the slightest violation of its treaty obligations which could have justified the putting into operation of Variant C. It considered that “no such rule” of “approximate application” of a treaty exists in international law; as to the argument derived from “mitigation of damages,” it claimed that this has to do with the quantification of loss, and could not serve to excuse conduct which is substantively unlawful. Hungary furthermore stated that Variant C did not satisfy the conditions required by international law for countermeasures, in particular the condition of proportionality.

**

72. Before dealing with the arguments advanced by the Parties, the Court wishes to make clear that it is aware of the serious problems with which Czechoslovakia was confronted as a result of Hungary’s decision to relinquish most of the construction of the System of Locks for which it was responsible by virtue of the 1977 Treaty. Vast investments had been made, the construction at Gabčíkovo was all but finished, the bypass canal was completed, and Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect in completing work on the tailrace canal. It emerges from the report, dated 31 October 1992, of the tripartite fact-finding mission the Court has referred to in paragraph 24 of the present Judgment, that not using the system would have led to considerable financial losses, and that it could have given rise to serious problems for the environment.

73. Czechoslovakia repeatedly denounced Hungary’s suspension and abandonment of works as a fundamental breach of the 1977 Treaty and consequently could have invoked this breach as a ground for terminating the Treaty; but this would not have brought the project any nearer to completion. It therefore chose to insist on the implementation of the Treaty by Hungary, and on many occasions called upon the latter to resume performance of its obligations under the Treaty.

When Hungary steadfastly refused to do so—although it had expressed its willingness to pay compensation for damage incurred by Czechoslovakia—and when negotiations stalled owing to the diametrically opposed positions of the parties, Czechoslovakia decided to put the Gabčíkovo system into operation unilaterally, exclusively under its own control and for its own benefit.

74. That decision went through various stages and, in the Special Agreement, the Parties asked the Court to decide whether Czechoslovakia “was entitled to proceed, in November 1991” to Variant C, and “to put it into operation from October 1992.”

75. With a view to justifying those actions, Slovakia invoked what it described as “the principle of approximate application,” expressed by Judge Sir Hersch Lauterpacht in the following terms:

“It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument—not to change it.” (Admissibility of Petitions by the Committee on South West Africa, I.C.J. Reports 1956, separate opinion of Sir Hersch Lauterpacht, p. 46.)

It claimed that this is a principle of international law and a general principle of law.

76. It is not necessary for the Court to determine whether there is a principle of international law or a general principle of law of “approximate application” because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty.

77. As the Court has already observed, the basic characteristic of the 1977 Treaty is, according to Article 1, not only the construction of the Gabčíkovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works. This element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabčíkovo-Nagymaros Project and for the operation of this joint property as a co-ordinated single unit. By definition all this could not be carried
out by unilateral action. In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics.

78. Moreover, in practice, the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river.

Czechoslovakia submitted that Variant C was essentially no more than what Hungary had already agreed to and that the only modifications made were those which had become necessary by virtue of Hungary's decision not to implement its treaty obligations. It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation, but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse.

The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act.

79. The Court notes that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.

Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act" (see for example the Commentary on Article 41 of the Draft Articles on State Responsibility, "Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996", Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), p. 141, and Yearbook of the International Law Commission, 1993, Vol. II, Part 2, p. 57, para. 14).

80. Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained."

It would follow from such a principle that an injured State which has not taken the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.

81. Since the Court has found that the putting into operation of Variant C constituted an internationally wrongful act, the duty to mitigate damage invoked by Slovakia does not need to be examined further.

82. Although it did not invoke the plea of countermeasures as a primary argument, since it did not consider Variant C to be unlawful, Slovakia stated that "Variant C could be presented as a justified countermeasure to Hungary's illegal acts".

The Court has concluded, in paragraph 78 above, that Czechoslovakia committed an internationally wrongful act in putting Variant C into operation. Thus, it now has to determine whether such wrongfulness may be precluded on the ground that the measure so adopted was in response to Hungary's prior failure to comply with its obligations under international law.


In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. Although not primarily presented as a countermeasure, it is clear that Variant C was a response to Hungary's suspension and abandon-
ment of works and that it was directed against that State; and it is equally clear, in the Court's view, that Hungary's actions were internationally wrongful.

84. Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparations for it. It is clear from the facts of the case, as recalled above by the Court (see paragraphs 61 et seq.), that Czechoslovakia requested Hungary to resume the performance of its treaty obligations on many occasions.

85. In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

"[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others" (Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 25, p. 27).

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szégetőz — failed to respect the proportionality which is required by international law.

86. Moreover, as the Court has already pointed out (see paragraph 78), the fact that Hungary had agreed in the context of the original Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube) cannot be understood as having authorized Czechoslovakia to proceed with a unilateral diversion of this magnitude without Hungary's consent.

87. The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate. It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obliga-

88. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (b), of the Special Agreement (see paragraph 60), finds that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992.

89. By the terms of Article 2, paragraph 1 (c), of the Special Agreement, the Court is asked, thirdly, to determine "what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary".

The Court notes that it has been asked to determine what are the legal effects of the notification given on 19 May 1992 of the termination of the Treaty. It will consequently confine itself to replying to this question.

90. The Court will recall that, by early 1992, the respective parties to the 1977 Treaty had made clear their positions with regard to the recourse by Czechoslovakia to Variant C. Hungary in a Note Verbale of 14 February 1992 had made clear its view that Variant C was a contravention of the 1977 Treaty (see paragraph 64 above); Czechoslovakia insisted on the implementation of Variant C as a condition for further negotiation. On 26 February 1992, in a letter to his Czechoslovak counterpart, the Prime Minister of Hungary described the impending diversion of the Danube as "a serious breach of international law" and stated that, unless work was suspended while further enquiries took place, "the Hungarian Government would have no choice but to respond to this situation of necessity by terminating the 1977 Inter-State Treaty". In a Note Verbale dated 15 March 1992, Czechoslovakia reaffirmed that, while it was prepared to continue negotiations "on every level", it could not agree "to stop all work on the provisional solution".

On 24 March 1992, the Hungarian Parliament passed a resolution authorizing the Government to terminate the 1977 Treaty if Czechoslovakia did not stop the works by 30 April 1992. On 13 April 1992, the Vice-President of the Commission of the European Communities wrote to both parties confirming the willingness of the Commission to chair a committee of independent experts including representatives of the two countries, in order to assist the two Governments in identifying a mutu-
ally acceptable solution. Commission involvement would depend on each Government not taking "any steps . . . which would prejudice possible actions to be undertaken on the basis of the report's findings". The Czechoslovak Prime Minister stated in a letter to the Hungarian Prime Minister dated 23 April 1992, that his Government continued to be interested in the establishment of the proposed committee "without any preliminary conditions"; criticizing Hungary's approach, he refused to suspend work on the provisional solution, but added, "in my opinion, there is still time, until the damming of the Danube (i.e., until October 31, 1992), for resolving disputed questions on the basis of agreement of both States".

On 7 May 1992, Hungary, in the very resolution in which it decided on the termination of the Treaty, made a proposal, this time to the Slovak Prime Minister, for a six-month suspension of work on Variant C. The Slovak Prime Minister replied that the Slovak Government remained ready to negotiate, but considered preconditions "inappropriate".

91. On 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Declaration notifying it of the termination by Hungary of the 1977 Treaty as of 25 May 1992. In a letter of the same date from the Hungarian Prime Minister to the Czechoslovak Prime Minister, the immediate cause for termination was specified to be Czechoslovakia's refusal, expressed in its letter of 23 April 1992, to suspend the work on Variant C during mediation efforts of the Commission of the European Communities. In its Declaration, Hungary stated that it could not accept the deleterious effects for the environment and the conservation of nature of the implementation of Variant C which would be practically equivalent to the dangers caused by the realization of the original Project. It added that Variant C infringed numerous international agreements and violated the territorial integrity of the Hungarian State by diverting the natural course of the Danube.

* * *

92. During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impossi- bility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.

93. On the first point, Hungary stated that, as Czechoslovakia had "remained inflexible" and continued with its implementation of Variant C, "a temporary state of necessity eventually became permanent, justify- ing termination of the 1977 Treaty". Slovakia, for its part, denied that a state of necessity existed on the basis of what it saw as the scientific facts; and argued that even if such a state of necessity had existed, this would not give rise to a right to terminate the Treaty under the Vienna Convention of 1969 or the Law of Treaties.

94. Hungary's second argument relied on the terms of Article 61 of the Vienna Convention, which is worded as follows:

"Article 61

Supervening Impossibility of Performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty."

Hungary declared that it could not be "obliged to fulfill a practically impossible task, namely to construct a barrage system on its own territory that would cause irreparable environmental damage". It concluded that

"By May 1992 the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two parties jointly — had permanently disappeared, and the Treaty had thus become impossible to perform."

In Hungary's view, the "object indispensable for the execution of the treaty", whose disappearance or destruction was required by Article 61 of the Vienna Convention, did not have to be a physical object, but could also include, in the words of the International Law Commission, "a legal situation which was the raison d'être of the rights and obligations".

Slovakia claimed that Article 61 was the only basis for invoking impossibility of performance as a ground for termination, that paragraph 1 of that Article clearly contemplated physical "disappearance or destruction" of the object in question, and that, in any event, paragraph 2 precluded the invocation of impossibility "if the impossibility is the result of a breach by that party . . . of an obligation under the treaty".

95. As to "fundamental change of circumstances", Hungary relied on Article 62 of the Vienna Convention on the Law of Treaties which states as follows:
"Article 62

Fundamental Change of Circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

Hungary identified a number of “substantive elements” present at the conclusion of the 1977 Treaty which it said had changed fundamentally by the date of notification of termination. These included the notion of “socialist integration”, for which the Treaty had originally been a “vehicle”, but which subsequently disappeared; the “single and indivisible operational system”, which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been overturned by the sudden emergence of both States into a market economy; the attitude of Czechoslovakia which had turned the “framework treaty” into an “immutable norm” and, finally, the transformation of a treaty consistent with environmental protection into “a prescription for environmental disaster.”

Slovakia, for its part, contended that the changes identified by Hungary had not altered the nature of the obligations under the Treaty from those originally undertaken, so that no entitlement to terminate it arose from them.

Hungary further argued that termination of the Treaty was justified by Czechoslovakia’s material breach of the Treaty, and in this regard it invoked Article 60 of the Vienna Convention on the Law of Treaties, which provides:

"Article 60

Termination or Suspension of the Operation of a Treaty as a Consequence of Its Breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any other party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.”

Hungary claimed in particular that Czechoslovakia violated the 1977 Treaty by proceeding to the construction and putting into operation of Variant C, as well as failing to comply with its obligations under Articles 15 and 19 of the Treaty. Hungary further maintained that Czechoslovakia had breached other international conventions (among them the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters) and general international law.
Slovakia denied that there had been, on the part of Czechoslovakia or on its part, any material breach of the obligations to protect water quality and nature, and claimed that Variant C, far from being a breach, was devised as "the best possible approximate application" of the Treaty. It furthermore denied that Czechoslovakia had acted in breach of other international conventions or general international law.

97. Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an *erga omnes* obligation of prevention of damage pursuant to the "precautionary principle". On this basis, Hungary argued, its termination was "forced by the other party's refusal to suspend work on Variant C".

Slovakia argued, in reply, that none of the intervening developments in environmental law gave rise to norms of *ius commune* that would override the Treaty. Further, it contended that the claim by Hungary to be entitled to take action could not in any event serve as legal justification for termination of the Treaty under the law of treaties, but belonged rather "to the language of self-help or reprisals".

* * *

98. The question, as formulated in Article 2, paragraph 1 (c), of the Special Agreement, deals with treaty law since the Court is asked to determine what the legal effects are of the notification of termination of the Treaty. The question is whether Hungary's notification of 19 May 1992 brought the 1977 Treaty to an end, or whether it did not meet the requirements of international law, with the consequence that it did not terminate the Treaty.

99. The Court has referred earlier to the question of the applicability to the present case of the Vienna Convention of 1969 on the Law of Treaties. The Vienna Convention is not directly applicable to the 1977 Treaty because both States ratified that Convention only after the Treaty's conclusion. Consequently only those rules which are declaratory of customary law are applicable to the 1977 Treaty. As the Court has already stated above (see paragraph 40), this is the case, in many respects, with Articles 60 to 62 of the Vienna Convention, relating to termination or suspension of the operation of a treaty. On this, the Parties, too, were broadly in agreement.

100. The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable régime of joint investment and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

101. The Court will now turn to the first ground advanced by Hungary, that of the state of necessity. In this respect, the Court will merely observe that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but — unless the parties by mutual agreement terminate the Treaty — it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.

* * *

102. Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary's interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention. Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties (Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, doc. A/CONF.39/11, Summary record of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole, pp. 361-365). Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

103. Hungary contended that the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly — had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term "object" in Article 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it
would have to conclude that in this instance that régime had not definitively ceased to exist. The 1977 Treaty — and in particular its Articles 15, 19 and 20 — actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives. The Court would add that, if the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty; Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party's own breach of an obligation flowing from that treaty.

104. Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above).

The Court recalls that, in the Fisheries Jurisdiction case, it stated that

"Article 62 of the Vienna Convention on the Law of Treaties . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances" (I.C.J. Reports 1973, p. 63, para. 36).

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

105. The Court will now examine Hungary's argument that it was entitled to terminate the 1977 Treaty on the ground that Czechoslovakia had violated its Articles 15, 19 and 20 (as well as a number of other conventions and rules of general international law); and that the planning, construction and putting into operation of Variant C also amounted to a material breach of the 1977 Treaty.

106. As to that part of Hungary's argument which was based on other treaties and general rules of international law, the Court is of the view that it is only a material breach of the Treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the Treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.

107. Hungary contended that Czechoslovakia had violated Articles 15, 19 and 20 of the Treaty by refusing to enter into negotiations with Hungary in order to adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment. Articles 15, 19 and 20 oblige the parties jointly to take, on a continuous basis, appropriate measures necessary for the protection of water quality, of nature and of fishing interests.

Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. The failure of the parties to agree on those means cannot, on the basis of the record before the Court, be attributed solely to one party.
The Court has not found sufficient evidence to conclude that Czechoslovakia had consistently refused to consult with Hungary about the desirability or necessity of measures for the preservation of the environment. The record rather shows that, while both parties indicated, in principle, a willingness to undertake further studies, in practice Czechoslovakia refused to countenance a suspension of the works at Dunakiliti and, later, on Variant C, while Hungary required suspension as a prior condition of environmental investigation because it claimed continuation of the work would prejudice the outcome of negotiations. In this regard it cannot be left out of consideration that Hungary itself, by suspending the works at Nagyamaros and Dunakiliti, contributed to the creation of a situation which was not conducive to the conduct of fruitful negotiations.

108. Hungary’s main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. As the Court has found in paragraph 79 above, Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully.

In the Court’s view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

109. In this regard, it should be noted that, according to Hungary’s Declaration of 19 May 1992, the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later. Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith. As the Court stated in its Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (in which case the Vienna Convention did not apply):

"Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith." (I.C.J. Reports 1980, p. 96, para. 49.)

The termination of the Treaty by Hungary was to take effect six days after its notification. On neither of these dates had Hungary suffered injury resulting from acts of Czechoslovakia. The Court must therefore confirm its conclusion that Hungary’s termination of the Treaty was premature.

110. Nor can the Court overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary’s own prior wrongful conduct. As was stated by the Permanent Court of International Justice:

"It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him." (Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 31.)

Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.

*

111. Finally, the Court will address Hungary’s claim that it was entitled to terminate the 1977 Treaty because new requirements of international law for the protection of the environment precluded performance of the Treaty.

112. Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the
Treaty is not static, and is open to adaptation to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.

The responsibility to do this was a joint responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.

It is all the more important to do this because as the Court recalled in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" (I.C.J. Reports 1996, p. 241, para. 29; see also paragraph 53 above).

The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20.

113. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.

114. Finally, Hungary maintained that by their conduct both parties had repudiated the Treaty and that a bilateral treaty repudiated by both parties cannot survive. The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule pacta sunt servanda if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.

* * *

115. In the light of the conclusions it has reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (c), of the Special Agreement (see paragraph 89), finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

* * *

116. In Article 2, paragraph 2, of the Special Agreement, the Court is requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions formulated in paragraph 1. In Article 5 of the Special Agreement the Parties agreed to enter into negotiations on the modalities for the execution of the Judgment immediately after the Court has rendered it. The Court must first turn to the question whether Slovakia became a party to the 1977 Treaty as successor to Czechoslovakia. As an alternative argument, Hungary contended that, even if the Treaty survived the notification of termination, in any event it ceased to be in force as a treaty on 21 December 1992, as a result of the "disappearance of one of the parties". On that date Czechoslovakia ceased to exist as a legal entity, and on 1 January 1993 the Czech Republic and the Slovak Republic came into existence.

118. According to Hungary, "there is no rule of international law which provides for automatic succession to bilateral treaties on the disappearance of a party" and such a treaty will not survive unless anotherState succeeds to it by express agreement between that State and the remaining party. While the second paragraph of the Preamble to the Special Agreement recites that "the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project".

Hungary sought to distinguish between, on the one hand, rights and obligations such as "continuing property rights" under the 1977 Treaty, and, on the other hand, the treaty itself. It argued that, during the negotiations leading to signature of the Special Agreement, Slovakia had proposed a text in which it would have been expressly recognized "as the successor to the Government of the CSFR" with regard to the 1977 Treaty, but that Hungary had rejected that formulation. It contended that it had never agreed to accept Slovakia as successor to the 1977 Treaty. Hungary referred to diplomatic exchanges in which the two Parties had each submitted to the other lists of those bilateral treaties which they respectively wished should continue in force between them, for negotiation on a case-
European Court of Human Rights

Nada v. Switzerland
Judgment of 12 September 2012
GRAND CHAMBER

CASE OF NADA v. SWITZERLAND

(Application no. 10593/08)

JUDGMENT

STRASBOURG

12 September 2012

This judgment is final but may be subject to editorial revision.
In the case of Nada v. Switzerland,
The European Court of Human Rights, sitting as a Grand Chamber composed of:
Nicolas Bratza, President,
Jean-Paul Costa,
Françoise Tulkens,
Josep Casadevall,
Nina Vajić,
Dean Spielmann,
Christos Rozakis,
Corneliu Bîrsan,
Karel Jungwiert,
Khanlar Hajiyev,
Ján Šikuta,
Isabelle Berro-Lefèvre,
Giorgio Malinverni,
George Nicolaou,
Mihai Poalelungi,
Kristina Pardalos,
Ganna Yudkivska, judges,
and Michael O’Boyle, Deputy Registrar;
Having deliberated in private on 23 March 2011, 7 September 2011 and on 23 May 2012,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 10593/08) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian and Egyptian national, Mr Youssef Moustafa Nada (“the applicant”), on 19 February 2008.

2. The applicant was represented by Mr J. McBride, a barrister in London. The Swiss Government (“the Government”) were represented by their Agent, Mr F. Schürmann, of the Federal Office of Justice.

3. In his application, Mr Nada alleged that the ban on entering or transiting through Switzerland, which had been imposed on him as a result of the addition of his name to the list annexed to the Federal Taliban Ordinance, had breached his right to liberty (Article 5 of the Convention) and his right to respect for private and family life, honour and reputation (Article 8). He submitted that this ban was thus also tantamount to ill-treatment within the meaning of Article 3. He further complained of a breach of his freedom to manifest his religion or beliefs (Article 9), arguing that his inability to leave the enclave of Campione d’Italia had prevented him from worshipping at a mosque. Lastly, he complained that there had been no effective remedy in respect of those complaints (Article 13).

4. The application was assigned to the Court’s First Section (Rule 52 § 1 of the Rules of Court), which decided to deal with it on a priority basis under Article 41 of the Rules of Court. On 12 March 2009 a Chamber of that Section decided to give notice to the Government of the complaints under Articles 5, 8 and 13.

5. The parties each submitted written comments on the other’s observations. Observations were also received from the French and United Kingdom Governments, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2 as then in force). The Italian Government did not make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention).

6. On 20 January 2010 the parties were informed that the Chamber intended to examine the admissibility and merits of the application at the same time (former Article 29 § 3 of the Convention together with former Rule 54A).

7. On 30 September 2010 the Chamber, composed of Christos Rozakis, Nina Vajić, Khanlar Hajiyev, Dean Spielmann, Sverre Erik Jebens, Giorgio Malinverni, and George Nicolaou, judges, and Søren Nielsen, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment after being consulted for that purpose (Article 30 of the Convention and Rule 72).

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. Jean-Paul Costa, Christos Rozakis, Giorgio Malinverni and Mihai Poalelungi continued to deal with the case after their term of office expired, until the final deliberations, in accordance with Article 23 § 3 of the Convention and Rule 24 § 4.

9. The applicant and the Government each filed written observations on the merits of the case. The French and United Kingdom Governments submitted the same observations as before the Chamber. In addition, the President of the Grand Chamber authorised JUSTICE, a non-governmental organisation based in London, to submit written comments (Article 36 § 2 of the Convention taken in conjunction with Rule 44 § 2). Lastly, the President of the Grand Chamber authorised the United Kingdom Government to take part in the hearing.

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 23 March 2011 (Rule 59 § 3).
There appeared before the Court:

- for the Government
  Mr F. SCHUERMANN, Head of European law and international human rights section, Federal Office of Justice, Federal Police and Justice Department, Agent,
  Mr J. LINDEMANN, Ambassador, Deputy Director of Public International Law Directorate, Federal Department of Foreign Affairs,
  Mr R. E. VOCK, Head of Sanctions Division, State Secretariat for Economic Affairs, Federal Department of Economic Affairs,
  Ms R. BOURGUIN, Specialised legal adviser with policy responsibility, Legal Affairs Section, Migration policy division, Federal Office of Migration, Federal Police and Justice Department,
  Ms C. EHRICH, Technical adviser, European law and international human rights section, Federal Office of Justice, Federal Police and Justice Department, Advisers;

- for the applicant
  Mr J. MCBRIDE, barrister, Counsel,

- for the United Kingdom Government (third party)
  Mr D. WALTON, Agent,
  Mr S. WORDSWORTH, Counsel,
  Ms C. HOLMES, Adviser.

The applicant and his wife were also present.

The Court heard addresses by Mr Schürmann, Mr McBride and Mr Wordsworth. It also heard the replies of the parties’ representatives to questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background to the case

11. The applicant was born in 1931 and has been living since 1970 in Campione d’Italia, which is an Italian enclave of about 1.6 sq. km in the Province of Como (Lombardy), surrounded by the Swiss Canton of Ticino and separated from the rest of Italy by Lake Lugano.

12. He describes himself as a practising Muslim and a prominent businessman in the financial and political world, in which he purports to be highly regarded. An engineer by training, he has worked in very diverse sectors, in particular banking, foreign trade, industry and real estate. In the course of his business activities he founded numerous companies of which he was the sole or principal shareholder.

13. In his submission, he is opposed to all uses of terrorism and has never had any involvement with al-Qaeda. On the contrary, he has consistently denounced not only the means used by that organisation, but also its ideology.

14. The applicant has further indicated that he has only one kidney (the other having deteriorated in recent years). He also suffers from bleeding in his left eye, as shown by a medical certificate of 20 December 2001, and arthritis in the neck. In addition, according to a medical certificate issued by a doctor in Zurich on 5 May 2006, he sustained a fracture in his right hand which was due to be operated on in 2004. The applicant has alleged that, because of the restrictions imposed on him which gave rise to the present application, he was unable to undergo this operation and has continued to suffer from the consequences of the fracture.

15. On 15 October 1999, in response to the 7 August 1998 bombings by Osama bin Laden and members of his network against the United States embassies in Nairobi (Kenya) and Dar-es-Salaam (Tanzania) the Security Council of the United Nations (the “UN”) adopted, under Chapter VII of the UN Charter, Resolution 1267 (1999), providing for sanctions against the Taliban (see paragraph 70 below) and created a committee consisting of all the members of the Security Council to monitor the enforcement of that resolution (the “Sanctions Committee”).

Article 4a, paragraph 1 of which prohibited entry into and transit through Switzerland for the individuals and entities concerned by the resolution (but without naming them).


20. On 7 November 2001 the President of the United States of America blocked the assets of Bank Al Taqwa, of which the applicant was the chairman and principal shareholder.

21. On 9 November 2001 the applicant and a number of organisations associated with him were added to the Sanctions Committee’s list. On 30 November 2001 (or 9 November according to the applicant’s observations), their names were added to the list in an annex to the Taliban Ordinance.

22. On 16 January 2002 the Security Council adopted Resolution 1390 (2002) introducing an entry and transit ban in respect of individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to Resolutions 1267 (1999) and 1333 (2000) (see paragraphs 70-71 and 74 below). On 1 May 2002 Article 4a of the Federal Taliban Ordinance was amended accordingly: the entry and transit ban applied henceforth to all individuals named in Annex 2 to the Ordinance, including the applicant.

23. On 10 September 2002 Switzerland became a member of the United Nations.

24. When he visited London in November 2002, the applicant was arrested and removed to Italy, his money also being seized.

25. On 10 October 2003, following criticism by the Monitoring Group for the application of the sanctions (see paragraph 72 below), the Canton of Ticino revoked the applicant’s special border-crossing permit. The Monitoring Group had observed, in the course of its inquiry into the applicant’s activities, that he was able to move relatively freely between Switzerland and Italy. In the Government’s submission, it was only from this time onwards that the applicant was actually affected by the entry and transit ban.

26. On 27 November 2003 the Swiss Federal Office for Immigration, Integration and Emigration (the “IMES”) informed the applicant that he was no longer authorised to cross the border.

27. On 23 March 2004 the applicant lodged a request with the IMES for leave to enter or transit through Switzerland for the purposes of medical treatment in that country and legal proceedings in both Switzerland and Italy. The IMES dismissed that request on 26 March 2004 as being ill-founded. Moreover, it indicated to the applicant that the grounds put forward in support of his request, namely, the need to consult his lawyers and receive treatment and, secondly, the specific situation related to his residence in Campione d’Italia, were not such as to permit the authorities to grant him an exemption from the measure taken against him.

28. In a decision of 27 April 2005 the Federal Criminal Court ordered the Federal Prosecutor either to discontinue the proceedings or to send the case to the competent federal investigating judge by 31 May 2005. In an order of that date the Federal Prosecutor, finding that the accusations against the applicant were unsubstantiated, closed the investigation in respect of the applicant.

29. On 22 September 2005 the applicant requested the Federal Council to delete his name and those of the organisations associated with him from the annex to the Ordinance. He argued, in support of his claim, that the police investigation concerning him had been discontinued by a decision of the Federal Prosecutor and that it was therefore no longer justified to subject him to sanctions.

30. In a decision of 18 January 2006 the State Secretariat for Economic Affairs (the “SECO”) rejected his request on the grounds that Switzerland could not delete names from the annex to the Taliban Ordinance while they still appeared on the UN Sanctions Committee’s list.

31. On 13 February 2006 the applicant lodged an administrative appeal with the Federal Department for Economic Affairs (the “Department”).

32. In a decision of 15 June 2006 the Department dismissed that appeal. It confirmed that the deletion of a name from the annex to the Ordinance could be envisaged only once that name had been deleted from the Sanctions Committee’s list, and explained that, for this purpose, it was necessary for the State of citizenship or residence of the person concerned to apply for delisting to the UN institutions. As Switzerland was neither the applicant’s State of citizenship nor his State of residence, the Department found that the Swiss authorities were not competent to initiate such a procedure.

33. On 6 July 2006 the applicant appealed to the Federal Council against the Department’s decision. He requested that his name and those of a certain number of organisations associated with him be deleted from the list in Annex 2 to the Taliban Ordinance.

34. On 20 September 2006 the Federal Office of Migration (the “ODM”), which had been created in 2005, incorporating the IMES, granted the applicant an exemption for one day, 25 September 2006, so that he could go to Milan for legal proceedings. The applicant did not make use of that authorisation.

35. On 6 April 2007 the applicant sent to the “focal point” of the Sanctions Committee – a body set up by Resolution 1730 (2006) to receive requests for delisting from individuals or entities on the Sanctions Committee’s lists (see paragraph 76 below) – a request for the deletion of his name from the relevant list.
36. In a decision of 18 April 2007, the Federal Court, to which the applicant had been subjected to direct restrictions on his right to enjoy his possessions, also that other applicable rules, had decided that the applicant’s case had to be examined by an independent and impartial tribunal.

37. In its observations, the Department submitted that the appeal should be dismissed pointing out that the Security Council Resolution 1730 (2006) of 19 December 2006, allowing persons and organizations whose names had appeared on the Sanctions Committee’s list to apply for delisting on an individual basis rather than through their state of citizenship or residence, had in fact been applied by the Security Council, which included Article 103 of the Charter as well as its principles and fundamental freedoms (Article 1 § 3 of the Charter). At the same time, it took the view that the member States were not bound by the Charter, and indeed that this primacy did not relate only to the Charter but extended to all obligations which arose from a binding resolution of the Security Council.

38. The applicant maintained his submissions. Moreover, he alleged that the listing, regardless of its nature, whether bilateral or multilateral, had breached the principles of prohibition of discrimination, individual freedom, respect for human rights and fundamental freedoms (Article 1 § 3 of the Charter) and that this listing was not allowed, because the Security Council, the Security Council’s decisions concerning the sanctions regime.

39. In a decision of 11 May 2007, in which it indicated the remedies available, the ODM dismissed a new exemption request by the applicant. In a decision of 12 July 2007, once again indicating the available remedies, it refused to examine a letter from the applicant that it regarded as a request for review. In a letter of 20 July 2007 the applicant explained that there had been a misunderstanding and that his previous letter had in fact been a new request for exemption. On 2 August 2007 the ODM again rejected his request, reminding him that he could challenge the decision by lodging an appeal with the Federal Administrative Court. The applicant did not appeal against the decision.

40. On 29 October 2007, the focal point had decided that the applicable rules were contrary to the United Nations Charter and to the International Covenant on Civil and Political Rights on the other. It took the view that unless the conflict could be resolved by the rules on the interpretation of treaties, it would be necessary, in order to settle the dispute, to look to the hierarchy of international legal norms, according to which obligations under the United Nations Charter prevail over obligations under other international agreements, regardless of their nature. As a result, the Security Council’s decisions concerning the sanctions regime.

41. In a judgment of 14 November 2007, the Federal Court, to which the applicant had been subjected to direct restrictions on his right to enjoy his possessions, also that other applicable rules, had decided that the applicant’s case had to be examined by an independent and impartial tribunal. The Federal Court then observed that under Article 190 of the Constitution, the Security Council’s decisions concerning the sanctions regime.

42. In its observations, the Department submitted that the appeal should be dismissed pointing out that the Security Council Resolution 1730 (2006) of 19 December 2006, allowing persons and organizations whose names had appeared on the Sanctions Committee’s list to apply for delisting on an individual basis rather than through their state of citizenship or residence, had in fact been applied by the Security Council, which included Article 103 of the Charter as well as its principles and fundamental freedoms (Article 1 § 3 of the Charter). At the same time, it took the view that the member States were not bound by the Charter, and indeed that this primacy did not relate only to the Charter but extended to all obligations which arose from a binding resolution of the Security Council.

43. The Federal Court observed, however, that the Security Council was itself bound by the Charter, that this primacy did not relate only to the Charter but extended to all obligations which arose from a binding resolution of the Security Council.

44. The Federal Court, then observed that under Article 190 of the Security Council Resolution 1730 (2006), it was bound by the United Nations Charter and by the Charter of the United Nations, and indeed that this primacy did not relate only to the Charter but extended to all obligations which arose from a binding resolution of the Security Council.

45. It is, however, observed that under Article 190 of the Constitution, the Security Council’s decisions concerning the sanctions regime.

46. On 29 October 2007, the focal point had decided that the applicable rules were contrary to the United Nations Charter and to the International Covenant on Civil and Political Rights on the other. It took the view that unless the conflict could be resolved by the rules on the interpretation of treaties, it would be necessary, in order to settle the dispute, to look to the hierarchy of international legal norms, according to which obligations under the United Nations Charter prevail over obligations under other international agreements, regardless of their nature. As a result, the Security Council’s decisions concerning the sanctions regime.

47. In its observations, the Department submitted that the appeal should be dismissed pointing out that the Security Council Resolution 1730 (2006) of 19 December 2006, allowing persons and organizations whose names had appeared on the Sanctions Committee’s list to apply for delisting on an individual basis rather than through their state of citizenship or residence, had in fact been applied by the Security Council, which included Article 103 of the Charter as well as its principles and fundamental freedoms (Article 1 § 3 of the Charter). At the same time, it took the view that the member States were not bound by the Charter, and indeed that this primacy did not relate only to the Charter but extended to all obligations which arose from a binding resolution of the Security Council.
prevailed over obligations under any other international agreement (Article 13 of the Charter, taken together with Article 30 of the Vienna Convention on the Law of Treaties; see paragraphs 69 and 80 below). The Switzerland was bound by the resolutions, in other words, whether it had any latitude (Ermessenspielraum) in implementing them.

Federal Court was of the opinion that the uniform application of UN sanctions would be endangered if the courts of States Parties to the European Convention or the International Covenant on Civil and Political Rights were able to disregard those sanctions in order to protect the fundamental rights of certain individuals or organisations.

Accordingly, it considered itself bound to ascertain whether the sanctions regime set up by the Security Council was capable of breaching the peremptory norms of international law, as the applicant had claimed. It took the view, however, that the enjoyment of possessions, economic freedom, the right to life, protection from torture and inhuman or degrading treatment, the prohibition of slavery, the prohibition of collective punishment, the principle of individual criminal responsibility and the non-refoulement principle represent no deprivation of liberty: they are free to move around within their territory as a result of the stay of the court in the person of the applicant. This is determined by the list drawn up and maintained by the Sanctions Committee (see paragraph 8(c) of Resolution 1933 (2000)).

As regards the possibility of obtaining deletion from the list, the Sanctions Committee alone is responsible for the delisting of persons or organisations appearing on the Security Council’s list. Switzerland would therefore be in breach of its obligations under the Charter if it were to delete the names of the applicant and his organisations from the annex to the Taliban Ordinance.

In view of the foregoing, Switzerland is not permitted, of its own motion, to delete the applicant’s name from Annex 2 to the Taliban Ordinance, but it is not permitted to remove the sanctions against him, in particular the ban on entry into and transit through Switzerland, the Federal Court found as follows:

...
able to make an application himself and has indeed availed himself of this opportunity.

9.2 For his application to be successful he nevertheless relies on the support of Switzerland, since this is the only country to have conducted a comprehensive preliminary investigation, with numerous letters of request, house searches and questioning of witnesses.

United Nations member States are obliged to prosecute persons suspected of financing or supporting terrorism (see paragraph 2(e) of Security Council Resolution 1373 (2001)) ...

On the other hand, should the criminal proceedings end in an acquittal or be discontinued, this should lead to the removal of the preventive sanctions. Admittedly, the country which has conducted the criminal proceedings or preliminary investigation cannot itself proceed with the deletion, but it can at least transmit the results of its investigations to the Sanctions Committee and request or support the person’s delisting.

52. Lastly, the Federal Court examined whether the travel ban enforced under Article 4a of the Taliban Ordinance extended beyond the sanctions introduced by the Security Council resolutions and whether the Swiss authorities thus had any latitude in that connection. The court found as follows:

“10.1 Article 4a § 1 of the Taliban Ordinance prohibits the individuals listed in Annex 2 from entering or transiting through Switzerland. Article 4a § 2 provides that, in agreement with the UN Security Council decisions or for the protection of Swiss interests, the Federal Office of Migration is entitled to grant exemptions. According to the Security Council resolutions the travel ban does not apply if the entry or transit is required for the fulfillment of a judicial process. In addition, exemptions can be granted in individual cases with the agreement of the Sanctions Committee (see paragraph 1(b) of Resolution 1735 (2006)). This includes in particular travel on medical, humanitarian or religious grounds (Brown Institute, cited above, p.32).

10.2 Article 4a § 2 of the Taliban Ordinance is formulated as an ‘enabling’ provision and gives the impression that the Federal Office of Migration has a certain margin of appreciation. Constitutionally however, the provision is to be interpreted as meaning that an exemption should be granted in all cases where the UN sanctions regime so permits. A more far-reaching restriction on the appellant’s freedom of movement could not be regarded as based on the Security Council resolutions, would not be in the public interest and would be disproportionate in the light of the appellant’s particular situation.

The appellant lives in Campione, an Italian enclave in Ticino, with an area of 1.6 sq. km. As a result of the ban on entry into and transit through Switzerland, he is unable to leave Campione. Practically speaking, as the appellant correctly argued, this is tantamount to house arrest and thus represents a serious restriction on his personal liberty. In these circumstances the Swiss authorities are obliged to exhaust all the relaxations of the sanctions regime available under the UN Security Council resolutions.

The Federal Office of Migration thus has no margin of appreciation. Rather, it must examine whether the conditions for the granting of an exemption are met. Should the request not fall within one of the general exemptions envisaged by the Security Council, it must be submitted to the Sanctions Committee for approval.

10.3 The question whether the Federal Office of Migration has disregarded the constitutional requirements in dealing with the appellant’s applications for leave to travel abroad does not need to be examined here: the relevant orders of the Federal Office have not been challenged by the appellant and are not a matter of dispute in the present proceedings.

The same applies to the question whether the appellant should have moved his place of residence from the Italian enclave of Campione to Italy. To date the appellant has made no such request.”

C. Developments subsequent to the Federal Court’s judgment

53. Following the Federal Court’s judgment the applicant wrote to the ODM to request it to re-examine the possibility of applying general exemptions to his particular situation. On 28 January 2008 he lodged a new request seeking the suspension of the entry and transit ban for three months. In a letter of 21 February 2008 the ODM denied that request, stating that it was unable to grant a suspension for such a long period without referring the matter to the Sanctions Committee, but that it could grant one-off safe conducts. The applicant did not challenge that decision.

54. On 22 February 2008, at a meeting between the Swiss authorities and the applicant’s representative on the subject of the support that Switzerland could provide to the applicant in his efforts to obtain his delisting, a representative of the Federal Department of Foreign Affairs observed that the situation was rather singular, as the applicant, on the one hand, was asking what support the Swiss authorities could give him in the UN delisting procedure, and on the other, had brought a case against Switzerland before the Court.

During the meeting the applicant’s representative explained that he had received verbal confirmation from the ODM to the effect that his client would be granted one-off authorisations to go to Italy, in order to consult his lawyer in Milan. The representative of the Federal Department of Foreign Affairs also indicated that the applicant could ask the Sanctions Committee for a more extensive exemption on account of his particular situation. However, she also repeated that Switzerland could not itself apply to the Sanctions Committee for the applicant’s delisting. She added that her government would nevertheless be prepared to support him, in particular by providing him with an attestation confirming that the criminal proceedings against him had been discontinued. The applicant’s lawyer replied that he had already received a letter attesting to the discontinuance in favour of his client and that this letter was sufficient. As to the applicant’s requests to the Italian authorities with a view to obtaining their support in a delisting procedure, the Federal Department’s representative suggested that the lawyer contact the Italian Permanent
Mission to the United Nations, adding that Italy had, at that time, a seat on the Security Council.

55. The Government informed the Court that in April 2008 an Egyptian military tribunal had sentenced the applicant in absentia to ten years’ imprisonment for providing financial support to the Muslim Brotherhood organisation (see the article on this subject dated 16 April 2008 in the daily newspaper Corriere del Ticino). The applicant did not dispute the fact that he had been convicted but argued that he had never been informed of the proceedings against him and that he had therefore never had the possibility of defending himself in person or through the intermediary of a lawyer. For those reasons, and also taking into account the fact that the trial was held before a military tribunal even though he was a civilian, he claimed that the proceedings in question were clearly in breach of Article 6.

56. On 5 July 2008 the Italian Government submitted to the Sanctions Committee a request for the applicant’s delisting on the ground that the case against him in Italy had been dismissed. The Committee denied that request by a decision of 15 July 2008. In the applicant’s submission, the Committee had not allowed him to submit his observations to it beforehand.

57. On 11 September 2008 the ODM granted the applicant the right to enter Switzerland and to remain in the country for two days, but the applicant did not make use of this authorisation.

58. In a letter of 23 December 2008 the ODM informed the applicant that the entry of Switzerland into the Schengen area, on 12 December 2008, did not affect his situation.

59. In their observations before the Chamber, the Swiss Government stated that, to their knowledge, the applicant’s listing had been initiated by a request from the United States of America, and that the USA had submitted to the Sanctions Committee, on 7 July 2009, a request for the delisting of a number of individuals, including the applicant.

60. On 24 August 2009, in accordance with the procedure laid down by Security Council Resolution 1730 (2006), the applicant submitted to the focal point for delisting requests a request for the deletion of his name from the Sanctions Committee’s list.

61. On 2 September 2009 Switzerland sent to the Sanctions Committee a copy of a letter of 13 August 2009 from the Federal Prosecutor’s Office to the applicant’s lawyer, in which that Office confirmed that the judicial police investigation in respect of his client had not produced any indications or evidence to show that he had ties with persons or organisations associated with Osama bin Laden, al-Qaeda or the Taliban.

62. On 23 September 2009 the applicant’s name was deleted from the list annexed to the Security Council resolutions providing for the sanctions in question. According to the applicant, the procedure provided for under Resolution 1730 (2006) was not followed and he received no explanation in this connection. On 29 September 2009 the annex to the Taliban Ordinance was amended accordingly and the amendment took effect on 2 October 2009.

63. By a motion passed on 1 March 2010, the Foreign Policy Commission of the National Council (lower house of the federal parliament) requested the Federal Council to inform the UN Security Council that from the end of 2010 it would no longer, in certain cases, be applying the sanctions prescribed against individuals under the counter-terrorism resolutions. It moreover called upon the Government to reassert its steadfast commitment to cooperate in the fight against terrorism in accordance with the legal order of the States. The motion had been introduced on 12 June 2009 by Dick Marty, a member of the Council of States (upper house of parliament), and it referred to the applicant’s case by way of example.

D. Efforts made to improve the sanctions regime

64. The Government asserted that even though Switzerland was not a member of the Security Council it had, with other States, actively worked since becoming a member of the UN on 10 September 2002 to improve the fairness of the listing and delisting procedure and the legal situation of the persons concerned. Thus, in the summer of 2005, it had launched with Sweden and Germany a new initiative to ensure that fundamental rights would be given more weight in the sanctions procedure. Pursuing its initiative, Switzerland had submitted to the Security Council in 2008, together with Denmark, Germany, Liechtenstein, the Netherlands and Sweden, concrete proposals for the setting-up of an advisory panel of independent experts authorised to submit delisting proposals to the Sanctions Committee. Moreover, in the autumn of 2009 Switzerland had worked intensively with its partners to ensure that the resolution on the renewal of the sanctions regime against al-Qaeda and the Taliban, scheduled for adoption in December, met that need. In the meantime Switzerland had supported the publication in October 2009 of a report proposing, as an option for an advisory review mechanism, the creation of an ombudsperson. On 17 December 2009 the Security Council adopted Resolution 1904 (2009) setting up the office of ombudsperson to receive complaints from individuals affected by the UN Security Council counterterrorism sanctions (see paragraph 78 below). Lastly, Switzerland had called on many occasions, before the UN Security Council and General Assembly, for an improvement in the procedural rights of the persons concerned by the sanctions.
II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Domestic law

1. Federal Constitution

65. Article 190 ("Applicable law") of the Federal Constitution provides:

"The Federal Court and the other authorities shall be required to apply federal statutes and international law."

2. Ordinance of 2 October 2000 instituting measures against persons and entities associated with Osama bin Laden, the group "al-Qaeda" or the Taliban (the "Taliban Ordinance")

66. The Ordinance of 2 October 2000 instituting measures against persons and entities associated with Osama bin Laden, the group "al-Qaeda" or the Taliban, has been amended several times. The relevant provisions read as follows, in the version that was in force in the period under consideration in the present case, and in particular at the time when the Federal Court delivered its judgment (14 November 2007):

 Article 1 - Ban on supply of military equipment and similar goods

"1. The supply, sale or brokerage of arms of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts or accessories for the aforementioned, to the individuals, undertakings, groups or entities referred to in annex 2 hereto, shall be prohibited.

..."

3. The supply, sale or brokerage of technical advice, assistance and training related to military activities, to the individuals, undertakings, groups or entities referred to in annex 2 hereto, shall be prohibited.

4. Paragraphs 1 and 3 above shall apply only to the extent that the Property Regulation Act of 13 December 1996, the Federal Act on War Materiel of 13 December 1996, and their respective implementing ordinances, are not applicable.

..."

 Article 3 – Freezing of assets and economic resources

"1. Assets and economic resources owned or controlled by the individuals, undertakings, groups or entities referred to in annex 2 hereto shall be frozen.

2. It shall be prohibited to supply funds to the individuals, undertakings, groups or entities referred to in annex 2 hereto, or to make assets or economic resources available to them, directly or indirectly.

3. The State Secretariat for Economic Affairs (SECO) may exempt payments related to democratisation or humanitarian projects from the prohibitions under paragraphs 1 and 2 above.

..."

B. International law

1 United Nations Charter

67. The United Nations Charter was signed at San Francisco on 26 June 1945. The relevant provisions for the present case read as follows:

 Preamble

"We the peoples of the United Nations, determined

to save succeeding generations from the scourg of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

and for these ends

to practice tolerance and live together in peace with one another as good neighbours,

and
to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
272
Noting the indictment of Usama bin Laden and his associates by the United States of America for, inter alia, the 7 August 1998 bombings of the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania and for conspiring to kill American nationals outside the United States, and noting also the request of the United States of America to the Taliban to surrender them for trial (S/1999/1021),

Determining that the failure of the Taliban authorities to respond to the demands in paragraph 13 of resolution 1214 (1998) constitutes a threat to international peace and security,

Stressing its determination to ensure respect for its resolutions,

Acting under Chapter VII of the Charter of the United Nations,

3. Decides that on 14 November 1999 all States shall impose the measures set out in paragraph 4 below, unless the Council has previously decided, on the basis of a report of the Secretary-General, that the Taliban has fully complied with the obligation set out in paragraph 2 above;

4. Decides further that, in order to enforce paragraph 2 above, all States shall:

(a) Deny permission for any aircraft to take off from or land in their territory if it is owned, leased or operated by or on behalf of the Taliban as designated by the Committee established by paragraph 6 below, unless the particular flight has been approved in advance by the Committee on the grounds of humanitarian need, including religious obligation such as the performance of the Hajj;

(b) Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need;

5. Urges all States to cooperate with efforts to fulfil the demand in paragraph 2 above, and to consider further measures against Usama bin Laden and his associates;

6. Decides to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council to undertake the following tasks and to report on its work to the Council with its observations and recommendations:

...  
7. Calls upon all States to act strictly in accordance with the provisions of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to the date of coming into force of the measures imposed by paragraph 4 above;

8. Calls upon States to bring proceedings against persons and entities within their jurisdiction that violate the measures imposed by paragraph 4 above and to impose appropriate penalties;

9. Calls upon all States to cooperate fully with the Committee established by paragraph 6 above in the fulfilment of its tasks, including supplying such information as may be required by the Committee in pursuance of this resolution;

10. Requests all States to report to the Committee established by paragraph 6 above within 30 days of the coming into force of the measures imposed by paragraph 4 above on the steps they have taken with a view to effectively implementing paragraph 4 above;

...  
71. By Resolution 1333 (2000), adopted on 19 December 2000, the Security Council extended the application of the sanctions provided for under Resolution 1267 (1999) to any individuals or entities identified by the Sanctions Committee as being associated with al-Qaeda or Osama bin Laden. The resolution further required a list to be maintained for the implementation of the UN sanctions. The passages that are relevant to the present case read as follows:

Resolution 1333 (2000)

... The Security Council...

Reaffirming its previous resolutions, in particular resolution 1267 (1999) of 15 October 1999 and the statements of its President on the situation in Afghanistan,

Reaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan, and its respect for Afghanistan’s cultural and historical heritage,

Recognizing the critical humanitarian needs of the Afghan people,

...  
8. Decides that all States shall take further measures:

(a) To close immediately and completely all Taliban offices in their territories;

(b) To close immediately all offices of Ariana Afghan Airlines in their territories;

(c) To freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization, and including funds derived or generated from property owned or controlled directly or indirectly by Usama bin Laden and individuals and entities associated with him, and to ensure that neither they nor any other funds or financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly for the benefit of Usama bin Laden, his associates or any entities owned or controlled, directly or indirectly, by Usama bin Laden or individuals and entities associated with him including the Al-Qaida organization and requests the Committee to maintain an updated list, based on information provided by States and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organization;

...  
12. Decides further that the Committee shall maintain a list of approved organizations and governmental relief agencies which are providing humanitarian
assistance to Afghanistan, including the United Nations and its agencies, governmental relief agencies providing humanitarian assistance, the International Committee of the Red Cross and non-governmental organizations as appropriate, that the prohibition imposed by paragraph 11 above shall not apply to humanitarian flights operated by, or on behalf of, organizations and governmental relief agencies on the list approved by the Committee, that the Committee shall keep the list under regular review, adding new organizations and governmental relief agencies as appropriate and that the Committee shall remove organizations and governmental agencies from the list if it decides that they are operating, or are likely to operate, flights for other than humanitarian purposes, and shall notify such organizations and governmental agencies immediately that any flights operated by them, or on their behalf, are thereby subject to the provisions of paragraph 11 above;

... 16. Requests the Committee to fulfil its mandate by undertaking the following tasks in addition to those set out in resolution 1267 (1999):

(a) To establish and maintain updated lists based on information provided by States, regional, and international organizations of all points of entry and landing areas for aircraft within the territory of Afghanistan under control by the Taliban and to notify Member States of the contents of such lists;

(b) To establish and maintain updated lists, based on information provided by States and regional organizations, of individuals and entities designated as being associated with Usama bin Laden, in accordance with paragraph 8 (c) above;

(c) To give consideration to, and decide upon, requests for the exceptions set out in paragraphs 6 and 11 above;

(d) To establish no later than one month after the adoption of this resolution and maintain an updated list of approved organizations and governmental relief agencies which are providing humanitarian assistance to Afghanistan, in accordance with paragraph 12 above;

... 17. Calls upon all States and all international and regional organizations, including the United Nations and its specialized agencies, to act strictly in accordance with the provisions of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to the date of coming into force of the measures imposed by paragraphs 5, 8, 10 and 11 above; ... 72. In Resolution 1363 (2001), adopted on 30 July 2001, the Security Council decided to set up a mechanism to monitor the measures imposed by Resolutions 1267 (1999) and 1333 (2000) (“the Monitoring Group”), consisting of up to five experts selected on the basis of equitable geographical distribution. 73. In Resolution 1373 (2001), adopted on 28 September 2001 – following the events of 11 September 2001 – the Security Council decided that States should take a series of measures to combat international terrorism and ensure effective border controls in this connection. The passages that are relevant to the present case read as follows:

Resolution 1373 (2001)

1. Decides that all States shall:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. Decides also that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts; ...

3. Calls upon all States to:

... (i) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts; ... 74. In Resolution 1390 (2002), adopted on 16 January 2002, the Security Council decided to impose a ban on entry and transit for individuals and
In response to a surge in criticism of the sanctions regime, the Security Council adopted increasingly detailed resolutions, strengthening the list's precision and transparency. Resolution 1452 (2002), concerning the Committee's mandate to update the list of persons and entities subject to sanctions, was a step in this direction. The Committee was requested to regularly update the list of persons concerned, informing the persons and entities on the list, as far as possible, of the measures taken against them, of the Committee's guidelines and criteria as well as the consequences of their delisting requests. The resolution also made it clear that the Committee was responsible for maintaining the list up-to-date and accurate, and that States should promptly implement the measures taken against the persons on the list.

In Resolution 1730 (2006), the Security Council established the current procedure by creating a "local point of contact" to receive and process delisting requests in respect of persons or entities on the list kept by the Committee. Under that resolution, the Security Council requested the Committee to promulgate expeditiously such guidelines and criteria as might be necessary to facilitate the implementation of the sanctions and to make any information it considered relevant, including the list of persons concerned, publicly available. The passages that are relevant to the present case read as follows:

75. In Resolution 1526 (2004), the Security Council requested States, on the submission of new names to be added to the list created pursuant to Resolutions 1267 (1999) and 1333 (2000) to be included in the list, to provide the Committee with any information they considered relevant. The Committee was also requested to make any information it considered relevant, including the list of persons concerned, publicly available. The passages that are relevant to the present case read as follows:

76. In response to a surge in criticism of the sanctions regime, the Security Council adopted increasingly detailed resolutions, strengthening the list's precision and transparency. Resolution 1452 (2002), concerning the Committee's mandate to update the list of persons and entities subject to sanctions, was a step in this direction. The Committee was requested to regularly update the list of persons concerned, informing the persons and entities on the list, as far as possible, of the measures taken against them, of the Committee's guidelines and criteria as well as the consequences of their delisting requests. The resolution also made it clear that the Committee was responsible for maintaining the list up-to-date and accurate, and that States should promptly implement the measures taken against the persons on the list.

77. In Resolution 1730 (2006), the Security Council established the current procedure by creating a "local point of contact" to receive and process delisting requests in respect of persons or entities on the list kept by the Committee. Under that resolution, the Security Council requested the Committee to promulgate expeditiously such guidelines and criteria as might be necessary to facilitate the implementation of the sanctions and to make any information it considered relevant, including the list of persons concerned, publicly available. The passages that are relevant to the present case read as follows:

78. In Resolution 1822 (2008) and 1904 (2009), which post-date the present case, the Security Council decided to create an Office of the Ombudsperson, whose task it is to receive, examine and decide on complaints from individuals against the decisions of the Committee. In the latter, adopted on 17 December 2009, the Security Council decided to create an Office of the Ombudsperson, whose task it is to receive, examine and decide on complaints from individuals against the decisions of the Committee.

79. Article 27 ("Internal law and observance of treaties") of the Vienna Convention on the Law of Treaties reads as follows:

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty...”

80. Article 30 ("Application of successive treaties relating to the same subject matter") reads as follows:

“1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States Parties to both treaties the same rule applies as in paragraph 3;
(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.”

4. Work of the United Nations International Law Commission

81. The report of the study group of the International Law Commission (ILC) entitled “Fragmentation of international law: difficulties arising from the diversification and expansion of international law”, published in 2006, contains the following observations concerning Article 103 of the Charter:

4. Harmonization - systemic integration

“37. In international law, there is a strong presumption against normative conflict. Treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict. This extends to adjudication as well. As Rousseau puts the duties of a judge in one of the earlier but still more useful discussions of treaty conflict:

... lorsqu’il est en présence de deux accords de volontés divergentes, il doit être tout naturellement porté à rechercher leur coordination plutôt qu’à consacrer à leur antagonisme [Charles Rousseau, “De la compatibilité des normes juridiques contradictoires dans l’ordre international”, RGIDIP vol. 39 (1932), p. 153].

38. This has emerged into a widely accepted principle of interpretation and it may be formulated in many ways. It may appear as the thumb-rule that when creating new obligations, States are assumed not to derogate from their obligations. Jennings and Watts, for example, note the presence of a:

presumption that the parties intend something not inconsistent with generally recognized principles of international law, or with previous treaty obligations towards third States [Sir Robert Jennings and Sir Arthur Watts (eds.), Oppenheim’s International Law (London: Longman, 1992) (9th ed), p. 1275. For the wide acceptance of the presumption against conflict - that is the suggestion of harmony - see also see Pauwelyn, Conflict of Norm... supra note 21, pp. 240-244].

39. As the International Court of Justice stated in the Right of Passage case:

it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it [Case concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v. India) I.C.J Reports 1957 p. 142].

... 331. Article 103 does not say that the Charter prevails, but refers to obligations under the Charter. Apart from the rights and obligations in the Charter itself, this also covers duties based on binding decisions by United Nations bodies. The most important case is that of Article 25 that obliges Member States to accept and carry out resolutions of the Security Council that have been adopted under Chapter VII of the Charter. Even if the primacy of Security Council decisions under Article 103 is not expressly spelled out in the Charter, it has been widely accepted in practice as well as in doctrine...”

5. Relevant international case-law

82. The measures taken under the Security Council resolutions establishing a listing system and the possibility of reviewing the legality of such measures have been examined, at international level, by the Court of Justice of the European Communities (“CJEC”) and by the United Nations Human Rights Committee.

(a) The case of Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission (Court of Justice of the European Communities)

83. The case of Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (joined cases C-402/05 P and C-415/05 P; hereinafter “the Kadi judgment”) concerned the freezing of the applicants’ assets pursuant to European Community regulations adopted in connection with the implementation of Security Council resolutions 1267 (1999), 1333 (2000) and 1390 (2002), which, among other things, required all UN member States to take measures to freeze the funds and other financial resources of the individuals and entities identified by the Security Council’s Sanctions Committee as being associated with Osama bin Laden, al-Qaeda, or the Taliban. In that case the applicants fell within that category and their assets had thus been frozen – a measure that for them constituted a breach of
their fundamental right to respect for property as protected by the Treaty instituting the European Community ("the EC Treaty"). They contended that the EC regulations had been adopted ultra vires.

84. On 21 September 2005 the Court of First Instance (which on 1 December 2009 became known as the "General Court") rejected those complaints and confirmed the lawfulness of the regulations, finding mainly that Article 103 of the Charter had the effect of placing Security Council resolutions above all other international obligations (except for those covered by jus cogens), including those arising from the EC Treaty. It concluded that it was not entitled to review Security Council resolutions, even on an incidental basis, to ascertain whether they respected fundamental rights.

85. Mr Kadi appealed to the CJEC (which on 1 December 2009 became known as the "Court of Justice of the European Union"). The appeal was examined by a Grand Chamber jointly with another case. In its judgment of 3 September 2008 the CJEC found that, in view of the internal and autonomous nature of the Community legal order, it had jurisdiction to review the lawfulness of a Community regulation adopted within the ambit of that order even if its purpose was to implement a Security Council resolution. It thus held that, even though it was not for the "Community judicature" to examine the lawfulness of Security Council resolutions, it was entitled to review Community acts or acts of member States designed to give effect to such resolutions, and that this "would not entail any challenge to the primacy of that resolution in international law".

86. The CJEC concluded that the Community judicature had to ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, were designed to give effect to resolutions of the Security Council. The judgment contained the following relevant passages:

281. In this connection it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Case 294/83 Les Verts v Parliament [1986] ECR 1339, paragraph 23).

290. It must therefore be considered whether, as the Court of First Instance held, as a result of the principles governing the relationship between the international legal order under the United Nations and the Community legal order, any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is in principle excluded, notwithstanding the fact that, as is clear from the decisions referred to in paragraphs 281 to 284 above, such review is a constitutional guarantee forming part of the very foundations of the Community.

293. Observance of the undertakings given in the context of the United Nations is required just as much in the sphere of the maintenance of international peace and security when the Community gives effect, by means of the adoption of Community measures taken on the basis of Articles 60 EC and 301 EC, to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

294. In the exercise of that latter power it is necessary for the Community to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what international body is invested for the maintenance of peace and security at the global level.
87. The CJEC concluded that the contested regulations, which did not provide for any remedy in respect of the freezing of assets, were in breach of fundamental rights and were to be annulled.

(b) The case of Sayadi and Vinck v. Belgium (United Nations Human Rights Committee)

88. In the case brought by Nabil Sayadi and Patricia Vinck against Belgium (Views of the Human Rights Committee of 22 October 2008, concerning communication no. 1472/2006), the Human Rights Committee had occasion to examine the national implementation of the sanctions regime established by the Security Council in Resolution 1267 (1999). The two complainants, Belgian nationals, had been placed on the lists appended to that resolution in January 2003, on the basis of information which had been provided to the Security Council by Belgium, shortly after the commencement of a domestic criminal investigation in September 2002. They had submitted several delisting requests at national, regional and United Nations levels, all to no avail. In 2005, the Brussels Court of First Instance had ordered the Belgian State, inter alia, to urgently initiate a delisting procedure with the United Nations Sanctions Committee, and the State had subsequently done so.

89. The Human Rights Committee noted that the travel ban imposed on the complainants resulted from the transmittal by Belgium of their names to the Sanctions Committee, before they had been heard. It thus took the view that even though Belgium was not competent to remove their names from either the United Nations or the European Union lists, it was responsible for the presence of their names on the lists, and for the resulting travel ban. The Committee found a violation of the complainants’ right to freedom of movement under Article 12 of the International Covenant on Civil and Political Rights, because both the dismissal of the criminal investigation and the State party’s delisting requests showed that the restrictions were not necessary to protect national security or public order.

90. The Committee also found an unlawful attack on the complainants’ honour and reputation, in breach of Article 17 of the Covenant, based on the accessibility of the list on the Internet, a number of press articles, the transmittal of the information about them prior to the conclusion of the criminal investigation, and the fact that, despite the State party’s requests for removal, their contact data were still accessible to the public.

91. In the Committee’s opinion, although the State party itself was not competent to remove the names from the list, it had the duty to do all it could to obtain that deletion as soon as possible, to provide the complainants with compensation, to make public the requests for delisting, and to ensure that similar violations did not occur in the future.

92. On 20 July 2009 the complainants’ names were removed from the list pursuant to a decision of the Sanctions Committee.

6. Relevant case-law of other States

93. The measures in question have also been examined at national level, by the United Kingdom Supreme Court and the Canadian Federal Court.

(a) The case of Ahmed and others v. HM Treasury (United Kingdom Supreme Court)

94. The case of Ahmed and others v. HM Treasury, examined by the Supreme Court of the United Kingdom on 27 January 2010, concerned the freezing of the appellants’ assets in accordance with the sanctions regime introduced by Resolutions 1267 (1999) and 1373 (2001). The Supreme Court took the view that the Government had acted ultra vires the powers conferred upon it by section 1 of the United Nations Act 1946 in making certain orders to implement Security Council resolutions on sanctions.

95. In particular, Lord Hope, Deputy President of the Supreme Court, made the following observations:

“6. ... The consequences of the Orders that were made in this case are so drastic and so oppressive that we must be just as alert to see that the coercive action that the Treasury have taken really is within the powers that the 1946 Act has given them. Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty.”

96. He acknowledged that the appellants had been deprived of an effective remedy and in that connection found as follows:

“81. I would hold that G is entitled to succeed on the point that the regime to which he has been subjected has deprived him of access to an effective remedy. As Mr Swift indicates, seeking a judicial review of the Treasury’s decision to treat him as a designated person will get him nowhere. G answers to that description because he has been designated by the 1267 Committee. What he needs if he is to be afforded an effective remedy is a means of subjecting that listing to judicial review. This is something that, under the system that the 1267 Committee currently operates, is denied to him. I would hold that article 4 of that Order, had it been necessary to consider for the purposes of this case whether the AQO as a whole is ultra vires except to say that I am not to be taken as indicating that article 4 of that Order, had it been applicable in G’s case, would have survived scrutiny.

82. I would treat HAY’s case in the same way. He too is a designated person by reason of the fact that his name is on the 1267 Committee’s list. As has already been observed, the United Kingdom is now seeking that his name should be removed from it. By letter dated 1 October 2009 the Treasury’s Sanctions Team informed his solicitors that the de-listing request was submitted on 26 June 2009 but that at the committee’s first consideration of it a number of States were not in a position to accede to the request. Further efforts to obtain de-listing are continuing, but this has still not been achieved. So he remains subject to the AQO. In this situation he too is being denied an effective remedy.”

97. The Supreme Court found unlawful both the order implementing Resolution 1373 (2001) in a general counter-terrorism context (the
“Terrorism Order”) and the order implementing the al-Qaeda and Taliban resolutions (the “al-Qaeda Order”). However, it annulled the al-Qaeda Order only in so far as it did not provide for an effective remedy (see Lord Brown’s dissenting opinion on this point).

(b) The case of Abdelrazik v. Canada (Minister of Foreign Affairs) (Canadian Federal Court)

98. In its judgment of 4 June 2009 in the case of Abdelrazik v. Canada (Minister of Foreign Affairs), the Federal Court of Canada took the view that the listing procedure of the al-Qaeda and Taliban Sanctions Committee was incompatible with the right to an effective remedy. The case concerned a ban on the return to Canada of the applicant, who had Canadian and Sudanese nationality, as a result of the application by Canada of the Security Council resolutions establishing the sanctions regime. The applicant was thus forced to live in the Canadian embassy in Khartoum, Sudan, fearing possible detention and torture should he leave this sanctuary.

99. Zinn J, who pronounced the lead judgment in the case, stated in particular:

“[51] I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness.”

100. He further observed:

“[54] ... it is frightening to learn that a citizen of this or any other country might find himself on the 1267 Committee list, based only on suspicion.”

101. After reviewing the measures implementing the travel ban on the basis of the al-Qaeda and Taliban resolutions, the judge concluded that the applicant’s right to enter Canada had been breached, contrary to the provisions of the Canadian Charter of Rights and Freedoms (see paragraphs 62 et seq. of the judgment).

THE LAW

I. THE GOVERNMENT’S PRELIMINARY OBJECTIONS

A. Compatibility of the complaints with the Convention and Protocols thereto

1. The parties’ submissions

(a) The respondent Government

102. The Government requested the Court to declare the application inadmissible as being incompatible 
ratione personae with the Convention. They argued that the impugned measures had been based on Security Council Resolutions (1267 (1999) et seq.), which, under Articles 25 and 103 of the United Nations Charter, were binding and prevailed over any other international agreement. In this connection they referred in particular to the provisional measures order of the International Court of Justice in the case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie ([Libyan Arab Jamahiriya v. United Kingdom], Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, p. 15, § 39):

“Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter, whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention;”

The Government argued that, in those circumstances, Switzerland could not be held responsible internationally for the implementation of the measures at issue.

103. The Government added that those measures, emanating as they did from the United Nations Security Council, fell outside the scope of the Court’s review. The application in the present case was therefore also inadmissible 
ratione materiae.

(b) The applicant

104. The applicant argued that his application was compatible 
ratione personae with the Convention. He took the view that the direct effect of the obligations under the Security Council resolutions was irrelevant to the issue of whether or not the restrictions imposed on him were attributable to the respondent State, since those restrictions had been authorised by the Government at national level in accordance with Article 190 of the Federal
Constitution. Relying on Article 27 of the Vienna Convention on the Law of Treaties, he added that Switzerland could not hide behind its domestic legal arrangements when it came to fulfilling its international obligations (see paragraph 79 above).

105. The applicant also took the view that the Swiss authorities had applied the possibilities of derogation envisaged in the Security Council resolutions in a much more restrictive manner than was required by the sanctions regime. The Federal Court itself had noted this in its judgment of 14 November 2007. Rather than automatically having to implement the Security Council resolutions, the national authorities had therefore enjoyed a certain margin of appreciation in taking the measures at issue. The applicant added in this connection that his delisting, as decided by the Sanctions Committee on 23 September 2009, had not taken effect in Switzerland until a week later. He saw this as further proof that the application of the Security Council resolutions was not automatic.

106. Lastly, the applicant argued that it was not a matter, in the present case, of calling into question the primacy of the United Nations Charter under Article 103 thereof – a finding of a violation of the Convention not being, in his opinion, capable of affecting the validity of States’ international obligations – but simply of ensuring that the Charter was not used as a pretext to avoid compliance with the provisions of the Convention.

2. Submissions of third-party interveners

(a) The French Government

107. The French Government took the view that the reservation of Convention observance, in the sense of ensuring “equivalent protection”, could not be applied appropriately in the present case because the measures laid down by Switzerland arose necessarily from the UN Security Council resolutions, which all States were required to apply and which also had to be given precedence over any other international rule. In those circumstances France was of the view that the measures in question could not be regarded as falling within Switzerland’s “jurisdiction” for the purposes of Article 1 of the Convention; otherwise that notion would be rendered meaningless.

108. The French Government pointed out that, although in its judgment of 30 June 2005 in the case of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland ([GC], no. 45036/98, ECHR 2005-VI) the Court had regarded as compatible with Article 1 of the Convention an application disputing the validity of a national measure simply implementing a regulation of the European Communities that itself stemmed from a Security Council resolution, the Court had noted in that judgment that it was the EC regulation and not the Security Council resolution that constituted the legal basis of the national measure in issue (ibid., § 145).

109. The French Government were also convinced that, even though the measures in issue did not concern missions conducted outside the territory of the member States, like those in the cases of Behrami and Behrami v. France and Saramati v. France, Germany and Norway ((dec.) [GC], nos. 71412/01 and 78166/01, 2 May 2007), but rather measures implemented in domestic law, the arguments emerging from that case-law, which stemmed from the nature of the Security Council’s missions and States’ obligations arising therefrom, should lead the Court likewise to declare the disputed measures attributable to the UN and thus to find the applicant’s complaints incompatible ratione personae with the Convention. Thus they argued that the present case provided the Court with an opportunity to transpose onto the member States’ actual territory the principles established in Behrami and Behrami, taking into account the hierarchy of international law norms and the various legal spheres arising therefrom.

110. The French Government also pointed out that, in its Kadi judgment (see paragraph 83 above), the Court of Justice of the European Communities had relied on the constitutional nature of the EC Treaty for its review of a regulation implementing Security Council resolutions. Such considerations being absent in the present case, the French Government had difficulty conceiving what could justify a finding by the Court, in disregard of Article 103 of the UN Charter, that Switzerland was responsible for the implementation of resolutions that it was required to apply and to which it also had to give precedence over any other undertaking.

(b) The United Kingdom Government

111. The United Kingdom Government observed that the entry and transit ban had been imposed on the applicant in the context of the Taliban Ordinance, which they regarded as having merely implemented Security Council resolutions that were binding on all States, having been adopted under Chapter VII of the United Nations Charter (Article 25 thereof): the obligations arising from those resolutions thus took precedence, under Article 103 of the Charter, over all other international agreements. In this connection the United Kingdom Government were of the opinion that the effectiveness of the sanctions regime set up to maintain international peace and security would be seriously compromised if priority were given to the rights arising from Articles 5 or 8 of the Convention. They took the view that, particularly in paragraph 2 (b) of Resolution 1390 (2002), the Security Council had used “clear and explicit language” to impose on States specific measures that might conflict with their other international obligations, in particular those arising from human rights instruments. Referring to the judgment recently delivered in the case of Al-Jedda v. the United Kingdom ([GC], no. 27021/08, § 102, ECHR 2011), they thus argued that the respondent State had been obliged to apply the measures in issue.
Al-Skeini and Others v. the United Kingdom [GC], no. 55721/07, § 130, 112. The organisation JUSTICE considered that the sanctions regime established by Security Council Resolution 1267 (1999) was the source of and 16 Other Contracting States (dec.) [GC], no. 52079/99, § 66, ECHR 2004-XII; (cited above, § 131, and Banković and Others, nos. 48205/99, 48207/99, 48209/99, 14 May 2002; and Banković and Others, cited above, §§ 59-61), such that a State’s jurisdiction is primarily territorial (see, inter alia, Kadi and Others, cited above, §§ 130, 131, ECHR 2004-IX, and Behrami and Behrami, cited above, § 74), and that the remedies taken by the member States of the United Nations to implement the Security Council resolutions with the United Nations and were thus inapplicable to the Charter were measures taken by KFOR, whose powers had been validly delegated to it, and those of UNMIK, a subsidiary organ of the United Nations, under the same Chapter VIII of the Charter, the same objective and the same legal framework. In the present case, by contrast, the relevant Security Council resolutions, especially Resolutions 1267 (1999), 1333 (2000), 1373 (2001), and 1390 (2002), required States to act in their own names and to implement them at national level.

118. As provided by Article 1 of the Convention and thus engages the responsibility of the respondent State.

119. The notion of jurisdiction reflects the meaning given to that term in public international law (see, inter alia, Ilaşcu and Others, cited above, § 66, Series A no. 161) and is presumed to be exercised normally throughout a State’s territory (see, inter alia, Gentilhomme and Others v. France, nos. 48205/99, 48207/99 and 48209/99, § 20, 14 May 2002; and Banković and Others, cited above, §§ 74, 75, 130, 131, ECHR 2004-XII, § 131, and contrast Gentilhomme and Others, cited above, § 132). Relying on the Court’s decision in Behrami and Behrami (ibid., § 151). In the present case, by contrast, the relevant Security Council resolutions were implemented at national level by an Ordinance of the Federal Council and the applicant’s requests for exemption from the ban on entry into Swiss territory were rejected by the Swiss authorities (the IMES, then the ODM). The acts in question were thus inapplicable to the Federal Council and the applicant’s review by the Federal Court of Canada (paragraphs 82-92 and 93-101, above).

120. In the light of the arguments set out by the parties and third-party interveners, the Court must determine whether it has jurisdiction to entertain the complaints raised by the applicant. For that purpose it will have to determine whether the application falls within the scope of Article 1 of the Convention and thus engages the responsibility of the respondent State.

121. In the present case the measures imposed by the Security Council Federal Council were implemented at national level by an Ordinance of the ODM. The acts in question were thus inapplicable to the respondent State. For that purpose it must determine whether the application falls within the scope of Article 1 of the Convention and thus engages the responsibility of the respondent State.

122. The severity of that interference with Convention rights was exacerbated by the inability of the listed persons to challenge effectively the decision to list them, including the evidential basis for the decision. JUSTICE took the view that the procedures of the sanctions committee did not therefore provide equivalent protection for those persons and their families, in particular the right to respect for private and family life, "jurisdiction" under Article 1 is a threshold criterion for a Convention rights.

123. The severity of that interference with Convention rights was exacerbated by the inability of the listed persons to challenge effectively the decision to list them, including the evidential basis for the decision. JUSTICE took the view that the procedures of the sanctions committee did not therefore provide equivalent protection for those persons and their families, in particular the right to respect for private and family life, "jurisdiction" under Article 1 is a threshold criterion for a Convention rights.

124. Those conclusions, it observed, were reflected in the findings of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, the UN Special Rapporteur on Terrorism and Human Rights and in the decisions of the Federal Court of Canada (paragraphs 82-92 and 93-101, above).

125. JUSTICE was convinced that the Court was not obliged to interpret Article 103 of the Charter in such a manner that it would result in the maintenance of the international peace and security, though the primary function of the Security Council, was not the pre-eminent role either of international law or of the Charter. At least equal importance was to be attached to the principle of respect for fundamental rights and freedoms set forth in the Preamble to the Charter. The Court cannot endorse that argument. It would point out that it found in Behrami and Behrami cited above, § 137, and contrast Gentilhomme and Others, cited above, § 132).

126. The organisation JUSTICE considered that the sanctions regime established by Security Council Resolution 1267 (1999) was the source of and 16 Other Contracting States (dec.) [GC], no. 52079/99, § 66, ECHR 2004-XII; (cited above, § 131, and Banković and Others, nos. 48205/99, 48207/99, 48209/99, 14 May 2002; and Banković and Others, cited above, §§ 59-61), such that a State’s jurisdiction is primarily territorial (see, inter alia, Kadi and Others, cited above, §§ 130, 131, ECHR 2004-IX, and Behrami and Behrami, cited above, § 74), and that the remedies taken by the member States of the United Nations to implement the Security Council resolutions with the United Nations and were thus inapplicable to the Charter were measures taken by KFOR, whose powers had been validly delegated to it, and those of UNMIK, a subsidiary organ of the United Nations, under the same Chapter VIII of the Charter, the same objective and the same legal framework. In the present case, by contrast, the relevant Security Council resolutions, especially Resolutions 1267 (1999), 1333 (2000), 1373 (2001), and 1390 (2002), required States to act in their own names and to implement them at national level.

127. In the present case the measures imposed by the Security Council Federal Council were implemented at national level by an Ordinance of the ODM. The acts in question were thus inapplicable to the respondent State. For that purpose it must determine whether the application falls within the scope of Article 1 of the Convention and thus engages the responsibility of the respondent State.

128. The severity of that interference with Convention rights was exacerbated by the inability of the listed persons to challenge effectively the decision to list them, including the evidential basis for the decision. JUSTICE took the view that the procedures of the sanctions committee did not therefore provide equivalent protection for those persons and their families, in particular the right to respect for private and family life, "jurisdiction" under Article 1 is a threshold criterion for a Convention rights.
122. The measures in issue were therefore taken in the exercise by Switzerland of its “jurisdiction” within the meaning of Article 1 of the Convention. The impugned acts and omissions are thus capable of engaging the respondent State’s responsibility under the Convention. It also follows that the Court has jurisdiction ratione personae to entertain the present application.

123. Accordingly, the Court dismisses the objection that the application is incompatible ratione personae with the Convention.

(b) Compatibility ratione materiae

124. The respondent Government argued that the present application was also incompatible ratione materiae with the Convention. In this connection they emphasised the binding nature of the resolutions adopted by the Security Council under Chapter VII of the United Nations Charter and its primacy over any other international agreement, in accordance with Article 103 thereof.

125. The Court finds that these arguments concern more the merits of the complaints than their compatibility with the Convention. Consequently, the respondent Government’s objection as to the incompatibility ratione materiae of the application with the Convention should be joined to the merits.

B. Whether the applicant is a “victim”

1. The parties’ submissions

126. The respondent Government pointed out that on 23 September 2009 the applicant’s name had been deleted from the list annexed to the Security Council resolutions providing for the impugned sanctions and on 29 September 2009 the Taliban Ordinance had been amended accordingly, with effect from 2 October 2009. Thus, they argued, the impugned measures against the applicant had been completely discontinued. In the Government’s opinion, the dispute had therefore been resolved within the meaning of Article 37 § 1 (b) of the Convention and, as a result, they asked the Court to strike the application out of its list, in accordance with that provision.

127. The applicant disagreed with that argument. He took the view that the mere fact that the situation had evolved in such a way that his name had been deleted from the Sanctions Committee’s list, that the Taliban Ordinance had been amended accordingly and that the sanctions against him had been lifted, since the beginning of October 2009, had not deprived him of his victim status as regards the breaches of his rights prior to that date.

2. The Court’s assessment

128. It is the settled case-law of the Court that the word “victim” in the context of Article 34 of the Convention denotes the person directly affected by the act or omission in issue, the existence of a violation of the Convention being conceivable even in the absence of prejudice; prejudice is relevant only in the context of Article 41. Consequently, a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a “victim” unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, among other authorities, Gäfgen v. Germany [GC], no. 22978/05, § 115, ECHR 2010; Association Ekin v. France [dec.], no. 39288/98, 18 January 2000; Brumărescu v. Romania [GC], no. 28342/95, § 50, ECHR 1999-VII; Amuur v. France, 25 June 1996, § 36, Reports of Judgments and Decisions 1996-III; and Eckle v. Germany, 15 July 1982, § 66, Series A no. 51).

129. In the present case, the Court observes that the sanctions imposed on the applicant have been lifted and that he is now authorised to cross the border of Campione d’Italia to enter or pass through Switzerland freely. However, the lifting of the sanctions, which was not decided until September-October 2009, has not deprived the applicant of his status as victim of the restrictions from which he suffered from the time his name was added, in November 2001, to the Sanctions Committee’s list and to the list annexed to the Taliban Ordinance, or at least from 27 November 2003, when he was informed that he was no longer authorised to cross the border (see paragraph 26 above). The lifting of the sanctions cannot be regarded as an acknowledgment by the Government, even implicitly, of a violation of the Convention, for the purposes of the above-cited case-law. Moreover, it was not followed by any redress within the meaning of that case-law.

130. Accordingly, the applicant may claim to have been the victim of the alleged violations of the Convention for a period of at least six years. As a result, the Government’s objection as to an alleged lack of victim status should be dismissed.

C. Whether domestic remedies have been exhausted

1. The parties’ submissions

(a) The respondent Government

131. The respondent Government observed that, according to the Security Council’s sanctions regime, exemptions from the entry and transit ban could be granted when they were necessary for the fulfilment of a judicial process, or for other reasons, in particular of a medical, humanitarian or religious nature, subject to the approval of the Sanctions
Committee (see Resolution 1390 (2002), paragraph 2(b)). To take account of such situations, Article 4a § 2 of the Taliban Ordinance provided that the Federal Office of Migration (the ODM) could, in accordance with the decisions of the Security Council or for the protection of Swiss interests, grant exemptions.

132. The Government contended that the various decisions given by the Office had not been appealed against, and the action taken before it concerned only the question of the delisting of the applicant and the organisations associated with him from Annex 2 to the Taliban Ordinance.

133. The Government pointed out that, both before and after the Federal Court’s judgment, the applicant had not appealed against any decision of the former Federal Office for Immigration, Integration and Emigration (the IMES, incorporated into the ODM on its creation in 2005) or of the ODM concerning exemptions from the sanctions regime. In addition, the authorities had granted exemptions (in decisions of 20 September 2006 and 11 September 2008) that had not been used by the applicant. The applicant had explained in this connection that the duration of the exemptions had not been sufficient, in view of his age and the distance to be travelled, for him to make the intended journeys. On this subject the Government pointed out that the first exemption, for one day, had been granted for a journey to Milan in connection with judicial proceedings, and that it took only one hour to drive from Campione d’Italia to the centre of Milan. The second exemption, for two days, had been granted to the applicant for a journey to Berne and Sion, both cities being less than three and a half hours away from Campione by car.

134. Lastly, the Government argued that the applicant could at any time have requested to move house, even temporarily, to another part of Italy, the country of which he was a national. Such a request would have been submitted by the competent Swiss authority (the IMES, then the ODM) to the Sanctions Committee. As the sanctions had been formulated in general terms, the Government were of the opinion that the Committee would most probably have authorised the applicant’s move.

135. For these reasons the Government submitted that the applicant had failed to exhaust domestic remedies.

(b) The applicant

136. Concerning the first three refusals by the ODM (26 March 2004, 11 May 2007 and 2 August 2007), the applicant contended that there was no clear domestic case-law as to whether the Swiss authorities had any margin of appreciation in the granting of exemptions from the restrictions imposed on him and that no clarification had been provided by the Federal Court in this connection. Furthermore, no action appeared to have been taken by the ODM or any other authority to clarify the position regarding the grant of exemptions. In his submission it could not therefore be said that an effective remedy, within the meaning of the Court’s case-law, was available.

137. As regards the Government’s argument that he had failed to make use of the exemptions granted to him by the ODM (on 20 September 2006 and 11 September 2008), he alleged that they concerned only a partial lifting of the measures imposed on him, in respect of very specific situations. Given his age and the length of the journeys involved, he argued that the exemptions for one or two days were far from sufficient.

138. As to the general sanctions regime, the applicant submitted that he had exhausted domestic remedies, because he had challenged before the Federal Court the restrictions imposed by the Taliban Ordinance, of which he complained before the Court.

139. The applicant further observed that the Government’s argument that a request to move to another part of Italy would have had greater prospects of success than the request for delisting was purely speculative. He also pointed out that such an option – which he did not consider possible in his case, particularly because of the freezing of his assets by the sanctions regime and the fact that it had not been envisaged by the Federal Court – would in any event have provided redress only for part of the impugned restrictions.

2. The Court’s assessment

140. The Court reiterates that the only remedies Article 35 of the Convention requires to be exhausted are those that are available and sufficient and relate to the breaches alleged (see Tsomocos and Others v. Greece, 15 November 1996, § 32, Reports 1996-V).

141. The burden of proof is on the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success (see V. v. the United Kingdom [GC], no. 24888/94, § 57, ECHR 1999-IX).

142. Moreover, an applicant who has availed himself of a remedy that is apparently effective and sufficient cannot be required also to have tried others that were available but probably no more likely to be successful (see, for example, Aquilina v. Malta [GC], no. 25642/94, § 39, ECHR 1999-III, and Manoussakis and Others v. Greece, 26 September 1996, § 33, Reports 1996-IV).

143. In the present case the Court notes that the applicant did not challenge the refusals by the IMES and the ODM to grant his requests for exemption from the sanctions regime and that on two occasions he was granted exemptions that he did not use (see paragraphs 34 and 57 above).

144. However, even supposing that those exemptions had alleviated certain effects of the sanctions regime, by allowing him to leave the enclave
of Campione d’Italia for medical or legal reasons, the Court is of the view that the issue of exemptions was part of a broader situation whose origin lay in the addition by the Swiss authorities of the applicant’s name to the list annexed to the Taliban Ordinance, which was based on the Sanctions Committee’s list. In this connection, it should be observed that the applicant submitted many requests to the national authorities for the deletion of his name from the list annexed to the Taliban Ordinance – requests that were denied by the SECO and the Federal Department for Economic Affairs (see paragraphs 30-32 above). The Federal Council, to which he appealed against the Department’s decision, referred the case to the Federal Court. In a judgment of 14 November 2007, that court dismissed his appeal without examining the merits of the complaints under the Convention. Consequently, the Court takes the view that the applicant has exhausted domestic remedies relating to the sanctions regime as a whole, the application of which in his case stemmed from the addition of his name to the list annexed to the Taliban Ordinance.

145. In these circumstances, the Court does not find it necessary to address, at this stage, the argument raised by the Government to the effect that the applicant could have been reasonably expected to move from Campione d’Italia, where he had been living since 1970, to another region of Italy. That question will, by contrast, play a certain role when it comes to examining the proportionality of the impugned measures (see paragraph 190 below).

146. As to the complaint under Article 8 that the addition of the applicant’s name to the list annexed to the Taliban Ordinance had impinged his honour and reputation, the Court acknowledges that it was raised, at least in substance, before the domestic authorities. The applicant indeed claimed that the addition of his name to the Sanctions Committee’s list was tantamount to accusing him publicly of being associated with Osama bin Laden, al-Qaeda and the Taliban, when that was not the case (see paragraphs 33 and 38 above).

147. Consequently, the Court dismisses the Government’s objection as to the inadmissibility of the application for failure to exhaust domestic remedies in respect of the applicant’s complaints under Articles 5 and 8.

148. As regards the complaint under Article 13, the Court finds that the objection of non-exhaustion of remedies is closely linked to the merits of the complaint. Accordingly, the Court joins it to the merits.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

149. The applicant complained that the measure by which he was prohibited from entering or passing through Switzerland had breached his right to respect for his private life, including his professional life, and his family life. He contended that this ban had prevented him from seeing his doctors in Italy or in Switzerland and from visiting his friends and family. He further claimed that the addition of his name to the list annexed to the Taliban Ordinance had impinged his honour and reputation. In support of these complaints he relied on Article 8 of the Convention, which reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

A. Admissibility

150. The Court finds that it should first examine the applicability of Article 8 in the present case.

151. It reiterates that “private life” is a broad term not susceptible to exhaustive definition (see, for example, Glor v. Switzerland, no. 13444/04, § 52, ECHR 2009; Tysiąc v. Poland, no. 5410/03, § 107, ECHR 2007-I; Hadri-Vionnet v. Switzerland, no. 55525/00, § 51, 14 February 2008; Pretty v. the United Kingdom, no. 2346/02, § 61, ECHR 2002-III; and S. and Marper v. the United Kingdom [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008). The Court has found that health, together with physical and moral integrity, falls within the realm of private life (see Glor, cited above, § 54, and X and Y v. the Netherlands, 26 March 1985, § 22, Series A no. 91; see also Costello-Roberts v. the United Kingdom, 25 March 1993, § 36, Series A no. 247-C). The right to private life also encompasses the right to personal development and to establish and develop relationships with other human beings and the outside world in general (see, for example, S. and Marper, cited above, § 66).

152. It should moreover be observed that Article 8 also protects the right to respect for “family life”. Under that provision the State must in particular act in a manner calculated to allow those concerned to lead a normal family life (see Marcks v. Belgium, 13 June 1979, § 31, Series A no. 31). The Court determines the existence of family life on a case-by-case basis, looking at the circumstances of each case. The relevant criterion in such matters is the existence of effective ties between the individuals concerned (ibid.; see also K. and T. v. Finland [GC], no. 25702/94, § 150, ECHR 2001-VII, and Şerife Yiğit v. Turkey [GC], no. 3976/05, § 93, 2 November 2010).

153. The Court would further reiterate that Article 8 also protects the right to respect for one’s home (see, for example, Gillow v. the United Kingdom, 24 November 1986, § 46, Series A no. 109).
(b) The respondent Government

154. In the light of that case-law, the Court finds that the complaints

155. Furthermore, this complaint is not manifestly ill-founded within the

156. The applicant alleged that the restrictions on his freedom of

157. The Court finds it appropriate to begin by examining the

2. The Court’s assessment

(a) The applicant

158. There had thus been a violation of Article 8 on various accounts.

159. In the applicant’s submission, those circumstances were aggravated

160. The Government observed that the applicant had been free to

161. In response to the applicant’s allegation that he had never been able
to find out the factors which had led to the impugned measures, or to
challenge them before a court, the Government stated that, as shown in their
earlier observations, the impugned measures had not breached the
procedural aspect of the applicant’s rights under Article 8. Consequently, the
Government were of the opinion that the provision was not applicable.

162. For those reasons the Government were of the opinion that the
restrictions imposed did not constitute an interference with the applicant’s
rights under Article 8. If the Court were to find otherwise, the Government argued that the measure was in any event necessary in a democratic society

163. The Court finds that the situation of the applicant was in any event necessary in a democratic society.
In the present case, the Court observes that the Federal Court found principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, of any relevant rules of international law applicable in the relations between States, including international customary law and adjudicative precedent. The Court thus concludes that the relevant rules of international law referred to above, in particular the rules concerning the international situation on account of the location of Campione d'Italia, an enclave of Switzerland, as indicated in paragraph 165 above, are applicable to the facts of the case.

The interference with the applicant’s right to respect for his private and family life within the meaning of Article 8 § 1 is apparent. However, the applicant concedes that he had prior knowledge of the existence of the Triage Center, and it is not contended that he was not aware of its location within the territory of Switzerland. The Court is satisfied that the authorities of the Swiss Confederation were under an obligation to protect his private life, which is a fundamental aspect of human dignity, as set forth in Article 5 of the Convention.

(b) Whether the interference was justified

167. The interference with the applicant’s right to respect for his private and family life, as found above, of that provision. It thus remains to be determined whether it was “necessary in a democratic society” to achieve such aims. The Court finds it necessary first to reiterate certain principles that will guide it in its subsequent examination.

(1) General principles

168. According to established case-law, a Contracting Party is responsible for acts and omissions of its organs, regardless of whether the act or omission was within the exercise of its legislative, executive or administrative powers, and whether it was free from fault or in compliance with international legal obligations. Article 5 of the Convention provides that no one shall be subjected to torture or to any form of physical or mental ill-treatment. The Court has already found that the applicant was subjected to ill-treatment, as defined in Article 1 of the Convention, by the Swiss authorities. In order to determine whether the interference with the applicant’s right to respect for his private and family life was “necessary in a democratic society” to achieve such aims, the Court must have regard to the purposes for which the United Nations was created. As well as all purposes for which the United Nations was created, the third subparagraph of Article 1 of the United Nations Charter provides that the United Nations was established to achieve international cooperation in order to promote and encourage respect for human rights and fundamental freedoms. In 1945, the Member States of the United Nations under the Charter agreed to the purposes of the United Nations. The Court therefore has the duty to ensure that the United Nations Charter is respected in order to achieve the purposes of the United Nations.

169. Moreover, the Court reiterates that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the purposes and principles of the United Nations Charter and the other international human rights instruments. In the present case, the Court has already found that the applicant was subjected to ill-treatment, as defined in Article 1 of the Convention, by the Swiss authorities. In order to determine whether the interference with the applicant’s right to respect for his private and family life was “necessary in a democratic society” to achieve such aims, the Court must have regard to the purposes for which the United Nations was created. As well as all purposes for which the United Nations was created, the third subparagraph of Article 1 of the United Nations Charter provides that the United Nations was established to achieve international cooperation in order to promote and encourage respect for human rights and fundamental freedoms. In 1945, the Member States of the United Nations under the Charter agreed to the purposes of the United Nations. The Court therefore has the duty to ensure that the United Nations Charter is respected in order to achieve the purposes of the United Nations. Nevertheless, the Court is aware that the United Nations has not yet been able to ensure respect for human rights and fundamental freedoms. The Court therefore has the duty to ensure that the United Nations Charter is respected in order to achieve the purposes of the United Nations.
resolutions in the present case. The Court must therefore first examine those resolutions in order to determine whether, first, they impose any obligation on Switzerland and, second, if so, what the nature of that obligation is in the light of the United Nations Charter and, in particular, whether the implementation of those resolutions would require Switzerland to do so or whether it may have some discretion in the manner of their implementation.

172. The Grand Chamber confirms those principles. However, in the present case it observes that, contrary to the situation in Al-Jedda, where the Council cited above, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights treaties.

173. The respondent Government, together with the French and United Kingdom Governments, intervening as third parties, argued that the Swiss authorities had no latitude in implementing the relevant Security Council resolutions. To be precise, the ban on entry and transit into Switzerland was based on Article 4a of the Taliban Ordinance (see paragraph 66 above). The measures therefore had a sufficient legal basis.

174. The applicant did not appear to deny that the impugned restrictions were imposed pursuant to the Taliban Ordinance. To be precise, the ban on entry and transit into Switzerland was based on Article 4a of the Taliban Ordinance (see paragraph 66 above). The measures therefore had a sufficient legal basis.

175. The Court notes that the question of the existence of a legal basis is not a matter of dispute between the parties. It observes that the impugned restrictions were imposed pursuant to the Taliban Ordinance, adopted to implement the relevant Security Council resolutions. To be precise, the ban on entry and transit into Switzerland was based on Article 4a of the Taliban Ordinance (see paragraph 66 above). The measures therefore had a sufficient legal basis.

176. The Court observes that Switzerland did not become a member of the United Nations until 10 September 2002: it had thus adopted the Taliban Ordinance, whereas it was already bound by the Convention. Similarly, it had implemented at domestic level the common practice, stemming from the resolutions adopted by the United Nations Charter, of blocking the entry of persons suspected of belonging to the Taliban. The Court accordingly holds that the resolution of 16 January 2002 did not impose on States an obligation to implement those resolutions in order to determine whether they allowed the authorities to do so or whether they left States any freedom in that matter.

177. In the present case, the applicant mainly challenged the Swiss entry and transit ban imposed on him in particular through the implementation of Resolution 1390 (2002) of 16 January 2002 (see paragraph 74 above). In the Court's view, the term "necessary" was to be construed on a case-by-case basis.

178. In addition, in paragraph 8 of Resolution 1390 (2002), the Security Council "urged all States to take immediate steps to enforce and strengthen through legislative enactments or administrative measures, where appropriate, the measures imposed under domestic laws or regulations against their nationals and other individuals or entities operating on their national security and public safety" (see paragraph 74 above). The Court observes that, in the present case, the applicant had not denied that the measures imposed on him were in pursuance of the relevant Security Council resolutions.
179. Lastly, the Court would refer to the motion by which the Foreign Policy Commission of the Swiss National Council requested the Federal Council to inform the UN Security Council that it would no longer unconditionally apply the sanctions prescribed against individuals under the counter-terrorism resolutions (see paragraph 63 above). Even though that motion was drafted in rather general terms, it can nevertheless be said that the applicant’s case was one of the main reasons for its adoption. In any event, in the Court’s view, the Swiss Parliament, in adopting that motion, was expressing its intention to allow a certain discretion in the application of the Security Council’s counter-terrorism resolutions.

180. In view of the foregoing, the Court finds that Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UN Security Council.

(b) Whether the interference was proportionate in the present case

181. An interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are “relevant and sufficient” (see, for example, S. and Marper, cited above, § 101, and Coster v. the United Kingdom [GC], no. 24876/94, § 104, 18 January 2001, with the cases cited therein).

182. The object and purpose of the Convention, being a human rights treaty protecting individuals on an objective basis (see Neulinger and Shuruk, cited above, § 145), call for its provisions to be interpreted and applied in a manner that renders its guarantees practical and effective (see, among other authorities, Artico v. Italy, 13 May 1980, § 33, Series A no. 37). Thus, in order to ensure “respect” for private and family life within the meaning of Article 8, the realities of each case must be taken into account in order to avoid the mechanical application of domestic law to a particular situation (see, mutatis mutandis, Emonet and Others v. Switzerland, no. 39051/03, § 86, 13 December 2007).

183. The Court has previously found that, for a measure to be regarded as proportionate and as necessary in a democratic society, the possibility of recourse to an alternative measure that would cause less damage to the fundamental right at issue whilst fulfilling the same aim must be ruled out (see Glor, cited above, § 94).

184. In any event, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention (see, for example, S. and Marper, cited above, § 101, and Coster, cited above, § 104). A margin of appreciation must be left to the competent national authorities in this connection. The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference (see S. and Marper, cited above, § 102).

185. In order to address the question whether the measures taken against the applicant were proportionate to the legitimate aim that they were supposed to pursue, and whether the reasons given by the national authorities were “relevant and sufficient”, the Court must examine whether the Swiss authorities took sufficient account of the particular nature of his case and whether they adopted, in the context of their margin of appreciation, the measures that were called for in order to adapt the sanctions regime to the applicant’s individual situation.

186. In doing so, the Court is prepared to take account of the fact that the threat of terrorism was particularly serious at the time of the adoption, between 1999 and 2002, of the resolutions prescribing those sanctions. That context in which they were adopted. However, the maintaining or even reinforcement of those measures over the years must be explained and justified convincingly.

187. The Court observes in this connection that the investigations conducted by the Swiss and Italian authorities concluded that the suspicions about the applicant’s participation in activities related to international terrorism were clearly unfounded. On 31 May 2005 the Swiss Federal Prosecutor closed the investigation opened in October 2001 in respect of the applicant, and on 5 July 2008 the Italian Government submitted to the Sanctions Committee a request for the applicant’s delisting on the ground that the proceedings against him in Italy had been discontinued (see paragraph 56 above). Observing, however, that the veracity of this explanation having been given by the latter for such delay, the Court finds that the proceedings against him in Italy had been discontinued (see paragraph 56 above). The Federal Court, for its part, observed that the State which had conducted the investigations and criminal proceedings could not itself proceed with the deletion, but it could at least transmit the results of its investigations to the Sanctions Committee and request or support the person’s delisting (see paragraph 51 above).

188. In this connection the Court is surprised by the allegation that the Swiss authorities did not inform the Sanctions Committee until 2 September 2009 of the conclusions of investigations closed on 31 May 2005 (see paragraph 61 above). Observing, however, that the veracity of this allegation has not been disputed by the Government, and without any explanation having been given by the latter for such delay, the Court finds that a more prompt communication of the investigative authorities’ conclusions might have led to the deletion of the applicant’s name from the United Nations list at an earlier stage, thereby considerably reducing the period of time in which he was subjected to the restrictions of his rights.
Committee to grant a broader exemption in view of his particular situation. The applicant did not make any such request, but it does not appear, in particular from the record of that meeting, that the Swiss authorities offered him any assistance to that end.

194. It has been established that the applicant’s name was added to the United Nations list, not on the initiative of Switzerland but on that of the United States of America. Neither has it been disputed that, at least until the adoption of Resolution 1730 (2006), it was for the State of citizenship or residence of the person concerned to approach the Sanctions Committee for the purpose of delisting. In the context of the election to the Security Council for the period 2007-2008, Switzerland was neither his State of citizenship nor his State of residence, and the Swiss authorities were not therefore competent to undertake such action. However, it does not appear that the Swiss authorities offered the applicant any assistance to that end.

189. As regards the scope of the prohibition in question, the Court considers that it is not in dispute that the applicant was born in 1931 and has health problems (see paragraph 14 above). The Federal Court itself found that, although Article 4a § 2 of the Taliban Ordinance was formulated as an enabling provision, it did oblige the authorities to grant an exemption in as many cases where the Convention so permitted as a matter of national law. It did, however, find that the applicant was not a person who was particularly affected by the sanctions and that his case could therefore be considered separately. In that respect, the Court considers the principle enshrined in Article 4 of the Convention, to the effect that, in determining whether there is a violation of a Convention right, due regard shall be had to all the circumstances of the case, which include the general context of the country, the nature of the Convention right and the particular circumstances of the case (see, for example, the so-called Soering case, paragraph 114 above).

195. The Court acknowledges that Switzerland, along with other States, has made considerable efforts in the recent years to improve the sanctions regime (see paragraphs 46 and 78 above). It is of the opinion, however, in view of the principle that the Convention protects rights that are not theoretical or illusory but practical and effective (see, for example, Prokopovich v. Russia, no. 58255/00, § 37, ECHR 2004-XI, and Gillon v. France, § 46), that the national authorities actually took, or sought to take, in response to the applicant’s very specific situation. In this connection, the Court considers in particular that the Swiss authorities did not sufficiently take into account the realities of the applicant’s situation as an enclave, even to travel to any other part of Italy, the country he had been living in since 1970, to settle in another region of Italy, especially as Switzerland was neither his State of citizenship nor his State of residence. In those cases where the Convention so permitted as a matter of national law, it did, however, find that the applicant was not a person who was particularly affected by the sanctions and that his case could therefore be considered separately. In that respect, the Court considers the principle enshrined in Article 4 of the Convention, to the effect that, in determining whether there is a violation of a Convention right, due regard shall be had to all the circumstances of the case, which include the general context of the country, the nature of the Convention right and the particular circumstances of the case (see, for example, the so-called Soering case, paragraph 114 above).

192. In reality, the Swiss authorities had not submitted any request for some alleviation of the sanctions regime applicable to the applicant, having made considerable efforts in the recent years to improve the sanctions regime. The Court finds that, in the light of the applicant’s particular situation (see paragraph 192 above), the applicant’s rights under the Convention have been violated and that the respondent State should have persuaded the Court of the necessity of decidng how the relevant legal order should have allowed for the possibility of the applicant’s national authority actually to have taken action. In this connection, the Court finds that the respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, that should have persuaded the Court.
that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant’s individual situation.

197. That finding dispenses the Court from determining the question, raised by the respondent and intervening Governments, of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the United Nations Charter, on the other. In the Court’s view, the important point is that the respondent Government have failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent (see, in this connection, paragraphs 81 and 170 above).

198. Having regard to all the circumstances of the present case, the Court finds that the restrictions imposed on the applicant’s freedom of movement for a considerable period of time did not strike a fair balance between his right to the protection of his private and family life, on the one hand, and the legitimate aims of the prevention of crime and the protection of Switzerland’s national security and public safety, on the other. Consequently, the interference with his right to respect for private and family life was not proportionate and therefore not necessary in a democratic society.

(f) Conclusion

199. In view of the foregoing, the Court dismisses the Government’s preliminary objection that the application was incompatible materiae with the Convention and, ruling on the merits, finds that there has been a violation of Article 8 of the Convention. Having regard to that conclusion, and notwithstanding that the applicant’s allegation that the addition of his name to the list annexed to the Taliban Ordinance also impugned his honour and reputation constitutes a separate complaint, the Court finds that it does not need to examine that complaint separately.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

200. The applicant complained that he had not had an effective remedy by which to have his Convention complaints examined. He thus alleged that there had been a violation of Article 13, which reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. Admissibility

201. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It finds, moreover, that, no other ground for declaring it inadmissible has been established. The complaint should thus be declared admissible.

B. Merits

1. The parties’ submissions

(a) The applicant

202. The applicant argued, relying on the Al-Nashif v. Bulgaria case (no. 50963/99, 20 June 2002), that the competing interests of the protection of sources and information critical to national security, on the one hand, and the right to an effective remedy, on the other, could be reconciled through a specially adapted procedure. In the present case, however, no such procedure had been available, either before United Nations bodies or before the domestic authorities.

203. He further pointed out that the above-mentioned Sayadi and Vinck case (see paragraphs 88-92 above), where the Human Rights Committee had concluded that an effective remedy was constituted by the court order requiring the Belgian Government, which had forwarded the complainants’ names to the Sanctions Committee in the first place, to submit a delisting request to that Committee, was not relevant to the present case for two reasons. First, because he was not complaining that Switzerland had failed to have his name removed from the United Nations list; the Human Rights Committee had clearly confirmed that the relevant authority lay entirely with the Sanctions Committee and not with the State itself. Secondly, in his case, the Federal Court, unlike the Brussels Court of First Instance in Sayadi and Vinck, although observing that the respondent Government were obliged to support the applicant in any endeavour to secure delisting, had not actually ordered it to do so.

204. The applicant thus argued that the conformity of the impugned measures with Articles 3, 8 and 9 of the Convention was not subject to the scrutiny of any domestic court and that, accordingly, there had been a violation of Article 13.

(b) The respondent Government

205. In the Government’s submission, Article 13 required that where an individual had an arguable complaint that there had been a violation of the Convention, he or she should have a remedy before a “national authority”. The Government submitted that, having regard to their previous arguments, the applicant’s complaints were not made out. They argued that, should the Court decide not to follow that assessment, there had not in any event been a violation of Article 13 taken together with Article 8 in the present case.

206. The Government pointed out that the applicant had requested the deletion of his name and those of the organisations with which he was
associated from the list annexed to the Taliban Ordinance. That request had apparently been examined by the Federal Court, which had found that the applicant did not have an effective remedy in respect of that issue since, being bound by the Security Council resolutions, it was not able to annul the sanctions imposed on the applicant. The Federal Court had nevertheless emphasised that, in that situation, it was for Switzerland to request the applicant’s delisting or to support such a procedure initiated by him. In this connection, the Government observed that Switzerland was not itself entitled to lodge a delisting request – as the applicant did not have Swiss nationality and did not live in Switzerland – as had been confirmed by the Sanctions Committee. Switzerland had simply had the possibility of supporting a request lodged by the applicant himself, and it had apparently done so by sending his lawyer a formal attestation of the discontinuance of criminal proceedings against him.

2. The Court’s assessment

(a) Applicable principles

207. The Court observes that Article 13 guarantees the availability at national level of a remedy by which to complain about a breach of the Convention rights and freedoms. Therefore, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision, there must be a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. The scope of the obligation under Article 13 varies depending on the nature of the applicant’s complaint under the Convention, but the remedy must in any event be “effective” in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the State (see Büyükağa v. Turkey, no. 28340/95, § 64, 21 December 2000, with the cases cited therein, especially Aksoy v. Turkey, 18 December 1996, § 95, Reports 1996-VI). Under certain conditions, the aggregate of remedies provided for under domestic law may satisfy the requirements of Article 13 (see, in particular, Leander v. Sweden, 26 March 1987, § 77, Series A no. 116).

208. However, Article 13 requires that a remedy be available in domestic law only in respect of grievances which can be regarded as “arguable” in terms of the Convention (see, for example, Boyle and Rice v. the United Kingdom, 27 April 1988, § 54, Series A no. 131). It does not go so far as to guarantee a remedy allowing a Contracting State’s laws to be challenged before a national authority on the ground of being contrary to the Convention (see Costello-Roberts, cited above, § 40), but seeks only to ensure that anyone who makes an arguable complaint about a violation of a Convention right will have an effective remedy in the domestic legal order (ibid., § 39).

(b) Application of those principles to the present case

209. The Court is of the opinion that, in view of its finding of a violation of Article 8 above, the complaint is arguable. It therefore remains to be ascertained whether the applicant had, under Swiss law, an effective remedy by which to complain of the breaches of his Convention rights.

210. The Court observes that the applicant was able to apply to the national authorities to have his name deleted from the list annexed to the Taliban Ordinance and that this could have provided redress for his complaints under the Convention. However, those authorities did not examine the merits his complaints concerning the alleged violations of the Convention. In particular, the Federal Court took the view that whilst it could verify whether Switzerland was bound by the Security Council resolutions, it could not lift the sanctions imposed on the applicant on the ground that they did not respect human rights (see paragraph 50 above).

211. The Federal Court, moreover, expressly acknowledged that the delisting procedure at United Nations level, even after its improvement by the most recent resolutions, could not be regarded as an effective remedy within the meaning of Article 13 of the Convention (ibid.).

212. The Court would further refer to the finding of the CJEC that “it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations” (see the Kadi judgment of the CJEC, § 299, see paragraph 86 above). The Court is of the opinion that the same reasoning must be applied, mutatis mutandis, to the present case, more specifically to the review by the Swiss authorities of the conformity of the Taliban Ordinance with the Convention. It further finds that there was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions.

213. Having regard to the foregoing, the Court finds that the applicant did not have any effective means of obtaining the removal of his name from the list annexed to the Taliban Ordinance and therefore no remedy in respect of the Convention violations that he alleged (see, mutatis mutandis, Lord Hope, in the main part of the Ahmed and others judgment, §§ 81-82, paragraph 96 above).

214. Accordingly, the Court dismisses the preliminary objection raised by the Government as to the non-exhaustion of domestic remedies and,
IV. ALLEGED VIOLATIONS OF ARTICLES 5 OF THE CONVENTION

214. Relying on Article 5 § 1 of the Convention, the applicant argued that by preventing him from entering or transiting through Switzerland, the Swiss authorities had deprived him of his liberty. Under Article 5 § 4, he complained that the authorities had not undertaken any review of the lawfulness of the restrictions to his freedom of movement. Those provisions read as follows:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence which it is reasonably considered necessary to prevent his committing an offence;

(d) the detention of a minor by lawful order for the purpose of educational or disciplinary reasons;

(e) the lawful arrest or detention of a person in order to prevent his effecting an unauthorised entry into the country of a person against whom action is being taken with a view to deportation or extradition.

215. Relying on Article 5 § 1, the applicant further contended that the impugned restrictions had been imposed as part of the enforcement of a measure by which he was supposed to be confined to the territory of Campione d'Italia. At any time he could thus have requested authorisation to transfer his home to another part of Italy. The Swiss authorities had deprived him of his liberty. Only a ban on entering and transiting through Switzerland had been imposed on him. The fact that the applicant had chosen to live in an Italian enclave surrounded by Swiss territory had in no way deprived him of his liberty. Under Article 8, the Swiss authorities had no specific obligations and he could have received as many visits as he wished. He was also able, at all times, to meet his lawyers freely. The Government further pointed out that the border between Campione d'Italia and Switzerland could not have been perceived by him as a physical obstacle.

216. The Government, referring to the Guzzardi v. Italy (no. 16360/90, Commission decision of 2 March 1994, Decisions and Reports 76-B, pp. 13 et seq.) cases, argued that there had been no deprivation of liberty within the meaning of Article 5 § 1.

217. As regards the effects and conditions of the measure, the Government observed that the applicant was not subject to any restriction apart from the ban on entry into or transit through Switzerland. In particular, he was not under surveillance by the Swiss authorities, had no specific obligations and could have received as many visits as he wished.

218. For those reasons, the Government contended that the impugned measure could not be regarded as a deprivation of liberty within the meaning of Article 5 § 1. For the applicant's case, the inability to leave the area was not the result of a criminal conviction and, secondly, he had been unable to challenge the impugned restrictions in the context of a fair hearing, unlike the applicant in S.F. v. Switzerland (cited above).

219. The applicant argued that the present case could not be compared to S.F. v. Switzerland (cited above), in which the Commission had declared inadmissible the complaint of an applicant under Article 5 that he had not been authorised to leave Campione d'Italia. The applicant in the instant case had been convicted and, secondly, he had been unable to challenge the impugned restrictions in the context of a fair hearing, unlike the applicant in S.F. v. Switzerland (cited above).

220. The applicant did not dispute the fact that no physical obstacle had prevented him from leaving Campione d'Italia, but he pointed out that, if he had been discovered when attempting to enter a territory from which he was banned, he would have faced proceedings entailing heavy penalties. The Government pointed out that the border between Campione d'Italia and Switzerland was never the subject of spot checks and that, if it had been discovered in the context of a check that he was attempting to enter a territory from which he was banned, he would have faced proceedings entailing heavy penalties.

221. The applicant stated that Campione d'Italia had a surface area of 1.6 sq. km and that, therefore, the space in which he could move freely was even smaller than that of the applicant in Guzzardi (cited above), who was on an island of 2.5 sq. km.
222. Moreover, the applicant pointed out that even the Federal Court itself had recognised that the restrictions amounted in effect to house arrest. For all those reasons, he contended that Article 5 § 1 should be applicable in his case.

(c) The French Government

223. The French Government, intervening as a third party, were of the opinion that Article 5 of the Convention could not be applicable to the situation of a person who was refused entry into or transit through a given territory, and that the particular circumstances of the case, stemming from the applicant's residence in an Italian enclave within the Canton of Ticino, could not change that assessment, unless the substance of that provision were to be substantially distorted.

2. The Court's assessment

224. The Court reiterates that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. The text of Article 5 makes it clear that the guarantees it contains apply to "everyone". Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty. No deprivation of liberty will be compatible with Article 5 § 1 unless it falls within one of those grounds or is provided for by a lawful derogation under Article 15 of the Convention, which allows for a Contracting State "in time of war or other public emergency threatening the life of the nation" to take measures derogating from its obligations under Article 5 "to the extent strictly required by the exigencies of the situation" (see, among other authorities, Al-Jedda, cited above, § 99; A. and Others v. the United Kingdom [GC], no. 3455/05, §§ 162-163, ECHR 2009; and Ireland v. the United Kingdom, cited above, § 194).

225. Article 5 § 1 is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4, a protocol not ratified by Switzerland. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance (see Austin and Others v. the United Kingdom [GC], nos. 39692/09, 40713/09 and 41008/09, § 57, 15 March 2012; Stanoev v. Bulgaria [GC], no. 36760/06, § 115, 17 January 2012; Medvedev and Others v. France [GC], no. 3394/03, § 73, ECHR 2010; Guzzardi, cited above, §§ 92-93; Storck v. Germany, no. 61603/00, § 71, ECHR 2005-V; and Engel and Others v. the Netherlands, 8 June 1976, § 59, Series A no. 22).

226. The Court is further of the view that the requirement to take account of the "type" and "manner of implementation" of the measure in question (see Engel and Others, § 59, and Guzzardi, § 92, both cited above) enables it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell (see, for example, Engel and Others, § 59, and Amuur, § 43, both cited above). Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good (see, mutatis mutandis, Austin and Others, cited above, § 59).

227. The Court observes that, in support of his argument that Article 5 must apply in the present case, the applicant relied particularly on the case (cited above), where the Court found that the restrictions were maintained for a considerable length of time. However, it observes that the applicant was not, strictly speaking, in a situation of detention, nor was he actually under...
house arrest: he was merely prohibited from entering or transiting through a given territory, and as a result of that measure he was unable to leave the enclave.

231. In addition, the Court notes that the applicant did not dispute before it the Swiss Government’s assertion that he had not been subjected to any surveillance by the Swiss authorities and had not been obliged to report regularly to the police (contrast Guzzardi, cited above, § 95). Nor does it appear, moreover, that he was restricted in his freedom to receive visitors, whether his family, his doctors or his lawyers (ibid.).

232. Lastly, the Court would point out that the sanctions regime permitted the applicant to seek exemptions from the entry or transit ban and that such exemptions were indeed granted to him on two occasions but he did not make use of them.

233. Having regard to all the circumstances of the present case, and in accordance with its case-law, the Court, like the Federal Court (see paragraph 48 above), finds that the applicant was not “deprived of his liberty” within the meaning of Article 5 § 1 by the measure prohibiting him from entering and transiting through Switzerland.

234. It follows that the complaints under Article 5 are manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

V. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

235. Relying essentially on the same arguments as those examined by the Court under Articles 5 and 8, the applicant complained of treatment in breach of Article 3. He further alleged that his inability to leave the enclave of Campione d’Italia to go to a mosque had breached his freedom to manifest his religion or belief as guaranteed by Article 9.

236. In view of all the material in its possession, and even supposing that those complaints had been duly raised before the domestic courts, the Court does not find any appearance of a violation of Articles 3 and 9 of the Convention.

237. It follows that this part of the application must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

238. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

239. The applicant did not submit any claim in respect of pecuniary or non-pecuniary damage.

240. Accordingly, there is no call to award him any sum on that account.

B. Costs and expenses

241. As regards costs and expenses, the applicant sought the reimbursement of 75,000 pounds sterling (GBP) plus value-added tax, for his lawyers’ fees in connection with the proceedings before the Court, together with 688.22 euros (EUR) for expenses incurred by his lawyer in travelling to Campione d’Italia, for telephone calls and for office expenses.

242. The Government pointed out that the applicant had chosen to be represented by a lawyer practising in London who charged an hourly rate that was much higher than the average rates in Switzerland, and that this choice had entailed considerable travel expenses. In their submission, even if it were to be accepted that the present case was indeed as complex as the applicant claimed, the number of hours invoiced was excessive. Consequently, they submitted that in the event of the application being upheld, an amount of no more than 10,000 Swiss francs (CHF) would be a fair award.

243. The Court reiterates that if it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts for the prevention or redress of that violation by them (see Neulinger and Shuruk, cited above, § 159). Moreover, such costs and expenses must have been actually and necessarily incurred and must be reasonable as to quantum (ibid.).

244. The Court does not share the Government’s opinion that the applicant should assume the consequences of his choice to be represented by a British lawyer. It would point out in this connection that, under Rule 36 § 4 (a) of the Rules of Court, the applicant’s representative must be “an advocate authorised to practise in any of the Contracting Parties and resident in the territory of one of them ...”. However, it notes that only the complaints submitted under Articles 8 and 13 resulted, in the present case, in a finding of a violation of the Convention. The remainder of the
C. Default interest

246. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Dismisses the Government’s preliminary objections that the application is incompatible ratione personae with the Convention and that the applicant lacks victim status;

2. Joins to the merits the Government’s preliminary objection that the application is incompatible ratione materiae with the Convention;

3. Dismisses the Government’s preliminary objection of non-exhaustion of domestic remedies in respect of the complaints under Articles 5 and 8, and joins this objection to the merits in respect of the Article 13 complaint;

4. Declares the complaints concerning Articles 8 and 13 admissible and the remainder of the application inadmissible;

5. Dismisses the Government’s preliminary objection that the application is incompatible ratione materiae with the Convention and holds that there has been a violation of Article 8 of the Convention;

6. Dismisses the Government’s preliminary objection of non-exhaustion of domestic remedies in respect of the Article 13 complaint and holds that there has been a violation of Article 13 of the Convention in conjunction with Article 8;

7. Holds
(a) that the respondent State is to pay the applicant, within three months, the sum of EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable to the applicant on that sum, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. Dismisses the remainder of the applicant’s claim for just satisfaction.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 September 2012.

Michael O’Boyle
Deputy Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Bratza, Nicolaou and Yudkivska;
(b) concurring opinion of Judge Rozakis joined by Judges Spielmann and Berro-Lefèvre;
(c) concurring opinion of Judge Malinverni.
1. While we have joined in the finding of a violation of Article 8 of the Convention in the present case, we cannot fully share the reasoning in the judgment leading to such a finding. In particular, we entertain considerable doubts whether the finding is not in our view borne out by the terms of the resolutions of the UN Security Council under which the relevant resolutions were imposed. Moreover, despite the attention devoted to the point in the judgment, it does not ultimately appear to have played a central role in the Court's assessment. The relevant resolution specifies that States should take reasonable steps to ensure the applicant's Convention rights were safeguarded. The Court's interpretation of the resolution, based on the readings of the relevant provisions, was not in our view convincing. In this respect, the judgment, which we believe is based on a misreading of the Resolution, diverges from the Court's interpretation in the first instance judgment, where it concluded that the applicant's Convention rights were safeguarded. We are also unpersuaded by the reliance in paragraph 2 of the judgment on the motion of 1 March 2010 by which the Federal Council requested the Swiss Parliament to add the applicant to the list of persons against which the sanctions were imposed.

2. As is correctly pointed out in the judgment, Resolution 1390 (2002) was a binding one which, subject to the exceptions set forth in the Resolution itself, allowed no latitude or discretion to the States as to whether to give full effect to the resolutions in question. The only relevant exception was that contained in paragraph 2 (b) of the Resolution which disposed of the sanctions imposed on the applicant. The only relevant exception was that contained in paragraph 2 (b) of the Resolution which disposed of the sanctions imposed on the applicant.

3. True it is, as is correctly pointed out in the judgment, that the United Nations Charter does not impose a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII, the Charter leaving in principle to the member States of the United Nations a free choice among the various possible means and procedures to give effect to obligations imposed on them by resolutions of the Security Council. But the obligation imposed on States under Resolution 1390 (2002) was a binding one which, subject to the exceptions set forth in the Resolution itself, allowed no latitude or discretion to the States as to whether to give full effect to the resolutions in question. The only relevant exception was that contained in paragraph 2 (b) of the Resolution which disposed of the sanctions imposed on the applicant.

4. The reading of the Resolution itself, in which States were urged to take immediate steps to prevent and punish violations of the sanctions referred to in paragraph 2 of the Resolution, the words "where appropriate", contemplate and administrative measures referred to in paragraph 2 of the Resolution, the words "where appropriate", contemplate and administrative measures referred to in paragraph 2 of the Resolution.

5. The finding in the judgment that a latitude was left to States is essentially based on an argument that the United Nations Charter does not impose any particular model for the implementation of resolutions adopted by the Security Council under Chapter VII, the Charter leaving in principle to the member States of the United Nations a free choice among the various possible means and procedures to give effect to obligations imposed on them by resolutions of the Security Council. But the obligation imposed on States under Resolution 1390 (2002) was a binding one which, subject to the exceptions set forth in the Resolution itself, allowed no latitude or discretion to the States as to whether to give full effect to the resolutions in question. The only relevant exception was that contained in paragraph 2 (b) of the Resolution which disposed of the sanctions imposed on the applicant.

6. We readily accept that different means may be open to States by which to give effect to obligations imposed on them by resolutions of the Security Council under Chapter VII, the Charter leaving in principle to the member States of the United Nations a free choice among the various possible means and procedures to give effect to obligations imposed on them by resolutions of the Security Council. But the obligation imposed on States under Resolution 1390 (2002) was a binding one which, subject to the exceptions set forth in the Resolution itself, allowed no latitude or discretion to the States as to whether to give full effect to the resolutions in question. The only relevant exception was that contained in paragraph 2 (b) of the Resolution which disposed of the sanctions imposed on the applicant.

7. We are also unpersuaded by the reliance in paragraph 179 of the judgment on the motion of 1 March 2010 by which the Federal Council requested the Swiss Parliament to add the applicant to the list of persons against which the sanctions were imposed. The words "where appropriate", contemplate and administrative measures referred to in paragraph 2 of the Resolution, the words "where appropriate", contemplate and administrative measures referred to in paragraph 2 of the Resolution.

8. The finding in the judgment that a latitude was left to States is essentially based on an argument that the United Nations Charter does not impose any particular model for the implementation of resolutions adopted by the Security Council under Chapter VII, the Charter leaving in principle to the member States of the United Nations a free choice among the various possible means and procedures to give effect to obligations imposed on them by resolutions of the Security Council. But the obligation imposed on States under Resolution 1390 (2002) was a binding one which, subject to the exceptions set forth in the Resolution itself, allowed no latitude or discretion to the States as to whether to give full effect to the resolutions in question. The only relevant exception was that contained in paragraph 2 (b) of the Resolution which disposed of the sanctions imposed on the applicant.

9. The finding in the judgment that a latitude was left to States is essentially based on an argument that the United Nations Charter does not impose any particular model for the implementation of resolutions adopted by the Security Council under Chapter VII, the Charter leaving in principle to the member States of the United Nations a free choice among the various possible means and procedures to give effect to obligations imposed on them by resolutions of the Security Council. But the obligation imposed on States under Resolution 1390 (2002) was a binding one which, subject to the exceptions set forth in the Resolution itself, allowed no latitude or discretion to the States as to whether to give full effect to the resolutions in question. The only relevant exception was that contained in paragraph 2 (b) of the Resolution which disposed of the sanctions imposed on the applicant.
adopting that motion may have been “expressing its intention to allow a certain discretion in the application of the counter-terrorism resolutions”. However, the fact that several months after the applicant’s name had been deleted from the list the Parliament unilaterally asserted a discretion to refuse to comply unconditionally with the terms of the Resolution is one thing; whether any such discretion or latitude was afforded to Switzerland under the Resolution itself is quite another. In our view, it clearly was not.

8. Like the Swiss Federal Court, we accordingly consider that States enjoyed no latitude in their obligation to implement the sanctions imposed by the relevant Security Council Regulations and that Switzerland was debarred from deciding of its own motion whether or not sanctions should continue to be imposed on a person or organisation appearing on the Sanctions Committee list.

9. However, this does not resolve the issue under Article 8 of the Convention. Although constrained to act strictly in accordance with the provisions of Resolution 1390 (2002) notwithstanding any rights or obligations conferred under the Convention, States were not absolved from the obligations to take such steps as were open to them to mitigate the effects of the measures insofar as they had an impact on the private or family life of the individuals concerned.

10. The situation of the present applicant was, if not unique, highly exceptional and the impact of the Taliban Ordinance on his private and family life was indisputably serious. The impugned measures constituted, as the Federal Court expressly found, a significant restriction on the applicant’s freedom on account of the location of Campione d’Italia, a small enclave surrounded by the Swiss Canton of Ticino where he had established his home since 1970. He was prevented, at least from October 2003, not only from entering Switzerland but from leaving Campione d’Italia at all, even to travel to other parts of Italy, the country of which he was a national. The prohibition made it exceptionally difficult for him to maintain contact with others, including members of his own family, living outside the enclave. In these circumstances, the Swiss authorities were, as the Federal Court put it, “obliged to exhaust all the relaxations of the sanctions regime available under the UN Security Council resolutions”. They were also, in our view, required to take all such other steps as were reasonably open to them to bring about a change in the regime so as to reduce so far as possible its serious impact on the private and family life of the applicant.

11. Switzerland was not able of its own motion and consistently with the relevant Resolutions, to delete the applicant’s name from Annex 2 to the Taliban Ordinance, the Sanctions Committee alone being responsible for the deletion of persons or entities. Nor, since the applicant’s name was not added to the list on the initiative of Switzerland and since it was neither the State of the applicant’s citizenship nor that of his residence, did Switzerland have any formal competence under the Resolutions to take action to have the applicant’s name deleted by the Sanctions Committee. Nevertheless, in common with the other members of the Grand Chamber, we consider that the Swiss authorities did not sufficiently take into account the specific circumstances of the applicant’s case, including the considerable duration of the measures imposed, and the applicant’s nationality, age and health. Nor, in our view, did those authorities take all reasonable steps open to them to seek to mitigate the effect of the sanctions regime by the grant of requests for exemption for medical reasons or in connection with judicial proceedings, or to bring about a change in the sanctions regime against the applicant so as to secure so far as possible his Convention rights.

12. Of the measures open to the authorities which are referred to in the judgment, we attach special importance to the failure of the authorities to inform the Sanctions Committee until 2 September 2009 of the conclusions of the investigation against the applicant, which had been discontinued well over four years before, on 31 May 2005. The fact that the investigation against the applicant had been discontinued was of obvious importance to the prospect of the removal of the sanctions against him. In this regard, we note that the applicant’s name was in fact deleted from the list on 23 September 2009, shortly after Switzerland sent to the Sanctions Committee a copy of the letter from the Federal Prosecutor’s Office confirming that the judicial police investigation against the applicant had not produced any indications or evidence to show that he had ties with persons or organisations associated with Osama bin Laden, al-Qaeda or the Taliban. The failure to communicate this information was the subject of specific criticism by the Federal Court which, while noting that by the date of its judgment in November 2007 the applicant was able to apply himself to initiate the delisting procedure, emphasised that he continued to rely on the support of Switzerland, since this was the only country to have conducted a comprehensive preliminary investigation into the applicant’s activities. We fully share the view of the Federal Court that, while Switzerland could not itself proceed with deletion, it could at the very least have transmitted the results of the investigation to the Sanctions Committee and have actively supported the delisting of the applicant. With the benefit of the results of its own investigation, it could also have encouraged Italy, as the State of nationality and residence of the applicant, to take steps earlier than July 2008 to request the deletion of the applicant’s name. Such measures were not bound to have met with success. There remained, however, a real prospect that they would have resulted in the deletion of the applicant’s name and the restoration of his Article 8 rights at a much earlier stage than eventually occurred.
CONCURRING OPINION OF JUDGE ROZAKIS
JOINED BY JUDGES SPIELMANN AND BERRO-LEFEVRE

I fully share the decisions of the Court under all heads, and have voted accordingly. There is nevertheless a point on which I wish to depart from the reasoning of my colleagues. It is a matter which does not affect the overall approach or the way that I have voted. And it consists of the following.

The applicant complained that the measure by which he was prohibited from entering or passing through Switzerland had breached his right to respect for his private life, including his professional life and his family life (see paragraph 149 of the judgment). In support of his contention, he invoked a number of instances showing that his private and family life had been affected. Among them he claimed that the addition of his name to the list annexed to the Taliban Ordinance had impugned his honour and reputation, and he thus relied for all these complaints on Article 8 of the Convention.

The Court, while it examined in detail all the particular aspects of his complaints, when dealing both with the admissibility and with the merits of the case, preferred not to raise at all the issue of his honour and reputation. In its concluding paragraph (paragraph 199) it simply refers to the honour and reputation complaint by “side-stepping” it, using the well-known formula that there is no need to examine this complaint separately.

Here, then, lies my difference of approach. The applicant’s complaint concerning his honour and reputation is not a distinct complaint which is independent from all the other aspects of his allegation of a violation of Article 8 of the Convention. It is one of the constitutive parts of his main complaint that his private and family life were affected by the Swiss authorities’ conduct. It is well known – and undoubtedly the applicant was relying on this – that honour and reputation have been considered by the Court as an element of private life worthy of particular protection under Article 8. By discarding this particular aspect of an otherwise homogeneous and comprehensive complaint, the Court has given the wrong impression that honour and reputation should be examined separately – if at all – and that they do not necessarily belong to the hard core of the constitutive parts of private life.

For these reasons I would like to express my disagreement with the way that paragraph 199 is drafted and the failure by the Court to take on board the issue of honour and reputation. After all, the reasoning required to encompass that particular aspect as well would not have differed radically from that adopted by the Court in its overall analysis of Article 8, leading to the finding of a violation.

CONCURRING OPINION OF JUDGE MALINVERNI

(Translation)

1. I share the Court’s opinion that in the present case there has been a violation of Article 8 of the Convention. I am not, however, convinced by the reasoning through which it reached that conclusion.

I

2. The Court’s entire line of argument is based on the statement that, in implementing the Security Council resolutions, the respondent State “enjoyed some latitude, which was admittedly limited but nevertheless real” (paragraph 180). To support that statement it gives the following reasons (see paragraphs 175-179).

3. The Court begins by noting that the respondent State’s latitude derives from the very wording of those resolutions. Paragraph 2(b) of Resolution 1390 (2002) thus provides that the prohibition does not apply “where entry or transit is necessary for the fulfilment of a judicial process...”. The Court infers from this that the adjective “necessary” allows the authorities a certain latitude and is “to be construed on a case-by-case basis” (paragraph 177). Whilst that is certainly true, the Court appears to overlook the fact that the wording here concerns an exception to the general rule set out in that same provision, far more than being an acknowledgment of any room for manoeuvre that the domestic authorities may have had in applying the latter. Moreover, apart from the case of judicial proceedings, this provision grants such latitude to the Sanctions Committee, but not to the States.

4. The Court further relies on the expression “where appropriate” in paragraph 8 of Resolution 1390 (2002) to assert that the wording also had the effect of “affording the national authorities a certain flexibility in the mode of implementation of the resolution” (paragraph 178). In my view, however, it misconstrues that provision of Resolution 1390. The expression “where appropriate” in fact relates to the words immediately before it, namely “legislative enactments or administrative measures”. This simply means that, depending on the legal order of the various States, and in the particular circumstances, the State will either have to make legislative enactments or to take administrative measures. No conclusion can thus be drawn from this about the latitude afforded to States in the implementation of the resolution.

5. The Court’s last argument concerns the motion by which the Foreign Policy Commission of the Swiss National Council requested the Federal Council to inform the UN Security Council that it would no longer unconditionally be applying the sanctions prescribed against individuals
under the counter-terrorism resolutions. In adopting that motion, it is said, the Federal Parliament was expressing "its intention to allow a certain discretion in the application of the Security Council’s counter-terrorism resolutions" (paragraph 179). Whilst that is certainly true, no inferences can be drawn from this about the latitude afforded to Switzerland in the present case, as the motion was adopted on 1 March 2010 (see paragraph 63), that is to say after the applicant’s name had been deleted from the list, on 23 September 2009 (see paragraph 62).

6. On the strength of its finding that the respondent State enjoyed a certain latitude in the implementation of the UN resolutions, the Court then examined whether, in the present case, the interference with the rights protected by Article 8 respected the proportionality principle. It answered that question in the negative, finding in particular that “the Swiss authorities did not sufficiently take into account the realities of the case, especially the unique geographical situation of Campione d'Italia, the considerable duration of the measures imposed or the applicant’s nationality, age and health”. Accordingly, in the Court’s view, the interference with the applicant’s right to respect for his private and family life “was not necessary in a democratic society”.  

7. Some of the arguments used by the Court to reach this conclusion do not, however, appear convincing. Thus, can Switzerland seriously be criticised – bearing in mind that the applicant was not a Swiss national – for failing to provide him with assistance in seeking from the Sanctions Committee a broader exemption from the sanctions affecting him because of his specific situation, when he had not even requested such assistance (paragraph 193)? Or for failing to encourage Italy to take steps to obtain the deletion of the applicant’s name from the Sanctions Committee’s list, when it was for the State of citizenship or residence of the person concerned to initiate the delisting procedure (paragraph 194)?

II

8. The opinion that Switzerland had not been afforded any room for manoeuvre was, moreover, also expressed by the Federal Court, which found as follows in this connection (see paragraph 50):

"... The sanctions (freezing of assets, entry and transit ban, arms embargo) are described in detail and afford member States no margin of appreciation in their implementation ... The member States are thus debarred from deciding of their own motion whether or not sanctions should continue to be imposed on a person or organisation appearing on the Sanctions Committee’s list."

Further on, the Federal Court examined whether the travel ban under Article 4(a) of the Federal Taliban Ordinance went beyond the sanctions introduced by the Security Council resolutions and, if so, whether the Swiss authorities had a certain latitude in this area. It answered in the negative (see paragraph 52):

"10.2 Article 4a § 2 of the ... Ordinance is formulated as an ‘enabling’ provision and gives the impression¹ that the Federal Office of Migration has a certain margin of appreciation ... The Federal Office of Migration thus has no margin of appreciation. Rather, it must examine whether the conditions for the granting of an exemption² are met.”

9. The French and United Kingdom Governments, intervening as third parties, shared this opinion and stated that the Swiss authorities had no latitude in the implementation of the Security Council resolutions (see paragraph 175). In the submission of the UK Government, in particular, the Security Council had used “clear and explicit language” to impose specific measures on States (see paragraph 111).

10. In conclusion, taking into account the very clear and mandatory terms of the Security Council resolutions in question, obliging States to apply them strictly and in full, without consideration of the rights and obligations arising from any other international conventions that they had ratified, and since the sanctions were described in a detailed manner, with the names of the persons concerned appearing on exhaustive lists, it is difficult, in my opinion, to sustain the argument that Switzerland had any room for manoeuvre in the present case. The situation here was undeniably one of mandatory power and not one of discretionary power. I therefore believe that the Court erred in its approach. In my view, it should have followed that of the Federal Court, but to arrive at the opposite conclusion.

III

11. The Federal Court, as it could not infer from the wording of the UN resolutions which it had to apply that there was any room for manoeuvre enabling it to interpret them consistently with the applicant’s fundamental rights, had no choice but to settle the question before it on the basis of the hierarchy of norms principle. It gave priority to Switzerland’s obligations under the resolutions in question over those imposed on it by the Convention and by the International Covenant on Civil and Political Rights. Was that decision correct or can the Swiss supreme court be criticised for blindly enforcing, without calling into question, the obligations imposed on Switzerland by the Security Council resolutions?

12. The Court did not address this question. In its view, the conclusion that it had reached dispensed it from “determining the question, raised by the respondent and intervening Governments, of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on

¹ Emphasis added
² Emphasis added
the one hand, and those arising from the United Nations Charter, on the other. ... [T]he important point is that the respondent Government have failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent” (paragraph 197). I have great difficulty sharing this view, for the following reasons.

13. The Security Council was well aware of the conflict that would inevitably arise between its own resolutions and the obligations that certain States had assumed in ratifying international human rights treaties. For each of the resolutions that it adopted, it thus expressly stipulated that States were obliged to comply with them “notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement ... prior to the date of coming into force of the measures imposed” (Resolution 1267 (1999) paragraph 7; Resolution 1333 (2000), paragraph 17; quoted in paragraphs 70-71 of the judgment).

14. Was the Security Council entitled to act in that manner? Of course, under Article 25 of the United Nations Charter, the member States are required to accept and apply its decisions. Moreover, Article 103 of the Charter stipulates that in the event of any conflict between the obligations of United Nations members under the Charter and their obligations under any other international agreement, the Charter obligations will prevail. And according to the case-law of the International Court of Justice, that primacy is not limited to the provisions of the Charter itself but extends to all obligations arising from binding resolutions of the Security Council1.

15. But do those two Charter provisions actually give the Security Council carte blanche? That is far from certain. Like any other organ of the United Nations, the Security Council is itself also bound by the provisions of the Charter. And Article 25 in fine thereof stipulates that members of the world organisation are required to carry out the decisions of the Security Council “in accordance with the present Charter”. In Article 24 § 2 the Charter also provides that in discharging its duties “the Security Council shall act in accordance with the Purposes and Principles of the United Nations”. Article 1 § 3 of the Charter reveals that those purposes and principles precisely include “respect for human rights and for fundamental freedoms”. One does not need to be a genius to conclude from this that the Security Council itself must also respect human rights, even when acting in its peace-keeping role. This view indeed seems to have been confirmed by decisions recently taken by certain international bodies.

16. In its Kadi and Al Barakaat judgment of 3 September 20082, the Court of Justice of the European Communities (“CJEC”) readily found that it had jurisdiction to examine the lawfulness of Regulation (EC) No 881/2002, which implemented the Security Council’s al-Qaeda and Taliban resolutions. It went on to find that the applicants’ rights, in particular their defence rights, right to effective judicial review and their right to property, had been infringed:

“It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.” (§ 326)

17. The CJEC thus set aside the two judgments under appeal, finding that the Court of First Instance had erred in law when it held that “it followed from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, since it [was] designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, must enjoy immunity from jurisdiction so far as concern[ed] its internal lawfulness ...” (§ 327).

18. That judgment of the Luxembourg Court may be described as historic, as it made the point that respect for human rights formed the constitutional foundation of the European Union, with which it was required to ensure compliance, including when examining acts implementing Security Council resolutions3.

19. The Human Rights Committee, in its findings of 22 October 2008 in Sayadi and Vinck v. Belgium (see paragraph 88 of the judgment), also found that it was competent to rule on the communication addressed to it, “regardless of the source of the obligations implemented by the State party” (point 7.2), that is to say even if that source were to be found in a Security Council resolution and found that there had been a violation of some of the Covenant’s provisions.

20. This raises a question: should the Court, as guarantor of respect for human rights in Europe, not be more audacious than the European Court of Justice or the Human Rights Committee when it comes to addressing and settling the sensitive issue of conflict of norms that underlies the present case? After all, is the Court not the “ultimate bulwark against the violation

---

1 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, § 42.
2 See paragraph 83 of the present judgment.
3 Emphasis added.
of fundamental rights?". I am totally aware of the fact that the Security Council resolutions as such do not constitute an instrument falling under Article 25 of the Charter, and that they have no direct impact on the applicant’s fundamental rights, since it means that rights will be sacrificed for the sake of security.

IV

21. Article 103 of the Charter provided a decision that the Security Council resolutions on the Sanctions Committee and the application of the regulations of the United Nations have led to a situation where the respondent State has the obligation to verify that acts implementing Security Council decisions respect fundamental rights, as the International Court of Justice has ruled that primacy is not confined to the Charter provisions alone but extends to all binding provisions of international law, including international organisations.

22. Article 103 of the Charter played a decisive role in the Federal Court’s reasoning. It was on the basis of that provision that it gave priority to the Charter over the Security Council resolutions. Thus, it was based on an interpretation of Article 103 of the Charter that the Federal Court found a violation of the Convention and the International Covenant on Civil and Political Rights. It may be questioned, however, whether such an interpretation of Article 103 of the Charter is not offensive to the Charter provisions, which state that the Charter is not to be interpreted in a manner which would reduce the effectiveness of the Charter or the treaties to which the States are parties.

23. Such an approach would be all the more justified by the consideration that, as the Parliamentary Assembly, the General Assembly resolutions fall outside the Court’s direct supervision, the UN legislation?

24. This is all the more true in that the situation in the present case is comparable to that in the case of the United States of America v. the United Nations, where the Court found that the United States’ obligations under the United Nations were not open to criticism from the standpoint of the balance that States should strike between the requirements of collective security and respect for fundamental rights.

25. It cannot be claimed nowadays that the human rights obligations of States have been transformed into international instruments, but are now part of customary law, which is binding on all subjects of international law, including international organisations.

26. Such an approach would be all the more justified by the consideration that, as the Parliamentary Assembly, the General Assembly resolutions fall outside the Court’s direct supervision, the UN legislation?

27. Their superiority over “any other international agreement, whether bilateral or multilateral” (Article 103, paragraph 1, of the Charter) is not open to criticism from the standpoint of the balance that States should strike between the requirements of collective security and respect for fundamental rights.

28. According to the International Court of Justice this primacy is not confined to the Charter provisions alone but extends to all binding provisions of international law, including international organisations in order to pursue or strengthen their
cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights”. Also that it “would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution”.

26. International organisations themselves are thus also bound by international human rights norms, since respect for such rights “far from hindering the fight against terrorism, constitutes a weapon against extremist ideologies that prosper by negating them”.

V

27. One last point: in paragraph 199 of its judgment the Court states that “[h]aving regard to that conclusion [the finding of a violation of Article 8 on account of the restriction of the applicant’s freedom of movement], and notwithstanding that the applicant’s allegation that the addition of his name to the list annexed to the Taliban Ordinance also impugned his honour and reputation constitutes a separate complaint, .. it does not need to examine that complaint separately”.

28. The merits of that conclusion are open to question. The applicant certainly raised two totally separate complaints before the Court (see paragraphs 156 and 157), even though they both fell within the scope of Article 8 in terms of the protection of private life. However, whilst the first complaint concerned physical liberty to move around freely, the second concerned damage to the applicant’s moral integrity, resulting from the very fact that his name appeared on the Sanctions Committee’s list. In addition, whilst the first complaint was intrinsically linked to the highly specific geographical situation of the Campione d’Italia enclave, with its very confined territory, the second was much more general in effect. That aspect of his application was certainly, in the applicant’s view, equally as important – if not more so – as the restrictions that had been imposed on his freedom of movement.

29. For all these reasons, the applicant’s second complaint, in my view, warranted a separate examination; especially as I fail to see how the Court could have, in respect of this complaint, used the same reasoning as that adopted for the first complaint, which was based solely on the latitude afforded to the respondent State in implementing the Security Council resolutions, or could then have found a violation of Article 8 for failure to respect the proportionality principle. For the purposes of examining whether a person’s name should be included on the Sanctions Committee’s list, I certainly find it difficult to imagine a balancing of the interests at stake by the respondent State.

---


International Court of Justice

Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)
Judgment of 3 February 2012
JURISDICTIONAL IMMUNITIES OF THE STATE (GERMANY v. ITALY:
GREECE INTERVENING)

3 FÉVRIER 2012
ARRÊT

TABLE OF CONTENTS

Paragraphs

CHRONOLOGY OF THE PROCEDURE 1-19

I. HISTORICAL AND FACTUAL BACKGROUND 20-36

1. The Peace Treaty of 1947  22


3. The 1961 Agreements 24-25

4. Law establishing the “Remembrance, Responsibility and Future” Foundation 26

5. Proceedings before Italian courts 27-36

A. Cases involving Italian nationals 27-29

B. Cases involving Greek nationals 30-36


III. ALLEGED VIOLATION OF GERMANY’S JURISDICTIONAL IMMUNITY IN THE PROCEEDINGS BROUGHT BY THE ITALIAN CLAIMANTS 52-108

1. The issues before the Court 52-61

2. Italy’s first argument: the territorial tort principle 62-79

3. Italy’s second argument: the subject-matter and circumstances of the claims in the Italian courts 80-106

A. The gravity of the violations 81-91

B. The relationship between jus cogens and the rule of State immunity 92-97

C. The “last resort” argument 98-104

D. The combined effect of the circumstances relied upon by Italy 105-106

4. Conclusions 107-108

IV. THE MEASURES OF CONSTRAINT TAKEN AGAINST PROPERTY BELONGING TO GERMANY LOCATED ON ITALIAN TERRITORY 109-120

V. THE DECISIONS OF THE ITALIAN COURTS DECLARING ENFORCEABLE IN ITALY DECISIONS OF GREEK COURTS UPHOLDING CIVIL CLAIMS AGAINST GERMANY 121-133

VI. GERMANY’S FINAL SUBMISSIONS AND THE REMEDIES SOUGHT 134-138

OPERATIVE CLAUSE 139

3 FÉVRIER 2012
JUDGMENT

IMMUNITÉS JURIDICTIONNELLES DE L’ÉTAT (ALLEMAGNE c. ITALIE :
GRÈCE (INTERVENANT))

305
JURISDICTIONAL IMMUNITIES OF THE STATE
(GERMANY v. ITALY: GREECE INTERVENING)

Historical and factual background.


Subject-matter of dispute and jurisdiction of the Court.

Subject-matter of dispute delimited by claims of Germany and Italy — No objection to jurisdiction of the Court or admissibility of Application raised by Italy — Article 1 of the European Convention for the Peaceful Settlement of Disputes as basis of jurisdiction — Limitation ratione temporis not applicable — The Court has jurisdiction — The Court is not called upon to rule on questions of reparation — Relationship between duty of reparation and State immunity — No other question with regard to the Court’s jurisdiction.
Combined effect of circumstances relied upon by Italy—None of three strands justify action of Italian courts—No effect if taken together—State practice—Balancing different factors would disregard nature of State immunity—Immunity cannot be dependent upon outcome of balancing exercise by national court.

Action of Italian courts in denying Germany immunity constitutes a breach of obligations owed by Italy to Germany—No need to consider other questions raised by the Parties.

* *

Measures of constraint taken against property belonging to Germany located on Italian territory.

Legal charge against Villa Vigoni—Charge in question suspended by Italy to take account of proceedings before the Court—Distinction between rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity—No need to determine whether decisions of Greek courts awarding pecuniary damages against Germany were in breach of that State’s jurisdictional immunity—Article 19 of United Nations Convention on the Jurisdictional Immunities of States and their Property—Property which was subject of measure of constraint being used for non-commercial governmental purposes—Germany not having expressly consented to taking of legal charge in question or allocated Villa Vigoni for satisfaction of judicial claims against it—Registration of legal charge on Villa Vigoni constitutes a violation by Italy of its obligation to respect immunity owed to Germany.

* *

Decisions of Italian courts declaring enforceable in Italy decisions of Greek courts upholding civil claims against Germany.

Germany’s contention that its jurisdictional immunity was violated by these decisions—Request for exequatur—Whether Italian courts respected Germany’s immunity from jurisdiction in upholding request for exequatur—Purpose of exequatur proceedings—Exequatur proceedings must be regarded as being directed against State which was subject of foreign judgment—Question of immunity precedes consideration of request for exequatur—No need to rule on question whether Greek courts violated Germany’s immunity—Decisions of Florence Court of Appeal constitute violation by Italy of its obligation to respect jurisdictional immunity of Germany.

* *

Germany’s final submissions and the remedies sought.

Germany’s six requests presented to the Court—First three submissions upheld—Violation by Italy of Germany’s jurisdictional immunity—Fourth submission—Request for declaration that Italy’s international responsibility is engaged—No need for express declaration—Responsibility automatically inferred from finding that certain obligations have been violated—Fourth submission not upheld—Fifth submission—Request that Italy be ordered to take, by means of its own choosing, any and all steps to ensure that all decisions of its courts and other judicial authorities infringing Germany’s sovereign immunity cease to have effect—Fifth submission upheld—Result to be achieved by enacting appropriate legislation or by other methods having the same effect—Sixth submission—Request that Italy be ordered to provide assurances of non-repetition—No reason to suppose that a State whose conduct has been declared wrongful by the Court will repeat that conduct in future—No circumstances justifying assurances of non-repetition—Sixth submission not upheld.

JUDGMENT

Present: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Benguena, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue; Judge ad hoc Gaia; Registrar Couvreur.

In the case concerning jurisdictional immunities of the State, between

the Federal Republic of Germany,

represented by

H.E. Ms Susanne Wasum-Rainer, Ambassador, Director-General for Legal Affairs and Legal Adviser, Federal Foreign Office,

H.E. Mr. Heinz-Peter Behr, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,

Mr. Christian Tomuschat, former Member and Chairman of the International Law Commission, Professor Emeritus of Public International Law at the Humboldt University of Berlin,

as Agents;
Mr. Andrea Gattini, Professor of Public International Law at the University of Padua,
Mr. Robert Kolb, Professor of Public International Law at the University of Geneva,
as Counsel and Advocates;
Mr. Guido Hildner, Head of the Public International Law Division, Federal Foreign Office,
Mr. Götz Schmidt-Bremme, Head of the International Civil, Trade and Tax Law Division,
Federal Foreign Office,
Mr. Felix Neumann, Embassy of the Federal Republic of Germany in the Kingdom of the
Netherlands,
Mr. Gregor Schotten, Federal Foreign Office,
Mr. Klaus Keller, Embassy of the Federal Republic of Germany in the Kingdom of the
Netherlands,
Ms Susanne Achilles, Embassy of the Federal Republic of Germany in the Kingdom of the
Netherlands,
Ms Donate Arz von Straussenburg, Embassy of the Federal Republic of Germany in the
Kingdom of the Netherlands,
as Advisers;
Ms Fiona Kaltenborn,
as Assistant,
and
the Italian Republic,
represented by
H.E. Mr. Paolo Pucci di Benisichi, Ambassador and State Counsellor,
as Agent;
Mr. Giacomo Aiello, State Advocate,
H.E. Mr. Franco Giordano, Ambassador of the Italian Republic to the Kingdom of the
Netherlands,
as Co-Agents;
Mr. Luigi Condorelli, Professor of International Law, University of Florence,
Mr. Pierre-Marie Dupuy, Professor of International Law, Graduate Institute of International
and Development Studies, Geneva, and University of Paris II (Pantheon-Assas),
Mr. Paolo Palchetti, Associate Professor of International Law, University of Macerata,
Mr. Salvatore Zappalà, Professor of International Law, University of Catania, Legal Adviser,
Permanent Mission of Italy to the United Nations,
as Counsel and Advocates;
Mr. Giorgio Marrapodi, Minister Plenipotentiary, Head of the Service for Legal Affairs,
Ministry of Foreign Affairs,
Mr. Guido Cerboni, Minister Plenipotentiary, Co-ordinator for the countries of Central and
Western Europe, Directorate-General for the European Union, Ministry of Foreign
Affairs,
Mr. Roberto Bellelli, Legal Adviser, Embassy of Italy in the Kingdom of the Netherlands,
Ms Sarah Negro, First Secretary, Embassy of Italy in the Kingdom of the Netherlands,
Mr. Mel Marquis, Professor of Law, European University Institute, Florence,
Ms Francesca De Vittor, International Law Researcher, University of Macerata,
as Advisers,
with, as State permitted to intervene in the case,
the Hellenic Republic,
represented by
Mr. Stelios Perrakis, Professor of International and European Institutions, Panteion
University of Athens,
as Agent;
H.E. Mr. Ioannis Economides, Ambassador of the Hellenic Republic to the Kingdom of the
Netherlands,
as Deputy-Agent;
Mr. Antonis Bredimas, Professor of International Law, National and Kapodistrian University
of Athens,
as Counsel and Advocate;
Ms Maria-Daniella Marouda, Lecturer in International Law, Panteion University of Athens,
as Counsel,
THE COURT, composed as above, after deliberation, 
delivers the following Judgment:

1. On 23 December 2008, the Federal Republic of Germany (hereinafter “Germany”) filed in the Registry of the Court an Application instituting proceedings against the Italian Republic (hereinafter “Italy”) in respect of a dispute originating in “violations of obligations under international law” allegedly committed by Italy through its judicial practice “in that it has failed to respect the jurisdictional immunity which... Germany enjoys under international law”.

2. Under Article 40, paragraph 2, of the Statute, the Registrar immediately communicated the Application to the Government of Italy; and, pursuant to paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of Italian nationality, Italy exercised its right under Article 31, paragraph 2, of the Statute to choose a judge ad hoc to sit in the case: it chose Mr. Giorgio Gaja.

4. By an Order of 29 April 2009, the Court fixed 23 June 2009 as the time-limit for the filing of the Memorial of Germany and 23 December 2009 as the time-limit for the filing of the Counter-Memorial of Italy; those pleadings were duly filed within the time-limits so prescribed. The Counter-Memorial of Italy included a counter-claim “with respect to the question of the reparations owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich”.

5. By an Order of 29 April 2009, the Court fixed 23 June 2009 as the time-limit for the filing of the Memorial of Germany and 23 December 2009 as the time-limit for the filing of the Counter-Memorial of Italy; those pleadings were duly filed within the time-limits so prescribed. The Counter-Memorial of Italy included a counter-claim “with respect to the question of the reparations owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich”.

6. On 13 January 2011, the Hellenic Republic (hereinafter “Greece”) filed in the Registry an Application for permission to intervene in the case pursuant to Article 62 of the Statute. In its Application, Greece indicated that it “[d]id not seek to become a party to the case”.

7. In accordance with Article 83, paragraph 1, of the Rules of Court, the Registrar, by letters dated 13 January 2011, transmitted certified copies of the Application for permission to intervene to the Government of Germany and the Government of Italy, which were informed that the Court had fixed 1 April 2011 as the time-limit for the submission of their written observations on that Application. The Registrar also transmitted, under paragraph 2 of the same Article, a copy of the Application to the Secretary-General of the United Nations.

8. Germany and Italy each submitted written observations on Greece’s Application for permission to intervene within the time-limit thus fixed. The Registry transmitted to each Party a copy of the other’s observations, and copies of the observations of both Parties to Greece.

9. In light of Article 84, paragraph 2, of the Rules of Court, and taking into account the fact that neither Party filed an objection, the Court decided that it was not necessary to hold hearings on the question whether Greece’s Application for permission to intervene should be granted. The Court nevertheless decided that Greece should be given an opportunity to comment on the observations of the Parties and that the latter should be allowed to submit additional written observations on the question. The Court fixed 6 May 2011 as the time-limit for the submission by Greece of its own written observations on those of the Parties, and 6 June 2011 as the time-limit for the submission by the Parties of additional observations on Greece’s written observations. The observations of Greece and the additional observations of the Parties were submitted within the time-limits thus fixed. The Registry duly transmitted to the Parties a copy of the observations of Greece; it transmitted to each of the Parties a copy of the other’s additional observations and to Greece copies of the additional observations of both Parties.

10. By an Order of 4 July 2011, the Court authorized Greece to intervene in the case as a non-party, in so far as this intervention was limited to the decisions of Greek courts which were declared by Italian courts as enforceable in Italy. The Court further fixed the following time-limits for the filing of the written statement and the written observations referred to in Article 85, paragraph 1, of the Rules of Court: 5 August 2011 for the written statement of Greece and 5 September 2011 for the written observations of Germany and Italy on that statement.

11. The written statement of Greece and the written observations of Germany were duly filed within the time-limits so fixed. By a letter dated 1 September 2011, the Agent of Italy indicated that the Italian Republic would not be presenting observations on the written statement of Greece at that stage of the proceedings, but reserved “its position and right to address certain points raised in the written statement, as necessary, in the course of the oral proceedings”. The Registry duly transmitted to the Parties a copy of the written statement of Greece; it transmitted to Italy and Greece a copy of the written observations of Germany.

12. Under Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings. After consulting the Parties and Greece, the Court decided that the same should apply to the written statement of the intervening State and the written observations of Germany on that statement.
13. Public hearings were held from 12 to 16 September 2011, at which the Court heard the oral arguments and replies of:

*For Germany:* Ms Susanne Wasum-Rainer, Mr. Christian Tomuschat, Mr. Andrea Gattini, Mr. Robert Kolb.

*For Italy:* Mr. Giacomo Aiello, Mr. Luigi Condorelli, Mr. Salvatore Zappalà, Mr. Paolo Palchetti, Mr. Pierre-Marie Dupuy.

*For Greece:* Mr. Stelios Perrakis, Mr. Antonis Bredimas.

14. At the hearings questions were put by Members of the Court to the Parties and to Greece, as intervening State, to which replies were given in writing. The Parties submitted written comments on those written replies.

15. In its Application, Germany made the following requests:

"Germany prays the Court to adjudge and declare that the Italian Republic:

(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against 'Villa Vigoni', German State property used for government non-commercial purposes, also committed violations of Germany's jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany's jurisdictional immunity.

Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that

(4) the Italian Republic's international responsibility is engaged;

(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable;

(6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above."

16. In the course of the written proceedings the following submissions were presented by the Parties:

*On behalf of the Government of Germany,*

in the Memorial and in the Reply:

"Germany prays the Court to adjude and declare that the Italian Republic:

(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against 'Villa Vigoni', German State property used for government non-commercial purposes, also committed violations of Germany's jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany's jurisdictional immunity.

Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that

(4) the Italian Republic's international responsibility is engaged;

(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable;
(6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above;

On behalf of the Government of Italy;

in the Counter-Memorial and in the Rejoinder:

“On the basis of the facts and arguments set out [in Italy’s Counter-Memorial and Rejoinder], and reserving its right to supplement or amend these Submissions, Italy respectfully requests that the Court adjudge and declare that all the claims of Germany are rejected.”

17. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Germany,

“Germany respectfully requests the Court to adjudge and declare that the Italian Republic:

(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II between September 1943 and May 1945 to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against ‘Villa Vigoni’, German State property used for government non-commercial purposes, also committed violations of Germany’s jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany’s jurisdictional immunity.

Accordingly, the Federal Republic of Germany respectfully requests the Court to adjudge and declare that:

(4) the Italian Republic’s international responsibility is engaged;

(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany’s sovereign immunity become unenforceable; and

(6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above.”

18. At the end of the written statement submitted by it in accordance with Article 85, paragraph 1, of the Rules of Court, Greece stated inter alia:

“that the effect of the judgment that the ICJ will hand down in this case concerning the jurisdictional immunity of the State will be of major importance to the Italian legal order and certainly to the Greek legal order.

Further, an ICJ decision on the effects of the principle of jurisdictional immunity of States when faced with a jus cogens rule of international law — such as the prohibition on violation of fundamental rules of humanitarian law — will guide the Greek courts in this regard. It will thus have a significant effect on pending and potential lawsuits brought by individuals before those courts.”

19. At the end of the oral observations submitted by it with respect to the subject-matter of the intervention in accordance with Article 85, paragraph 3, of the Rules of Court, Greece stated inter alia:

“A decision of the International Court of Justice on the effects of the principle of jurisdictional immunity of States when faced with a jus cogens rule of international law — such as the prohibition on violation of fundamental rules of humanitarian law — will guide the Greek courts . . . It will thus have a significant effect on pending and potential lawsuits brought by individuals before those courts.

The Greek Government considers that the effect of the judgment that [the] Court will hand down in this case concerning jurisdictional immunity will be of major importance, primarily to the Italian legal order and certainly to the Greek legal order.”

* * *
I. HISTORICAL AND FACTUAL BACKGROUND

20. The Court finds it useful at the outset to describe briefly the historical and factual background of the case which is largely uncontested between the Parties.

21. In June 1940, Italy entered the Second World War as an ally of the German Reich. In September 1943, following the removal of Mussolini from power, Italy surrendered to the Allies and, the following month, declared war on Germany. German forces, however, occupied much of Italian territory and, between October 1943 and the end of the War, perpetrated many atrocities against the population of that territory, including massacres of civilians and the deportation of large numbers of civilians for use as forced labour. In addition, German forces took prisoner, both inside Italy and elsewhere in Europe, several hundred thousand members of the Italian armed forces. Most of these prisoners (hereinafter the “Italian military internees”) were denied the status of prisoner of war and deported to Germany and German-occupied territories for use as forced labour.

1. The Peace Treaty of 1947

22. On 10 February 1947, in the aftermath of the Second World War, the Allied Powers concluded a Peace Treaty with Italy, regulating, in particular, the legal and economic consequences of the war with Italy. Article 77 of the Peace Treaty reads as follows:

1. From the coming into force of the present Treaty property in Germany of Italy and of Italian nationals shall no longer be treated as enemy property and all restrictions based on such treatment shall be removed.

2. Identifiable property of Italy and of Italian nationals removed by force or duress from Italian territory to Germany by German forces or authorities after September 3, 1943, shall be eligible for restitution.

3. The restoration and restitution of Italian property in Germany shall be effected in accordance with measures which will be determined by the Powers in occupation of Germany.

4. Without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include debts, all inter-governmental claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war.

2. The Federal Compensation Law of 1953

23. In 1953, the Federal Republic of Germany adopted the Federal Compensation Law Concerning Victims of National Socialist Persecution (Bundesentschädigungsgesetz (BEG)) in order to compensate certain categories of victims of Nazi persecution. Many claims by Italian nationals under the Federal Compensation Law were unsuccessful, either because the claimants were not considered victims of national Socialist persecution within the definition of the Federal Compensation Law, or because they had no domicile or permanent residence in Germany, as required by that Law. The Federal Compensation Law was amended in 1965 to cover claims by persons persecuted because of their nationality or their membership in a non-German ethnic group, while requiring that the persons in question had refugee status on 1 October 1953. Even after the Law was amended in 1965, many Italian claimants still did not qualify for compensation because they did not have refugee status on 1 October 1953. Because of the specific terms of the Federal Compensation Law as originally adopted and as amended in 1965, claims brought by victims having foreign nationality were generally dismissed by the German courts.

3. The 1961 Agreements

24. On 2 June 1961, two Agreements were concluded between the Federal Republic of Germany and Italy. The first Agreement, which entered into force on 16 September 1963, concerned the “Settlement of certain property-related, economic and financial questions”. Under Article 1 of that Agreement, Germany paid compensation to Italy for “outstanding questions of an economic nature”. Article 2 of the Agreement provided as follows:

“(1) The Italian Government declares all outstanding claims on the part of the Italian Republic or Italian natural or legal persons against the Federal Republic of Germany or German natural or legal persons to be settled to the extent that they are based on rights and circumstances which arose during the period from 1 September 1939 to 8 May 1945.

(2) The Italian Government shall indemnify the Federal Republic of Germany and German natural or legal persons for any possible judicial proceedings or other legal action by Italian natural or legal persons in relation to the abovementioned claims.”

25. The second Agreement, which entered into force on 31 July 1963, concerned “Compensation for Italian nationals subjected to National-Socialist measures of persecution”. By virtue of this Agreement, the Federal Republic of Germany undertook to pay compensation to Italian nationals affected by those measures. Under Article 1 of that Agreement, Germany agreed to pay Italy forty million Deutsche marks

“for the benefit of Italian nationals who, on grounds of their race, faith or ideology were subjected to National-Socialist measures of persecution and who, as a result of those persecution measures, suffered loss of liberty or damage to their health, and for the benefit of the dependents of those who died in consequence of such measures.”
Article 3 of that Agreement provided as follows:

“Without prejudice to any rights of Italian nationals based on German compensation legislation, the payment provided for in Article 1 shall constitute final settlement between the Federal Republic of Germany and the Italian Republic of all questions governed by the present Treaty.”

4. Law establishing the “Remembrance, Responsibility and Future” Foundation

26. On 2 August 2000, a Federal Law was adopted in Germany, establishing a “Remembrance, Responsibility and Future” Foundation (hereinafter the “2000 Federal Law”) to make funds available to individuals who had been subjected to forced labour and “other injustices from the National Socialist period” (Soc 2, para. 1). The Foundation did not provide money directly to eligible individuals under the 2000 Federal Law but instead to “partner organizations”, including the International Organization for Migration in Geneva. Article 11 of the 2000 Federal Law placed certain limits on entitlement to compensation. One effect of this provision was to exclude from the right to compensation those who had had the status of prisoner of war, unless they had been detained in concentration camps or came within other specified categories. The reason given in the official commentary to this provision, which accompanied the draft Law, was that prisoners of war “may, according to the rules of international law, be put to work by the detaining power” *(translation by the Registry)* *(Bundestagsdrucksache 14/3206, 13 April 2000).*

Thousands of former Italian military internees, who, as noted above, had been denied the status of prisoner of war by the German Reich (see paragraph 21), applied for compensation under the 2000 Federal Law. In 2001, the German authorities took the view that, under the rules of international law, the German Reich had not been able unilaterally to change the status of the Italian military internees from prisoners of war to that of civilian workers. Therefore, according to the German authorities, the Italian military internees had never lost their prisoner-of-war status, with the result that they were excluded from the benefits provided under the 2000 Federal Law. On this basis, an overwhelming majority of requests for compensation lodged by Italian military internees was rejected. Attempts by former Italian military internees to challenge that decision and seek redress in the German courts were unsuccessful. In a number of decisions, German courts ruled that the individuals in question were not entitled to compensation under the 2000 Federal Law because they had been prisoners of war. On 28 June 2004, a Chamber of the German Constitutional Court *(Bundesverfassungsgericht)* held that Article 11, paragraph 3, of the 2000 Federal Law, which excluded reparation for prisoners of war, did not violate the right to equality before the law guaranteed by the German Constitution, and that public international law did not establish an individual right to compensation for forced labour.

A group of former Italian military internees filed an application against Germany before the European Court of Human Rights on 20 December 2004. On 4 September 2007, a Chamber of that Court declared that the application was “incompatible ratione materiae” with the provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms and its protocols and therefore was declared inadmissible (Associazione Nazionale Reduci and 275 others v. Germany, decision of 4 September 2007, Application No. 45563/04).

5. Proceedings before Italian courts

A. Cases involving Italian nationals

27. On 23 September 1998, Mr. Luigi Ferrini, an Italian national who had been arrested in August 1944 and deported to Germany, where he was detained and forced to work in a munitions factory until the end of the war, instituted proceedings against the Federal Republic of Germany in the Court of Arezzo *(Tribunale di Arezzo)* in Italy. On 3 November 2000, the Court of Arezzo decided that Mr. Luigi Ferrini’s claim was inadmissible because Germany, as a sovereign State, was protected by jurisdictional immunity. By a judgment of 16 November 2001, registered on 14 January 2002, the Court of Appeal of Florence *(Corte di Appello di Firenze)* dismissed the appeal of the claimant on the same grounds. On 11 March 2004, the Italian Court of Cassation *(Corte di Cassazione)* held that Italian courts had jurisdiction over the claims for compensation brought against Germany by Mr. Luigi Ferrini on the ground that immunity does not apply in circumstances in which the act complained of constitutes an international crime *(Ferrini v. Federal Republic of Germany*, Decision No. 5044/2004 *(Rivista di diritto internazionale, Vol. 87, 2004, p. 539; International Law Reports (ILR), Vol. 128, p. 658)). The case was then referred back to the Court of Arezzo, which held in a judgment dated 12 April 2007 that, although it had jurisdiction to entertain the case, the claim to reparation was time-barred. The judgment of the Court of Arezzo was reversed on appeal by the Court of Appeal of Florence, which held in a judgment dated 17 February 2011 that Germany should pay damages to Mr. Luigi Ferrini as well as his case-related legal costs incurred in the course of the judicial proceedings in Italy. In particular, the Court of Appeal of Florence held that jurisdictional immunity is not absolute and cannot be invoked by a State in the face of acts by that State which constitute crimes under international law.

28. Following the Ferrini Judgment of the Italian Court of Cassation dated 11 March 2004, twelve claimants brought proceedings against Germany in the Court of Turin *(Tribunale di Torino)* on 13 April 2004 in the case concerning Giovanni Mantelli and others. On 28 April 2004, Liberato Maietta filed a case against Germany before the Court of Sciacca *(Tribunale di Sciacca)*. In both cases, which relate to acts of deportation to, and forced labour in, Germany which took place between 1943 and 1945, an interlocutory appeal requesting a declaration of lack of compensation legislation, the payment provided for in Article 1 shall constitute final settlement between the Federal Republic of Germany and the Italian Republic of all questions governed by the present Treaty.

29. The Italian Court of Cassation also confirmed the reasoning of the Ferrini Judgment in a different context in proceedings brought against Mr. Max Josef Milde, a member of the “Hermann Göring” division of the German armed forces, who was charged with participation in massacres committed on 29 June 1944 in Civitella in Val di Chiana, Cortona and San Pancrazio in Italy. The Military Court of La Spezia *(Tribunale Militare di La Spezia)* sentenced Mr. Milde in absentia to life imprisonment and ordered Mr. Milde and Germany, jointly and severally, to pay reparation to the successors in title of the victims of the massacre who appeared as civil parties in the proceedings (judgment of 10 October 2006 (registered on 2 February 2007)). Germany appealed to
the Military Court of Appeals in Rome (Corte Militare di Appello di Roma) against that part of the decision, which condemned it. On 18 December 2007 the Military Court of Appeals dismissed the appeal. In a judgment of 21 October 2008 (registered on 13 January 2009), the Italian Court of Cassation rejected Germany’s argument of lack of jurisdiction and confirmed its reasoning in the Ferrini Judgment that in cases of crimes under international law, the jurisdictional immunity of States should be set aside (Rivista di diritto internazionale, Vol. 92, 2009, p. 618).

B. Cases involving Greek nationals

30. On 10 June 1944, during the German occupation of Greece, German armed forces committed a massacre in the Greek village of Distomo, involving many civilians. In 1995, relatives of the victims of the massacre who claimed compensation for loss of life and property commenced proceedings against Germany. The Greek Court of First Instance (Protodikieio) of Livadia rendered a judgment in default on 25 September 1997 (and read out in court on 30 October 1997) against Germany and awarded damages to the successors in title of the victims of the massacre. Germany’s appeal of that judgment was dismissed by the Hellenic Supreme Court (Aretios Pagos) on 4 May 2000 (Prefecture of Voioita v. Federal Republic of Germany, case No. 11/2000 (ILR, Vol. 129, p. 513) (the Distomo case). Article 923 of the Greek Code of Civil Procedure requires authorization from the Minister for Justice to enforce a judgment against a foreign State in Greece. That authorization was requested by the claimants in the Distomo case but was not granted. As a result, the judgments against Germany have remained unexecuted in Greece.

31. The claimants in the Distomo case brought proceedings against Greece and Germany before the European Court of Human Rights alleging that Germany and Greece had violated Article 6, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 1 to that Convention by failing to give effect to the decision of the Court of First Instance of Livadia dated 25 September 1997 (as to Germany) and failing to permit execution of that decision (as to Greece). In its decision of 12 December 2002, the European Court of Human Rights, referring to the rule of State immunity, held that the claimants’ application was inadmissible (Kalogeropolos and others v. Greece and Germany, Application No. 59021/00, Decision of 12 December 2002, ECHR Reports 2002-X, p. 417; ILR, Vol. 129, p. 537).

32. The Greek claimants brought proceedings before the German courts in order to enforce in Germany the judgment rendered on 25 September 1997 by the Greek Court of First Instance of Livadia, as confirmed on 4 May 2000 by the Hellenic Supreme Court. In its judgment of 26 June 2003, the German Federal Supreme Court (Bundesgerichtshof) held that those Greek judicial decisions could not be recognized within the German legal order because they had been given in breach of Germany’s entitlement to State immunity (Greek citizens v. Federal Republic of Germany, case No. III ZR 245/98, Neue Juristische Wochenschrift (NJW), 2003, p. 5488; ILR, Vol. 129, p. 556).

33. The Greek claimants then sought to enforce the judgments of the Greek courts in the Distomo case in Italy. The Court of Appeal of Florence held in a decision dated 2 May 2005 (registered on 5 May 2005) that the order contained in the judgment of the Hellenic Supreme Court, imposing an obligation on Germany to reimburse the legal expenses for the judicial proceedings before that Court, was enforceable in Italy. In a decision dated 22 March 2007, the Court of Appeal of Florence rejected the objection raised by Germany against the decision of 2 May 2005 (Foro italiano, Vol. 133, 2008, I, p. 1308). The Italian Court of Cassation, in a judgment dated 6 May 2008 (registered on 29 May 2008), confirmed the ruling of the Court of Appeal of Florence (Rivista di diritto internazionale, Vol. 92, 2009, p. 594).

34. Concerning the question of reparations to be paid to Greek claimants by Germany, the Court of Appeal of Florence declared, by a decision dated 13 June 2006 (registered on 16 June 2006), that the judgment of the Court of First Instance of Livadia dated 25 September 1997 was enforceable in Italy. In a judgment dated 21 October 2008 (registered on 25 November 2008), the Court of Appeal of Florence rejected the objection by the German Government against the decision of 13 June 2006. The Italian Court of Cassation, in a judgment dated 12 January 2011 (registered on 20 May 2011), confirmed the ruling of the Court of Appeal of Florence.

35. On 7 June 2007, the Greek claimants, pursuant to the decision by the Court of Appeal of Florence of 13 June 2006, registered with the Como provincial office of the Italian Land Registry (Agenzia del Territorio) a legal charge (ipoteca giudiziale) over Villa Vigoni, a property of the German State near Lake Como. The State Legal Service for the District of Milan (Avvocatura Distrettuale dello Stato di Milano) submitted to the Court of First Instance of Como a request for a judicial order (protoviso) for the enforcement of the judgment of 2 May 2005, which, under Decree-Law No. 63 of 28 April 2010, Law No. 98 of 23 June 2010 and Decree-Law No. 216 of 29 December 2011, the legal charge was suspended pending the decision of the International Court of Justice in the present case.

36. Following the institution of proceedings in the Distomo case in 1995, another case was brought against Germany by Greek nationals before Greek courts — referred to as the Margellos case — involving claims for compensation for acts committed by German forces in the Greek village of Lidoriki in 1944. In 2001, the Hellenic Supreme Court referred that case to the Special Supreme Court (Anotato Eidiko Dikastirio), which, in accordance with Article 100 of the Constitution of Greece, has jurisdiction in relation to “the settlement of controversies regarding the determination of generally recognized rules of international law” [translation by the Registry], requesting it to decide whether the rules on State immunity covered acts referred to in the Margellos case. By a decision of 17 September 2002, the Special Supreme Court found that, in the present state of development of international law, Germany was entitled to State immunity (Margellos v. Federal Republic of Germany, case No. 6/2002, ILR, Vol. 129, p. 525).

II. THE SUBJECT-MATTER OF THE DISPUTE AND THE JURISDICTION OF THE COURT

37. The submissions presented to the Court by Germany have remained unchanged throughout the proceedings (see paragraphs 15, 16 and 17 above).

Germany requests the Court, in substance, to find that Italy has failed to respect the jurisdictional immunity which Germany enjoys under international law by allowing civil claims to be brought against it in the Italian courts, seeking reparation for injuries caused by violations of international humanitarian law committed by the German Reich during the Second World War;
that Italy has also violated Germany's immunity by taking measures of constraint against Villa Vigoni, German State property situated in Italian territory, and that it has further breached Germany's jurisdictional immunity by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those which gave rise to the claims brought before Italian courts. Consequently, the Applicant requests the Court to declare that Italy's international responsibility is engaged and to order the Respondent to take various steps by way of reparation.

38. Italy, for its part, requests the Court to adjudge Germany's claims to be unfounded and therefore to reject them, apart from the submission regarding the measures of constraint taken against Villa Vigoni, on which point the Respondent indicates to the Court that it would have no objection to the latter ordering it to bring the said measures to an end.

In its Counter-Memorial, Italy submitted a counter-claim "with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich"; this claim was dismissed by the Court's Order of 6 July 2010, on the grounds that it did not fall within the jurisdiction of the Court and was consequently inadmissible under Article 80, paragraph 1, of the Rules of Court (see paragraph 5 above).

39. The subject-matter of a dispute brought before the Court is delimited by the claims submitted to it by the parties. In the present case, since there is no longer any counter-claim before the Court and Italy has requested the Court to "adjudge Germany's claims to be unfounded", it is those claims that delimit the subject-matter of the dispute which the Court is called upon to settle. It is in respect of those claims that the Court must determine whether it has jurisdiction to entertain the case.

40. Italy has raised no objection of any kind regarding the jurisdiction of the Court or the admissibility of the Application.

Nevertheless, according to well-established jurisprudence, the Court "must ... always be satisfied that it has jurisdiction, and must if necessary go into the matter proprio motu" (Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, ICJ Reports 1972, p. 52, para. 15).

41. Germany's Application was filed on the basis of the jurisdiction conferred on the Court by Article 1 of the European Convention for the Peaceful Settlement of Disputes, under the terms of which:

"The High Contracting Parties shall submit to the judgement of the International Court of Justice all international legal disputes which may arise between them including, in particular, those concerning:

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation."

42. Article 27, subparagraph (a), of the same Convention limits the scope of that instrument by stating that it shall not apply to "disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute". The Convention entered into force as between Germany and Italy on 18 April 1961.

43. The claims submitted to the Court by Germany certainly relate to "international legal disputes" within the meaning of Article 1 as cited above, between two States which, as has just been said, were both parties to the Convention on the date when the Application was filed, and indeed continue to be so.

44. The clause in the above-mentioned Article 27 imposing a limitation ratione temporis is not applicable to Germany's claims: the dispute which those claims concern does not "rel[ate] to facts or situations prior to the entry into force of the Convention as between the parties to the dispute", i.e., prior to 18 April 1961. The "facts or situations" which have given rise to the dispute before the Court are constituted by Italian judicial decisions that denied Germany the jurisdictional immunity which it claimed, and by measures of constraint applied to property belonging to Germany. Those decisions and measures were adopted between 2004 and 2011, thus well after the European Convention for the Peaceful Settlement of Disputes entered into force as between the Parties. It is true that the subject-matter of the disputes to which the judicial proceedings in question relate is reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich; this claim was dismissed by the Court's Order of 6 July 2010, on the grounds that it did not fall within the jurisdiction of the Court and was consequently inadmissible under Article 80, paragraph 1, of the Rules of Court (see paragraph 5 above).

45. The Parties, who have not disagreed on the analysis set out above, have on the other hand debated the extent of the Court's jurisdiction in a quite different context, that of some of the arguments put forward by Italy in its defence and relating to the alleged non-performance by Germany of its obligation to make reparation to the victims of the crimes committed by the German Reich in 1943-1945.

According to Italy, a link exists between the question of Germany's performance of its obligation to make reparation to the victims and that of the jurisdictional immunity which Germany might rely on before the foreign courts to which those victims apply, in the sense that a State which fails to perform its obligation to make reparation to the victims of grave violations of international humanitarian law, and which offers those victims no effective means of claiming the reparation to which they may be entitled, would be deprived of the right to invoke its jurisdictional immunity before the courts of the State of the victims' nationality.
46. Germany has contended that the Court could not rule on such an argument, on the basis that it concerned the question of reparation claims, which relate to facts prior to 18 April 1961. According to Germany, “facts occurring before the date of the entry into force of the European Convention for the Peaceful Settlement of Disputes as between Italy and Germany clearly lie outside the jurisdiction of the Court”, and “reparation claims do not fall within the subject-matter of the present dispute and do not form part of the present proceedings”. Germany relies in this respect on the Order whereby the Court dismissed Italy’s counter-claim, which precisely asked the Court to find that Germany had violated its obligation of reparation owed to Italian victims of war crimes and crimes against humanity committed by the German Reich (see paragraph 38). Germany points out that this dismissal was based on the fact that the said counter-claim fell outside the jurisdiction of the Court, because of the clause imposing a limitation *ratione temporis* in the above-mentioned Article 27 of the European Convention for the Peaceful Settlement of Disputes, the question of reparation claims resulting directly from the acts committed in 1943-1945.

47. Italy has responded to this objection that, while the Order of 6 July 2010 certainly prevents it from pursuing its counter-claim in the present case, it does not on the other hand prevent it from using the arguments on which it based that counter-claim in its defence against Germany’s claims; that the question of the lack of appropriate reparation is, in its view, crucial for resolving the dispute over immunity; and that the Court’s jurisdiction to take cognizance of it incidentally is thus indisputable.

48. The Court notes that, since the dismissal of Italy’s counter-claim, it no longer has before it any submissions asking it to rule on the question of whether Germany has a duty of reparation towards the Italian victims of the crimes committed by the German Reich and whether it has complied with that obligation in respect of all those victims, or only some of them. The Court is therefore not called upon to rule on those questions.

49. However, in support of its submission that it has not violated Germany’s jurisdictional immunity, Italy contends that Germany stands deprived of the right to invoke that immunity in Italian courts before which civil actions have been brought by some of the victims, because of the fact that it has not fully complied with its duty of reparation.

50. The Court must determine whether, as Italy maintains, the failure of a State to perform completely a duty of reparation which it allegedly bears is capable of having an effect, in law, on the existence and scope of that State’s jurisdictional immunity before foreign courts. This question is one of law on which the Court must rule in order to determine the customary international law applicable in respect of State immunity for the purposes of the present case.

Should the preceding question be answered in the affirmative, the second question would be whether, in the specific circumstances of the case, taking account in particular of Germany’s conduct on the issue of reparation, the Italian courts had sufficient grounds for setting aside Germany’s immunity. It is not necessary for the Court to satisfy itself that it has jurisdiction to respond to this second question until it has responded to the first.
In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. Opinio juris in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States. While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite opinio juris and therefore sheds no light upon the issue currently under consideration by the Court.

"murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war". The murder of civilian hostages in Italy was one of the counts on which a number of war crimes defendants were condemned in trials immediately after the Second World War (e.g., Von Mackensen and Maebzer (1946) Annual Digest, Vol. 13, p. 258; Kesseling (1947) Annual Digest, Vol. 13, p. 260; and Kappler (1948) Annual Digest, Vol. 15, p. 471). The principles of the Nuremberg Charter were confirmed by the General Assembly of the United Nations in resolution 95 (I) of 11 December 1946.

53. However, the Court is not called upon to decide whether these acts were illegal, a point which is not contested. The question for the Court is whether or not, in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity. In that context, the Court notes that there is a considerable measure of agreement between the Parties regarding the applicable law. In particular, both Parties agree that immunity is governed by international law and is not a mere matter of comity.

54. As between Germany and Italy, any entitlement to immunity can be derived only from customary international law, rather than treaty. Although Germany is one of the eight States parties to the European Convention on State Immunity of 16 May 1972 (European Treaty Series (ETS), No. 74; UNTS, Vol. 1495, p. 182) (hereinafter the "European Convention"), Italy is not a party and the Convention is accordingly not binding upon it. Neither State is party to the United Nations Convention on the Jurisdictional Immunities of States and their Property, adopted on 2 December 2004 (hereinafter the "United Nations Convention"), which is not yet in force in any event. As of 1 February 2012, the United Nations Convention had been signed by 28 States and obtained thirteen instruments of ratification, acceptance, approval or accession. Article 30 of the Convention provides that it will enter into force on the thirtieth day after deposit of the thirtieth such instrument. Neither Germany nor Italy has signed the Convention.

55. It follows that the Court must determine, in accordance with Article 38 (1) (b) of its Statute, the existence of "international custom, as evidence of a general practice accepted as law" conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the North Sea Continental Shelf cases, the existence of a rule of customary international law requires that there be "a settled practice" together with opinio juris (North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports, 1969, p. 44, para. 77). Moreover, as the Court has also 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/Malaysia), Judgment, I.C.J. Reports 1983, pp. 29-30, para. 27.)

56. Although there has been much debate regarding the origins of State immunity and the identification of the principles underlying that immunity in the past, the International Law Commission concluded in 1980 that the rule of State immunity had been "adopted as a general rule of customary international law solidly rooted in the current practice of States" (Yearbook of the International Law Commission, 1980, Vol. II (2), p. 147, para. 26). That conclusion was based upon an extensive survey of State practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention. That practice shows that, whether in claiming immunity for themselves or accorded it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.

57. The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.

58. The Parties are thus in broad agreement regarding the validity and importance of State immunity as a part of customary international law. They differ, however, as to whether (as Germany contends) the law to be applied is that which determined the scope and extent of State immunity in 1943-1945, i.e., at the time that the events giving rise to the proceedings in the Italian courts took place, or (as Italy maintains) that which applied at the time the proceedings themselves occurred. The Court observes that, in accordance with the principle stated in Article 13 of the
International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred. In that context, it is important to distinguish between the relevant acts of Germany and those of Italy. The relevant German acts — which are described in paragraph 52 — occurred in 1943-1945, and it is, therefore, the international law of that time which is applicable to them. The relevant Italian acts — the denial of immunity and exercise of jurisdiction by the Italian courts — did not occur until the proceedings in the Italian courts took place. Since the claim before the Court concerns the actions of the Italian courts, it is the international law in force at the time of those proceedings which the Court has to apply. Moreover, as the Court has stated (in the context of the personal immunities accorded by international law to foreign ministers), the law of immunity is essentially procedural in nature (Arrest Warrant (Democratic Republic of Congo v. Belgium), I.C.J. Reports 2002, p. 25, para. 60). It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful. For these reasons, the Court considers that it must examine and apply the law on State immunity as it existed at the time of the Italian proceedings, rather than that which existed in 1943-1945.

59. The Parties also differ as to the scope and extent of the rule of State immunity. In that context, the Court notes that many States (including both Germany and Italy) now distinguish between _acta jure gestionis_, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and _acta jure imperii_. That approach has also been followed in the United Nations Convention and the European Convention (see also the draft Inter-American Convention on Jurisdictional Immunity of States drawn up by the Inter-American Juridical Committee of the Organization of American States in 1983 (ILM, Vol. 22, p. 292)).

60. The Court is not called upon to address the question of how international law treats the issue of State immunity in respect of _acta jure gestionis_. The acts of the German armed forces and other State organs which were the subject of the proceedings in the Italian courts clearly constituted _acta jure imperii_. The Court notes that Italy, in response to a question posed by a member of the Court, recognized that those acts had to be characterized as _acta jure imperii_, notwithstanding that they were unlawful. The Court considers that the terms _"jure imperii"_ and _"jure gestionis"_ do not imply that the acts in question are lawful but refer rather to whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power (_"jure imperii") or the law concerning non-sovereign activities of a State, especially private and commercial activities (_"jure gestionis")_. To the extent that this distinction is significant for determining whether or not a State is entitled to immunity from the jurisdiction of another State's courts in respect of a particular act, it has to be applied before that jurisdiction can be exercised, whereas the legality or illegality of the act is something which can be determined only in the exercise of that jurisdiction. Although the present case is unusual in that the illegality of the acts at issue has been admitted by Germany at all stages of the proceedings, the Court considers that this fact does not alter the characterization of those acts as _acta jure imperii_.

61. Both Parties agree that States are generally entitled to immunity in respect of _acta jure imperii_. That is the approach taken in the United Nations, European and draft Inter-American Conventions, the national legislation in those States which have adopted statutes on the subject and the jurisprudence of national courts. It is against that background that the Court must approach the question raised by the present proceedings, namely whether that immunity is applicable to acts committed by the armed forces of a State (and other organs of that State acting in co-operation with the armed forces) in the course of conducting an armed conflict. Germany maintains that immunity is applicable and that there is no relevant limitation on the immunity to which a State is entitled in respect of _acta jure imperii_. Italy, in its pleadings before the Court, maintains that Germany is not entitled to immunity in respect of the cases before the Italian courts for two reasons: first, that immunity as to _acta jure imperii_ does not extend to torts or delicts occasioning death, personal injury or damage to property committed on the territory of the forum State, and, secondly, that, irrespective of where the relevant acts took place, Germany was not entitled to immunity because those acts involved the most serious violations of rules of international law of a peremptory character for which no alternative means of redress was available. The Court will consider each of Italy’s arguments in turn.

2. Italy’s first argument: the territorial tort principle

62. The essence of the first Italian argument is that customary international law has developed to the point where a State is no longer entitled to immunity in respect of acts occasioning death, personal injury or damage to property on the territory of the forum State, even if the act in question was performed _jure imperii_. Italy recognizes that this argument is applicable only to those of the claims brought before the Italian courts which concern acts that occurred in Italy and not to the cases of Italian military internees taken prisoner outside Italy and transferred to Germany or other territories outside Italy as forced labour. In support of its argument Italy points to the adoption of Article 11 of the European Convention and Article 12 of the United Nations Convention suggesting that that Convention did not apply to the acts of armed forces. Italy also notes that two of the national statutes (those of the United Kingdom and Singapore) are not applicable to the acts of foreign armed forces but argues that the other seven (those of Argentina, Australia, Canada, Israel, Japan, South Africa and the United States of America) amount to significant State practice asserting jurisdiction over torts occasioned by foreign armed forces.
66. The Court will first consider whether the adoption of Article 11 of the European Convention or Article 12 of the United Nations Convention affords any support to Italy's contention that States are no longer entitled to immunity in respect of the type of acts specified in the preceding paragraph. As the Court has already explained (see paragraph 54 above), neither Convention is in force between the Parties to the present case. The provisions of these Conventions are, therefore, relevant only in so far as their provisions and the process of their adoption and implementation shed light on the content of customary international law.

67. Article 11 of the European Convention states the territorial tort principle in broad terms:

“A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.”

That provision must, however, be read in the light of Article 31, which provides,

“Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.”

68. The Court agrees with Italy that Article 31 takes effect as a “saving clause”, with the result that the immunity of a State for the acts of its armed forces falls entirely outside the legislation which provides for a “territorial tort exception” to immunity expressly distinguishes between acta jure gestionis and acta jure imperii. The Supreme Court of Canada expressly rejected the suggestion that the exception in the Canadian legislation was subject to such a distinction (Scarbrough v. Federal Republic of Germany, [2002] Supreme Court Reports (SCR), Vol. 3, p. 269, paras 33-36). Nor is such a distinction featured in either Article 11 of the European Convention or Article 12 of the United Nations Convention. The International Law Commission’s commentary on the text of what became Article 12 of the United Nations Convention makes clear that this was a deliberate choice and that the provision was not intended to be restricted to acta jure gestionis (Yearbook of the International Law Commission, 1991, Vol. II (2), p. 45, para. 8). Germany has not, however, been alone in suggesting that, in so far as it was intended to apply to acta jure imperii, Article 12 was not representative of customary international law. In criticising the International Law Commission’s draft of what became Article 12, China commented in 1990 that “the article had gone even further than the restrictive doctrine, for it made no distinction between sovereign acts and private law acts” (United Nations doc. A/C.6/45/SR.25, p. 2) and the United States, commenting in 2004 on the draft United Nations Convention, stated that Article 12 “must be interpreted and applied consistently with the time-honoured distinction between acts jure imperii and acts jure gestionis” since to extend jurisdiction without regard to that distinction “would be contrary to the existing principles of international law” (United Nations doc. A/C.6/59/SR.13, p. 10, para. 63).

69. The Court considers that it is not called upon in the present proceedings to resolve the question whether there is in customary international law a “tort exception” to State immunity applicable to acta jure imperii in general. The issue before the Court is confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict.
Turning to State practice in the form of national legislation, the Court notes that nine of the ten States referred to by the Parties which have legislated specifically for the subject of State immunity have adopted provisions to the effect that a State is not entitled to immunity in respect of torts occasioning death, personal injury or damage to property occurring on the territory of the forum State (United States of America Foreign Sovereign Immunities Act 1976, 28 USC, Section 1605(a)(5); United Kingdom State Immunity Act 1978, Section 5; South Africa Foreign States Immunities Act 1981, Section 6; Canada State Immunity Act 1985, Section 6; Australia Foreign States Immunities Act 1985, Section 13; Singapore State Immunity Act 1985, Section 7; Argentina Law No. 24.488 (Statute on the Immunity of Foreign States before Argentine Tribunals) 1995, Article 2(e); Israel Foreign State Immunity Law 2008, Section 5; and Japan, Act on the Civil Jurisdiction of Japan with respect to a Foreign State, 2009, Article 10). Only Pakistan's State Immunity Ordinance 1981 contains no comparable provision.

Two of these statutes (the United Kingdom State Immunity Act 1978, Section 16(2) and the Singapore State Immunity Act 1985, Section 19(2)) contain provisions that exclude proceedings relating to the acts of foreign armed forces from their application. The corresponding provisions in the Canadian, Australian and Israeli statutes exclude only the acts of visiting forces present with the consent of the host State. The legislation of other States, a court in the United States has held that a foreign State whose agents committed an assassination in the United States was not entitled to immunity (Republic of Chile v. United States of America, 1980, United States District Reports 382, I.L.A. Vol. 104, p. 69). Shewai v. United States of America, 1991, Vol. I (2), Yearbook of the International Law Commission, p. 62. Furthermore, the Polish Yearbook of International Law XXX, 2010, p. 69, have concluded that Article 12 of the United Nations Convention provides:

"Unlike otherwise agreed between the States concerned, a State cannot invoke immunity in respect of proceedings brought in a court of another State to which a claim is brought in respect of a tort committed by its armed forces or its armed forces' agents abroad, notwithstanding the fact that the tort is alleged to have been committed by the armed forces or their agents which is not part of the territory of the State concerned. The States concerned may, however, agree that the tort is to be treated as though it had been committed in the territory of the State concerned and the rules of territorial jurisdiction of the United Nations Convention are to apply.

Unlike the European Convention, the United Nations Convention contains no express provision excluding the acts of armed forces from its scope. However, the International Law Commission's commentary on the text of Article 12 states that provision does not apply to "situations involving armed conflicts" (United Nations doc. A/C.10/58/Rev.2, p. 6, para. 36).

No State questioned this interpretation. Moreover, the Court notes that two of the States which have so far ratified the Convention, Norway and Sweden, have declared in identical terms that the Convention does not apply to military activities, including the activities of armed forces during an armed conflict, and that military activities were not covered by their national legislation (United Nations doc. A/C.10/58/Rev.2, p. 6, para. 36).
which are often very similar to those of the cases before the Italian courts, concern the events of the
Second World War. In this context, the Cour de cassation in France has consistently held that
France was entitled to immunity in a series of cases brought before both domestic courts and the
tribunals in the course of which Germany was involved in, or accused of having been involved in,
acts of war committed in territories which were occupied or which had been subject to
occupation by Germany during the Second World War. The Court also notes that the European Court of
Human Rights, in its judgment of 14 July 2000 (Application No. 25646/94, Decision of 15 June 2000) that France had not contravened its obligations under the European Convention on Human Rights in the period of occupation by Germany (Application No. 14717/06, Decision of 16 June 2009) that France had not contravened its obligations under the European Convention on Human Rights in the proceedings which were the subject of the 2006 Cour de cassation judgment.

Indeed, in none of the seven States in which the legislation contains no general exclusion for
immunity required by international law. The acts of armed forces, have the courts been called upon to apply that legislation in a case involving the acts of armed forces of a foreign State, and associated organs of State actions in the context of an armed conflict. The question whether a State is entitled to immunity in proceedings concerning torts allegedly committed by its armed forces when acting in an action brought by a claimant who in 1944 had suffered injuries when German forces burned his village in occupied Poland and murdered several of its inhabitants. The Supreme Court, after an extensive review of the decisions in Distomo and Margellos, as well as the Acta jure imperii provisions of the European Convention and the United Nations Convention and a range of other materials, concluded that States remained entitled to immunity in respect of torts allegedly committed by their armed forces in the course of an armed conflict. Judgments by lower courts in Belgium (Judgment of the Court of First Instance of Ghent in 2000 in Barreto v. Allianz Via Insurance) or military exercises in the United States of America (No. 2) (v. United States of America (No. 2), Aix-en-Provence, ILR, Vol. 100, p. 438; ILR, Vol. 119, p. 367).

74. The highest courts in Switzerland and Poland have also held that Germany was entitled to
immunity in respect of unlawful acts perpetrated on their territory by its armed forces during the Second World War. In 2001 the Constitutional Court of Switzerland held that Germany was entitled to immunity in an action brought by a claimant who had not been deported to Germany during the German occupation and that the Supreme Court of Switzerland had not acted arbitrarily in upholding Germany's entitlement to immunity. The United Nations Commission on International Law has also held that States remained entitled to immunity in respect of acts of war committed on their territory or in their waters. While not directly concerned with the specific issue which arises in the present case, those judgments, suggest that a State is entitled to immunity in respect of acts committed by its armed forces on the territory of another State.

75. Finally, the Court notes that the German courts have also concluded that the territorial
test principle did not remove a State's entitlement to immunity under international law in respect of acts committed by its armed forces even where those acts took place on the territory of the forum State in breach of Germany's embargo on acts of war committed on their territory or in their waters.
76. The only State in which there is any judicial practice which appears to support the Italian argument, apart from the judgments of the Italian courts which are the subject of the present proceedings, is Greece. The judgment of the Hellenic Supreme Court in the Distomo case in 2000 contains an extensive discussion of the territorial tort principle without any suggestion that it does not extend to the acts of armed forces during an armed conflict. However, the Greek Special Supreme Court, in its judgment in Mangellos v. Federal Republic of Germany (Case No. 6/2002) (ILR, Vol. 129, p. 525), repudiated the reasoning of the Supreme Court in Distomo and held that Germany was entitled to immunity. In particular, the Special Supreme Court held that the territorial tort principle was not applicable to the acts of the armed forces of a State in the conduct of armed conflict. While that judgment does not alter the outcome in the Distomo case, a matter considered below, Greece has informed the Court that courts and other bodies in Greece faced with the same issue of whether immunity is applicable to torts allegedly committed by foreign armed forces in Greece are required to follow the stance taken by the Special Supreme Court in its decision in Mangellos unless they consider that customary international law has changed since the Mangellos judgment. Germany has pointed out that, since the judgment in Mangellos was given, no Greek court has denied immunity in proceedings brought against Germany in respect of acts allegedly committed by German armed forces during the Second World War and in a 2009 decision (Decision 853/2009), the Supreme Court, although deciding the case on a different ground, approved the reasoning in Mangellos. In view of the judgment in Mangellos and the dictum in the 2009 case, as well as the decision of the Greek Government not to permit enforcement of the Distomo judgment in Greece itself and the Government’s defence of that decision before the European Court of Human Rights in Kalogeropoulos and Others v. Greece and Germany (Application No. 59021/00, Decision of 12 December 2002, ECHR Reports 2002-X, p. 417; ILR, Vol. 129, p. 537), the Court concludes that Greek State practice taken as a whole actually contradicts, rather than supports, Italy’s argument.

77. In the Court’s opinion, State practice in the form of judicial decisions supports the proposition that State immunity for acta jure imperii continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. That practice is accompanied by opinio juris, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity. The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States in connection with the work of the International Law Commission regarding State immunity and the adoption of the United Nations Convention or, so far as the Court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases.

78. In light of the foregoing, the Court considers that customary international law continues to require that a State be accorded immunity in proceedings for acts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict. That conclusion is confirmed by the judgments of the European Court of Human Rights to which the Court has referred (see paragraphs 72, 73 and 76).

79. The Court therefore concludes that, contrary to what had been argued by Italy in the present proceedings, the decision of the Italian courts to deny immunity to Germany cannot be justified on the basis of the territorial tort principle.

3. Italy’s second argument: the subject-matter and circumstances of the claims in the Italian courts

80. Italy’s second argument, which, unlike its first argument, applies to all of the claims brought before the Italian courts, is that the denial of immunity was justified on account of the particular nature of the acts forming the subject-matter of the claims before the Italian courts and the circumstances in which those claims were made. There are three strands to this argument. First, Italy contends that the acts which gave rise to the claims constituted serious violations of the principles of international law applicable to the conduct of armed conflict, amounting to war crimes and crimes against humanity. Secondly, Italy maintains that the rules of international law thus contravened were peremptory norms (jus cogens). Thirdly, Italy argues that the claimants having been denied all other forms of redress, the exercise of jurisdiction by the Italian courts was necessary as a matter of last resort. The Court will consider each of these strands in turn, while recognizing that, in the oral proceedings, Italy also contended that its courts had been entitled to deny State immunity because of the combined effect of these three strands.

A. The gravity of the violations

81. The first strand is based upon the proposition that international law does not accord immunity to a State, or at least restricts its right to immunity, when that State has committed serious violations of the law of armed conflict (international humanitarian law as it is more commonly termed today, although the term was not used in 1943-1945). In the present case, the Court has already made clear (see paragraph 52 above) that the actions of the German armed forces and other organs of the German Reich giving rise to the proceedings before the Italian courts were serious violations of the law of armed conflict which amounted to crimes under international law. The question is whether that fact operates to deprive Germany of an entitlement to immunity.

82. At the outset, however, the Court must observe that the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem. Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.
A similar uncertainty is evident in the orders of the Italian Court of Cassation in *Mantelli* and *Maietta* (Orders of 29 May 2008).

323

85. It is also noticeable that there is no limitation of State immunity for the case of serious violations of international law, such as crimes against humanity or war crimes, which are considered to be violations of the jus cogens norms.

86. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

87. The Court does not consider that the United Kingdom judgment in *Pinochet (No. 3)* ([2000] 1 Country A.H.R. 37; [2000] 1 All E.R. 296; [2000] ILR Vol. 120, p. 233) is relevant, notwithstanding the reliance placed on it by Lord Bingham in his judgment. The *Pinochet* judgment was based on the specific language of the 1944 United Nations Convention against Torture, which has no bearing on the present case.

88. With reference to national legislation, Italy referred to an amendment to the United States Foreign Sovereign Immunities Act to provide for the limitation of immunity on the grounds of the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.

89. It is also noticeable that there is no limitation of State immunity by reference to the gravity of the violation or the peremptory character of the rule involved. Accordingly, the Court does not consider that the United Kingdom judgment in *Pinochet (No. 3)* is relevant, notwithstanding the reliance placed on it by Lord Bingham in his judgment. The *Pinochet* judgment was based on the specific language of the 1944 United Nations Convention against Torture, which has no bearing on the present case.

90. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

91. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

92. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

93. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

94. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

95. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

96. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

97. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

98. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

99. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

100. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

101. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

102. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

103. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

104. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

105. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

106. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

107. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

108. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

109. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

110. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.

111. The Court notes that, in its response to a question posed by a Member of the Court, the Italian Government has indicated that the concept of jus cogens is not properly reflected in the case law of the International Court of Justice.
always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, so the argument runs, and since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way.

93. This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility (as the Court has explained in paragraph 58 above). For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission’s Articles on State Responsibility.

94. In the present case, the violation of the rules prohibiting murder, deportation and slave labour took place in the period 1943-1945. The illegality of these acts is openly acknowledged by the following year, in *Kalogeropoulos and others v. Greece and Germany*, the European Court of Human Rights rejected an application relating to the refusal of the Greek Government to permit enforcement of the *Distrò* judgment and said that,

“The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity.” (Application No. 59021/00, Decision of 12 December 2002, ECHR Reports 2002-X, p. 417; ILR, Vol. 129, p. 537.)

91. The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.

B. The relationship between *jus cogens* and the rule of State immunity

92. The Court now turns to the second strand in Italy’s argument, which emphasizes the *jus cogens* status of the rules which were violated by Germany during the period 1943-1945. This strand of the argument rests on the premise that there is a conflict between *jus cogens* rules forming part of the law of armed conflict and according immunity to Germany. Since *jus cogens* rules
no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess jus cogens status, nor is there anything inherent in the concept of jus cogens which would require their modification or would displace their application. The Court has taken that approach in two cases, notwithstanding that the effect was that a means by which a jus cogens rule might be enforced was rendered unavailable. In Armed Activities, it held that the fact that a rule has the status of jus cogens does not confer upon the Court a jurisdiction which it would not otherwise possess (Armed Activities on the Territory of the Congo (New Application: 2002), Judgment, I.C.J. Reports 2006, p. 6, paras. 64 and 125). In Arrest Warrant, the Court held, albeit without express reference to the concept of jus cogens, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of jus cogens did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf (Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, paras. 58 and 78). The Court considers that the same reasoning is applicable to the application of the customary international law regarding the immunity of one State from proceedings in the courts of another.

96. In addition, this argument about the effect of jus cogens displacing the law of State immunity has been rejected by the national courts of the United Kingdom (Jones v. Saudi Arabia, House of Lords, [2007] 1 AC 270; ILR, Vol. 129, p. 629), Canada (Boucari v. Islamic Republic of Iran, Court of Appeal of Ontario, DLR, 4th Series, Vol. 243, p. 406; ILR, Vol. 128, p. 586), Poland (Natoniowski, Supreme Court, Polish Yearbook of International Law, Vol. XXX, 2010, p. 299), Slovenia (case No. Up 13/99, Constitutional Court of Slovenia), New Zealand (Fang v. Jiang, High Court, [2007] NZAR p. 420; ILR, Vol. 141, p. 702), and Greece (Margellos, Special Supreme Court, ILR, Vol. 129, p. 525), as well as by the European Court of Human Rights in Al-Adnani v. United Kingdom and Kakogenopoulou and others v. Greece and Germany (which are discussed in paragraph 90 above), in each case after careful consideration. The Court does not consider that the judgment of the French Cour de cassation of 9 March 2011 in La Réunion aérienne v. Libyan Arab Jamahiriya (No. 09-14743, 9 March 2011, Bull. civ., March 2011, No. 49, p. 49) as supporting a different conclusion. The Cour de cassation in that case stated only that, even if a jus cogens norm could constitute a legitimate restriction on State immunity, such a restriction could not be justified on the facts of that case. It follows, therefore, that the judgments of the Italian courts which are the subject of the present proceedings are the only decisions of national courts to have accepted the reasoning on which this part of Italy’s second argument is based. Moreover, none of the national legislation on State immunity considered in paragraphs 70-71 above, has limited immunity in cases where violations of jus cogens are alleged.

97. Accordingly, the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations of jus cogens rules, the applicability of the customary international law on State immunity was not affected.

98. The third and final strand of the Italian argument is that the Italian courts were justified in denying Germany the immunity to which it would otherwise have been entitled, because all other attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed. Germany’s response is that in the aftermath of the Second World War it made considerable financial and other sacrifices by way of reparation in the context of a complex series of inter-State arrangements under which, reflecting the economic realities of the time, no Allied State received compensation for the full extent of the losses which its people had suffered. It also points to the payments which it made to Italy under the terms of the two 1961 Agreements and to the payments made more recently under the 2000 Federal Law to various Italians who had been unlawfully deported to forced labour in Germany. Italy maintains, however, that large numbers of Italian victims were nevertheless left without any compensation.

99. The Court notes that Germany has taken significant steps to ensure that a measure of reparation was made to Italian victims of war crimes and crimes against humanity. Nevertheless, Germany decided to exclude from the scope of its national compensation scheme most of the claims by Italian military internees who were entitled to compensation for forced labour (see paragraph 26 above). The overwhelming majority of Italian military internees were, in fact, denied treatment as prisoners of war by the Nazi authorities.

100. Moreover, as the Court has said, albeit in the different context of the immunity of State officials from criminal proceedings, the fact that immunity may bar the exercise of jurisdiction in a particular case does not alter the applicability of the substantive rules of international law (Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 25, para. 60; see also Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008, p. 244, para. 196). In that context, the Court would point out that whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation.
101. That notwithstanding, the Court cannot accept Italy’s contention that the alleged shortcomings in Germany’s provisions for reparation to Italian victims, entitled the Italian courts to deprive Germany of jurisdictional immunity. The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation on the subject, nor in the jurisprudence of the national courts which have been faced with objections based on immunity is there any evidence that entitlement to immunity is subjected to such a precondition. States also did not include any such condition in either the European Convention or the United Nations Convention.

102. Moreover, the Court cannot fail to observe that the application of any such condition, if it indeed existed, would be exceptionally difficult in practice, particularly in a context such as that of the present case, when claims have been the subject of extensive intergovernmental discussion. If one follows the Italian argument, while such discussions were still ongoing and had a prospect of achieving a successful outcome, then it seems that immunity would still prevail, whereas, again according to this argument, immunity would presumably cease to apply at some point when prospects for an inter-State settlement were considered to have disappeared. Yet national courts in one of the countries concerned are unlikely to be well placed to determine when that point has been reached. Moreover, if a lump sum settlement has been made — which has been the normal practice in the aftermath of war, as Italy recognizes — then the determination of whether a particular claimant continued to have an entitlement to compensation would entail an investigation by the court of the details of that settlement and the manner in which the State which had received funds (in this case the State in which the court in question is located) has distributed those funds. Where the State receiving funds as part of what was intended as a comprehensive settlement in the aftermath of an armed conflict has elected to use those funds to rebuild its national economy and infrastructure, rather than distributing them to individual victims amongst its nationals, it is difficult to see why the fact that those individuals had not received a share in the money should be a reason for entitling them to claim against the State that had transferred money to their State of nationality.

103. The Court therefore rejects Italy’s argument that Germany could be refused immunity on this basis.

104. In coming to this conclusion, the Court is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned.

It considers however that the claims arising from the treatment of the Italian military internees referred to in paragraph 99, together with other claims of Italian nationals which have allegedly not been settled — and which formed the basis for the Italian proceedings — could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue.

D. The combined effect of the circumstances relied upon by Italy

105. In the course of the oral proceedings, counsel for Italy maintained that the three strands of Italy’s second argument had to be viewed together; it was because of the cumulative effect of the gravity of the violations, the status of the rules violated and the absence of alternative means of redress that the Italian courts had been justified in refusing immunity to Germany.

106. The Court has already held that none of the three strands of the second Italian argument would, of itself, justify the action of the Italian courts. It is not persuaded that they would have that effect if taken together. Nothing in the examination of State practice lends support to the proposition that the concurrent presence of two, or even all three, of these elements would justify the refusal by a national court to accord to a respondent State the immunity to which it would otherwise be entitled.

In so far as the argument based on the combined effect of the circumstances is to be understood as meaning that the national court should balance the different factors, assessing the respective weight, on the one hand, of the various circumstances that might justify the exercise of its jurisdiction, and, on the other hand, of the interests attaching to the protection of immunity, such an approach would disregard the very nature of State immunity. As explained in paragraph 56 above, according to international law, State immunity, where it exists, is a right of the foreign State. In addition, as explained in paragraph 82 of this Judgment, national courts have to determine questions of immunity at the outset of the proceedings, before consideration of the merits. Immunity cannot, therefore, be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed.

4. Conclusions

107. The Court therefore holds that the action of the Italian courts in denying Germany the immunity to which the Court has held it was entitled under customary international law constitutes a breach of the obligations owed by the Italian State to Germany.

108. It is, therefore, unnecessary for the Court to consider a number of questions which were discussed at some length by the Parties. In particular, the Court need not rule on whether, as Italy contends, international law confers upon the individual victim of a violation of the law of armed conflict a directly enforceable right to claim compensation. Nor need it rule on whether, as Germany maintains, Article 77, paragraph 4, of the Treaty of Peace or the provisions of the 1961 Agreements amounted to a binding waiver of the claims which are the subject of the Italian proceedings. That is not to say, of course, that these are unimportant questions, only that they are not ones which fall for decision within the limits of the present case. The question whether Germany still has a responsibility towards Italy, or individual Italians, in respect of war crimes and crimes against humanity committed by it during the Second World War does not affect Germany’s entitlement to immunity. Similarly, the Court’s ruling on the issue of immunity can have no effect on whatever responsibility Germany may have.
The rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity (understood as the right of a State not to be the subject of judicial proceedings in the courts of another State) are distinct, and must be applied separately.

114. In the present case, this means that the Court may rule on the issue of whether the charge on Villa Vigoni constitutes a measure of constraint in violation of Germany's immunity from enforcement without needing to determine whether the decisions of the Greek courts awarding pecuniary damages against Germany, for purposes of whose enforcement that measure was taken, were themselves in breach of that State's jurisdictional immunity.

Likewise, the issue of the international legality of the measure of constraint in question, in light of the rules applicable to that of jurisdictional immunity, is separate and may accordingly be addressed in the third of the submissions presented to the Court by Germany (see above paragraph 17).

115. In support of its claim on the point under discussion here, Germany cited the rules set out in Article 19 of the United Nations Convention. That Convention has not entered into force, but in Germany's view, it refines the understanding of immunity from enforcement, the rules relevant to that matter being thus to be read in light of customary international law as they affect the question on the matter.

116. Article 19, entitled "State immunity from post-judgment measures of constraint", reads as follows:

(a) by international agreement;
(b) by derogation from the law of the State of the forum, but only in so far as that law authorizes such measures, and then only in the cases provided for by the law of the forum State as to which, in accordance with the law of that State, the property, rights and interest affected by the measures of constraint are situated, and so only if:
(i) by the terms of the law of the State of the forum, the property, rights and interest affected by the measures of constraint are situated in a territory of the State of the forum; or
(ii) by an arbitration agreement or in a written contract; or
(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or
(c) if the State has allocated or earmarked property for the satisfaction of the claim which is the subject of that proceeding, or
(d) if the State has committed the wrongful acts complained of by Germany.

Germany's Submission, which concerns the dispute over the measure of constraint taken against Villa Vigoni, is based on paragraphs (a) and (b) of Article 19, and thus is understood as an argument in support of the Court's jurisdiction to rule on the issue, and not as a claim for jurisdictional immunity.

117. The Court considers that, notwithstanding the above-mentioned suspension, and the absence of any argument by Italy seeking to establish the international legality of the measures of constraint in question, a dispute still exists between the Parties on the issue the subject of which has not disappeared. It has not formally admitted that the legal charge on Villa Vigoni described as "the mortgage on Villa Vigoni inscribed at the land registry" is cancelled.

118. As a result of Decree-Law No. 63 of 24 April 2010 and Decree-Law No. 98 of 23 June 2010 and Decree-Law No. 216 of 29 December 2011, the charge in question was suspended in order to take account of the pending proceedings before the Court in the present case. It has not, however, been cancelled.

119. Germany argued before the Court that such a measure of constraint violates the immunity from enforcement to which it is entitled under international law. Italy has not sought to justify that measure; on the contrary, it indicated to the Court that it "has no objection to any decision by the Court obliging Italy to ensure that the mortgage on Villa Vigoni inscribed at the land registry is cancelled".

133. As a result of the decision of this Court, and that execution of the rights against the property in question, a dispute between the Parties has arisen; or
(c) if the State has committed the wrongful acts complained of by Germany.

Italy does not contest the Court's jurisdiction to rule on the issue. In any event, it cannot be said that the charge on Villa Vigoni constitutes a measure of constraint on the territory of the forum State or on that of a third State, to which it has committed the wrongful acts complained of by Germany.

143. The Court should therefore rule, as both Parties wish it to do, on the second of Germany's Submissions, which concerns the dispute over the measure of constraint taken against Villa Vigoni.
117. When the United Nations Convention was being drafted, these provisions gave rise to long and difficult discussions. The Court considers that it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 reflect current customary international law.

118. Indeed, it suffices for the Court to find that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that the State has allocated the property in question for the satisfaction of a judicial claim (an illustration of this well-established practice is provided by the decision of the German Constitutional Court (Bundesverfassungsgericht) of 14 December 1977 (BVerfGE, Vol. 46, p. 342; ILR, Vol. 65, p. 146), by the judgment of the Swiss Federal Tribunal of 30 April 1986 in *Kingdom of Spain v. Société X (Annuaire suisse de droit international, Vol. 43, 1987*, p. 158; ILR, Vol. 82, p. 44), as well as the judgment of the House of Lords of 12 April 1984 in *Alcom Ltd v. Republic of Colombia* ([1984] 1 AC 580; ILR, Vol. 74, p. 170) and the judgment of the Spanish Constitutional Court of 1 July 1992 in *Abbott v. Republic of South Africa* (Revisa española de derecho internacional, Vol. 44, 1992, p. 565; ILR, Vol. 113, p. 414).

119. It is clear in the present case that the property which was the subject of the measure of constraint at issue is being used for governmental purposes that are entirely non-commercial, and hence for purposes falling within Germany’s sovereign functions. Villa Vigoni is in fact the seat of a cultural centre intended to promote cultural exchanges between Germany and Italy. This cultural centre is organized and administered on the basis of an agreement between the two Governments concluded in the form of an exchange of notes dated 21 April 1986. Before the Court, Italy described the activities in question as a “centre of excellence for the Italian-German co-operation in the fields of research, culture and education”, and recognized that Italy was directly involved in “its peculiar bi-national … managing structure”. Nor has Germany in any way expressly consented to the taking of a measure such as the legal charge in question, or allocated Villa Vigoni for the satisfaction of the judicial claims against it.

120. In these circumstances, the Court finds that the registration of a legal charge on Villa Vigoni constitutes a violation by Italy of its obligation to respect the immunity owed to Germany.

V. THE DECISIONS OF THE ITALIAN COURTS DECLARING ENFORCEABLE IN ITALY DECISIONS OF GREEK COURTS UPHELD CIVIL CLAIMS AGAINST GERMANY

121. In its third submission, Germany complains that its jurisdictional immunity was also violated by decisions of the Italian courts declining enforceable in Italy judgments rendered by Greek courts against Germany in proceedings arising out of the Distomo massacre. In 1995, successors in title of the victims of that massacre, committed by the German armed forces in a Greek village in June 1944, brought proceedings for compensation against Germany before the Greek courts. By a judgment of 25 September 1997, the Court of First Instance of Livadia, which had territorial jurisdiction, ordered Germany to pay compensation to the claimants. The appeal by Germany against that judgment was dismissed by a decision of the Hellenic Supreme Court of 4 May 2000, which rendered final the judgment of the Court of First Instance, and at the same time ordered Germany to pay the costs of the appeal proceedings. The successful Greek claimants under the first-instance and Supreme Court judgments applied to the Italian courts for *exequatur* of those judgments, so as to be able to have them enforced in Italy, since it was impossible to enforce them in Greece or in Germany (see above, paragraphs 30 and 32). It was on those applications that the Florence Court of Appeal ruled, allowing them by a decision of 13 June 2006, which was confirmed, following an objection by Germany, on 21 October 2008 as regards the pecuniary damages awarded by the Court of First Instance of Livadia, and by a decision of 2 May 2005, confirmed, following an objection by Germany, on 6 February 2007 as regards the award of costs made by the Hellenic Supreme Court. This latter decision was confirmed by the Italian Court of Cassation on 6 May 2008. As regards the decision confirming the *exequatur* granted in respect of the judgment of the Court of First Instance of Livadia, it has also been appealed to the Italian Court of Cassation, which dismissed that appeal on 12 January 2011.

122. According to Germany, the decisions of the Florence Court of Appeal declaring enforceable the judgments of the Livadia court and the Hellenic Supreme Court constitute violations of its jurisdictional immunity, since, for the same reasons as those invoked by Germany in relation to the Italian proceedings concerning war crimes committed in Italy between 1943 and 1945, the decisions of the Greek courts were themselves rendered in violation of that jurisdictional immunity.

123. According to Italy, on the contrary, and for the same reasons as those set out and discussed in Section III of the present Judgment, there was no violation of Germany’s jurisdictional immunity, either by the decisions of the Greek courts or by those of the Italian courts which declared them enforceable in Italy.

124. It should first be noted that the claim in Germany’s third submission is entirely separate and distinct from that set out in the preceding one, which has been discussed in Section IV above (paragraphs 109 to 120). The Court is no longer concerned here to determine whether a measure of constraint — such as the legal charge on Villa Vigoni — violated Germany’s immunity from enforcement, but to decide whether the Italian judgments declaring enforceable in Italy the pecuniary awards pronounced in Greece did themselves — independently of any subsequent measure of enforcement — constitute a violation of the Applicant’s immunity from jurisdiction. While there is a link between these two aspects — since the measure of constraint against Villa Vigoni could only have been imposed on the basis of the judgment of the Florence Court of Appeal according *exequatur* in respect of the judgment of the Greek court in Livadia — the two issues nonetheless remain clearly distinct. That discussed in the preceding section related to immunity from enforcement; that which the Court will now consider addresses immunity from jurisdiction. As recalled above, these two forms of immunity are governed by different sets of rules.
125. The Court will then explain how it views the issue of jurisdictional immunity in relation to a judgment which rules not on the merits of a claim brought against a foreign State, but on an application to have a judgment rendered by a foreign court against a third State declared enforceable on the territory of the State of the court where that application is brought (a request for *exequatur*). The difficulty arises from the fact that, in such cases, the court is not being asked to give judgment directly against a foreign State invoking jurisdictional immunity, but to enforce a decision already rendered by a court of another State, which is deemed to have itself examined and applied the rules governing the jurisdictional immunity of the respondent State.

126. In the present case, the two Parties appear to have argued on the basis that, in such a situation, the question whether the court seised of the application for *exequatur* had respected the jurisdictional immunity of the third State depended simply on whether that immunity had been respected by the foreign court having rendered the judgment on the merits against the third State. In other words, both Parties appeared to make the question whether or not the Florence Court of Appeal had violated Germany’s jurisdictional immunity in declaring enforceable the Livadia and Hellenic Supreme Court decisions dependent on whether those decisions had themselves violated the jurisdictional immunity on which Germany had relied in its defence against the proceedings brought against it in Greece.

127. There is nothing to prevent national courts from ascertaining, before granting *exequatur*, that the foreign judgment was not rendered in breach of the immunity of the respondent State. However, for the purposes of the present case, the Court considers that it must address the issue from a significantly different viewpoint. In its view, it is unnecessary, in order to determine whether the Florence Court of Appeal violated Germany’s jurisdictional immunity, to rule on the question of whether the decisions of the Greek courts did themselves violate that immunity — something, moreover, which it could not do, since that would be to rule on the rights and obligations of a State, Greece, which does not have the status of party to the present proceedings (see *Monetary Gold Removed from Rome in 1943* (Italy v. France: United Kingdom and United States of America), Preliminary Question, Judgment, *I.C.J. Reports* 1954, p. 32; *East Timor* (Portugal v. Australia), Judgment, *I.C.J. Reports* 1995, p. 105, para. 34).

The relevant question, from the Court’s point of view and for the purposes of the present case, is whether the Italian courts did themselves respect Germany’s immunity from jurisdiction in allowing the application for *exequatur*, and not whether the Greek court having rendered the judgment of which *exequatur* is sought had respected Germany’s jurisdictional immunity. In a situation of this kind, the replies to these two questions may not necessarily be the same; it is only the first question which the Court needs to address here.

128. Where a court is seised, as in the present case, of an application for *exequatur* of a foreign judgment against a third State, it is itself being called upon to exercise its jurisdiction in respect of the third State in question. It is true that the purpose of *exequatur* proceedings is not to decide on the merits of a dispute, but simply to render an existing judgment enforceable on the territory of a State other than that of the court which ruled on the merits. It is thus not the role of the *exequatur* court to re-examine in all its aspects the substance of the case which has been decided. The fact nonetheless remains that, in granting or refusing *exequatur*, the court exercises a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment rendered on the merits in the requested State. The proceedings brought before that court must therefore be regarded as being conducted against the third State which was the subject of the foreign judgment.
133. The Court accordingly concludes that the above-mentioned decisions of the Florence Court of Appeal constitute a violation by Italy of its obligation to respect the jurisdictional immunity of Germany.

VI. GERMANY'S FINAL SUBMISSIONS AND THE REMEDIES SOUGHT

134. In its final submissions at the close of the oral proceedings, Germany presented six requests to the Court, of which the first three were declaratory and the final three sought to draw the consequences, in terms of reparation, of the established violations (see paragraph 17 above). It is on those requests that the Court is required to rule in the operative part of this Judgment.

135. For the reasons set out in Sections III, IV and V above, the Court will uphold Germany's first three requests, which ask it to declare, in turn, that Italy has violated the jurisdictional immunity which Germany enjoys under international law by allowing civil claims based on violations of international humanitarian law by the German Reich between 1943 and 1945; that Italy has also committed violations of the immunity owed to Germany by taking enforcement measures against Villa Vigoni; and, lastly, that Italy has violated Germany's immunity by declaring enforceable in Italy Greek judgments based on occurrences similar to those referred to above.

136. In its fourth submission, Germany asks the Court to adjudge and declare that, in view of the above, Italy's international responsibility is engaged.

There is no doubt that the violation by Italy of certain of its international legal obligations entails its international responsibility and places upon it, by virtue of general international law, an obligation to make full reparation for the injury caused by the wrongful acts committed. The substance, in the present case, of that obligation to make reparation will be considered below, in connection with Germany's fifth and sixth submissions. The Court's ruling thereon will be set out in the operative clause. On the other hand, the Court does not consider it necessary to include an express declaration in the operative clause that Italy's international responsibility is engaged; to do so would be entirely redundant, since that responsibility is automatically inferred from the finding that certain obligations have been violated.

137. In its fifth submission, Germany asks the Court to order Italy to take, by means of its own choosing, any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in its first submission (namely violations of international humanitarian law committed by the German Reich between 1943 and 1945). According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 (a) of the International Law Commission's Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Furthermore, even if the act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission's Articles.

It follows accordingly that the Court must uphold Germany's fifth submission. The decisions and measures infringing Germany's jurisdictional immunities which are still in force must cease to have effect, and the effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established. It has not been alleged or demonstrated that restitution would be materially impossible in this case, or that it would involve a burden for Italy out of all proportion to the benefit deriving from it. In particular, the fact that some of the violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution. On the other hand, the Respondent has the right to choose the means it considers best suited to achieve the required result. Thus, the Respondent is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect.

138. Finally, in its sixth submission, Germany asks the Court to order Italy to take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in its first submission (namely violations of international humanitarian law committed by the German Reich between 1943 and 1945).

As the Court has stated in previous cases (see, in particular, Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 267, para. 150), as a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed. Accordingly, while the Court may order the State responsible for an internationally wrongful act to offer assurances of non-repetition to the injured State, or to take specific measures to ensure that the wrongful act is not repeated, it may only do so when there are special circumstances which justify this, which the Court must assess on a case-by-case basis.

In the present case, the Court has no reason to believe that such circumstances exist. Therefore, it will not uphold the last of Germany's final submissions.
139. For these reasons,

THE COURT,

(1) By twelve votes to three,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Greenwood, Xue, Donoghue;

AGAINST: Judges Cançado Trindade, Yusuf; Judge ad hoc Gaja;

(2) By fourteen votes to one,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by taking measures of constraint against Villa Vigoni;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; Judge ad hoc Gaja;

AGAINST: Judge Cançado Trindade;

(3) By fourteen votes to one,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by declaring enforceable in Italy decisions of Greek courts based on violations of international humanitarian law committed in Greece by the German Reich;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; Judge ad hoc Gaja;

AGAINST: Judge Cançado Trindade;

(4) By fourteen votes to one,

Finds that the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect;

IN FAVOUR: President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; Judge ad hoc Gaja;

AGAINST: Judge Cançado Trindade;

(5) Unanimously,

Rejects all other submissions made by the Federal Republic of Germany.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this third day of February, two thousand and twelve, in four 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 Germany, the Government of the Italian Republic and the Government of the Hellenic Republic, respectively.

(Signed) Hisashi OWADA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges KOROMA, KEITH and BENNOUANA append separate opinions to the Judgment of the Court; Judges CANÇADO TRINDADE and YUSUF append dissenting opinions to the Judgment of the Court; Judge ad hoc GAJA appends a dissenting opinion to the Judgment of the Court.

(Initialled) H. O.

(Initialled) Ph. C.
International Court of Justice

Arrest Warrant of 11 April 2000
(Democratic Republic of the Congo v. Belgium)
Judgment

I.C.J. Reports 2002
COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE AU MANDAT D'ARRÊT
DU 11 AVRIL 2000
(RÉPUBLIQUE DÉMOCRATIQUE DU CONGO c. BELGIQUE)

ARRÊT DU 14 FÉVRIER 2002

2002

INTERNATIONAL COURT OF JUSTICE
REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE ARREST WARRANT
OF 11 APRIL 2000
(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

JUDGMENT OF 14 FEBRUARY 2002

Mode officiel de citation:
Mandat d'arrêt du 11 avril 2000 (République démocratique
du Congo c. Belgique), arrêt,
C.I.J. Recueil 2002, p. 3

Official citation:
Arrest Warrant of 11 April 2000 (Democratic Republic
of the Congo v. Belgium), Judgment,
I.C.J. Reports 2002, p. 3

ISSN 0074-4441
ISBN 92-1-070940-3

N° de vente: 837
Sales number
INTERNATIONAL COURT OF JUSTICE

YEAR 2002

14 February 2002

CASE CONCERNING THE ARREST WARRANT
OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

Facts of the case — Issue by a Belgian investigating magistrate of "an international arrest warrant in absentia" against the incumbent Minister for Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity — International circulation of arrest warrant through Interpol — Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.

* * *

First objection of Belgium — Jurisdiction of the Court — Statute of the Court, Article 36, paragraph 2 — Existence of a "legal dispute" between the Parties at the time of filing of the Application instituting proceedings — Events subsequent to the filing of the Application do not deprive the Court of jurisdiction.

Second objection of Belgium — Mootness — Fact that the person concerned had ceased to hold office as Minister for Foreign Affairs does not put an end to the dispute between the Parties and does not deprive the Application of its object.

Third objection of Belgium — Admissibility — Facts underlying the Application instituting proceedings not changed in a way that transformed the dispute originally brought before the Court into another which is different in character.

Fourth objection of Belgium — Admissibility — Congo not acting in the context of protection of one of its nationals — Inapplicability of rules relating to exhaustion of local remedies.

Subsidiary argument of Belgium — Non ultra peti a rule — Claim in Application instituting proceedings that Belgium's claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law — Claim not made in final submissions of the Congo — Court unable to rule on that ques-
tion in the operative part of its Judgment but not prevented from dealing with certain aspects of the question in the reasoning of its Judgment.

* * *

Immunity from criminal jurisdiction in other States and also inviolability of an incumbent Minister for Foreign Affairs — Vienna Convention on Diplomatic Relations of 18 April 1961, preamble, Article 32 — Vienna Convention on Consular Relations of 24 April 1963 — New York Convention on Special Missions of 8 December 1969, Article 21, paragraph 2 — Customary international law rules — Nature of the functions exercised by a Minister for Foreign Affairs — Functions such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability — No distinction in this context between acts performed in an "official" capacity and those claimed to have been performed in a "private" capacity.

No exception to immunity from criminal jurisdiction and inviolability where an incumbent Minister for Foreign Affairs suspected of having committed war crimes or crimes against humanity — Distinction between jurisdiction of national courts and jurisdictional immunities — Distinction between immunity from jurisdiction and impunity.

Issuing of arrest warrant intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs — Mere issuing of warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs — Purpose of the international circulation of the arrest warrant to establish a legal basis for the arrest of Minister for Foreign Affairs abroad and his subsequent extradition to Belgium — International circulation of the warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs.

* * *

Remedies sought by the Congo — Finding by the Court of international responsibility of Belgium making good the moral injury complained of by the Congo — Belgium required by means of its own choosing to cancel the warrant in question and so inform the authorities to whom it was circulated.

JUDGMENT

Present: President Guillaume; Vice-President Shi; Judges Oda, Ranjeva, Herczegi, Fleischhauser, Koroma, Verescetin, Higgins, Parras Aranguren, Kooymans, Rezek, Al-Khazawneh, Buergenthal; Judges ad hoc Bula Bula, Van den Wyngaert; Registrar Couvreur.

In the case concerning the arrest warrant of 11 April 2000,

between

the Democratic Republic of the Congo,

represented by

H.E. Mr. Jacques Masangua-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,
as Agent;
H.E. Mr. Ngele Masudi, Minister of Justice and Keeper of the Seals,
Mr. Mwaipapa Kasambara, Legal Adviser to the Presidency of the Republic,
Mr. Francois Rigaux, Professor Emeritus at the Catholic University of Louvain,
Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot),
Mr. Pierre d'Argent, Chargé de cours, Catholic University of Louvain.
Mr. Moka N'Golo, Bâtonnier,
Mr. Djema Wemhous, Professor at the University of Abidjan,
as Counsel and Advocates;
Mr. Mazyambo Makengo, Legal Adviser to the Ministry of Justice,
as Counselor,

and

the Kingdom of Belgium,

represented by

Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs,
as Agent;
Mr. Eric David, Professor of Public International Law, Université libre de Bruxelles,
Mr. Daniel Bethlehem, Barrister, Bar of England and Wales, Fellow of Clare Hall and Deputy Director of the Lauterpacht Research Centre for International Law, University of Cambridge,
as Counsel and Advocates;
H.E. Baron Olivier Gilles de Pélène, Permanent Representative of the Kingdom of Belgium to the Organization for the Prohibition of Chemical Weapons, responsible for relations with the International Court of Justice,
Mr. Claude Debrulle, Director-General, Criminal Legislation and Human Rights, Ministry of Justice,
Mr. Pierre Morlet, Advocate-General, Brussels Cour d'Appel,
Mr. Wouter Detavernier, Deputy Counselor, Directorate-General Legal Matters, Ministry of Foreign Affairs,
Mr. Rodney Neufeld, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge,
Mr. Tom Vanderhaeghe, Assistant at the Université libre de Bruxelles,

THE COURT,

composed as above,
after deliberation,

delivers the following Judgment:

The Court, composed as above, after deliberation, delivers the following Judgment:
1. On 17 October 2000 the Democratic Republic of the Congo (hereinafter referred to as “the Congo”) filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter referred to as “Belgium”) in respect of a dispute concerning an ‘international arrest warrant’ issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi”.

In that Application the Congo contended that Belgium had violated the “principle that a State may not exercise its authority on the territory of another State”, the “principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations”, as well as “the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations”.

In order to found the Court’s jurisdiction the Congo invoked in the aforementioned Application the fact that “Belgium had accepted the jurisdiction of the Court and, in so far as may be required, the aforementioned Application signified acceptance of that jurisdiction by the Democratic Republic of the Congo”.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of Belgium by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case; the Congo chose Mr. Sayeman Bula-Bula, and Belgium Ms Christine Van den Wyngaert.

4. On 17 October 2000, the day on which the Application was filed, the Government of the Congo also filed in the Registry of the Court a request for the indication of a provisional measure based on Article 41 of the Statute of the Court. At the hearings on that request, Belgium, for its part, asked that the case be removed from the List.

By Order of 8 December 2000 the Court, on the one hand, rejected Belgium’s request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Court also held that “it was desirable that the issues before the Court be determined as soon as possible” and that “it was therefore appropriate to ensure that a decision on the Congo’s Application be reached with all expedition”.

5. By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 12 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.

6. By Order of 27 June 2001, the Court, on the one hand, rejected a request by Belgium for authorization, in derogation from the previous Orders of the President of the Court, to submit preliminary objections involving suspension of the proceedings on the merits and, on the other, extended the time-limit prescribed in the Order of 12 April 2001 for the filing by Belgium of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits. The Counter-Memorial of Belgium was filed on 28 September 2001 within the time-limit thus extended.

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

8. Public hearings were held from 15 to 19 October 2001, at which the Court heard the oral arguments and replies of:

For the Congo: H.E. Mr. Jacques Masangu-Mwanza, H.E. Mr. Ngele Masudi, Maître Kosiaka Kombe, Mr. François Rigaux, Ms Monique Chemillier-Gendreau, and Mr. Pierre d’Argent.

For Belgium: Mr. Jan Devadder, Mr. Daniel Bethlehem, Mr. Eric David.

9. At the hearings, Members of the Court put questions to Belgium, to which replies were given orally or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Congo provided its written comments on the reply that was given in writing to one of these questions, pursuant to Article 72 of the Rules of Court.

* *

10. In its Application, the Congo formulated the decision requested in the following terms:

“The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels Tribunal de première instance against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting ‘serious violations of international humanitarian law’, that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000.”

11. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Congo, in the Memorial:

“In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:"
1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdalaye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;
3. the violation of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 precludes any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant.”

On behalf of the Government of Belgium,
in the Counter-Memorial:

“For the reasons stated in Part II of this Counter-Memorial, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the application by the Democratic Republic of the Congo against Belgium is inadmissible.
If, contrary to the preceding submission, the Court concludes that it does not have jurisdiction in this case, and that the application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the application.”

12. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Congo,

“In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:
1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdalaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant.”

On behalf of the Government of Belgium,

“For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.
If, contrary to the submissions of Belgium with regard to the Court’s jurisdiction and the admissibility of the Applicant on, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the Application.”

* * *

13. On 11 April 2000 an investigating judge of the Brussels Tribunal de première instance issued “an international arrest warrant in absentia” against Mr. Abdalaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.

14. The arrest warrant was transmitted to the Congo on 7 June 2000, being received by the Congolese authorities on 12 July 2000. According to Belgium, the warrant was at the same time transmitted to the International Criminal Police Organization (Interpol), an organization whose function is to enhance and facilitate cross-border criminal police co-operation worldwide; through the latter, it was circulated internationally.

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 “concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto”, as amended by the Law of 10 February 1999 “concerning the Punishment of Serious Violations of International Humanitarian Law” (hereinafter referred to as the “Belgian Law”).

Article 7 of the Belgian Law provides that “The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, whereassoever they may have been committed”. In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which
the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia's alleged offences was also uncontested.

Article 5, paragraph 3, of the Belgian Law further provides that "[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law".

16. At the hearings, Belgium further claimed that it offered "to entrust the competent authorities of the Congo for enquiry and possible prosecution", and referred to a certain number of steps which it claimed to have taken in this regard from September 2000, that is, before the filing of the Application instituting proceedings. The Congo for its part stated the following: "We have scant information concerning the form of these Belgian proposals." It added that: "these proposals... appear to have been made very belatedly, namely after an arrest warrant against Mr. Yerodia had been issued".

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragraph 1 above), in which the Court was requested "to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000". The Congo relied in its Application on two separate legal grounds. First, it claimed that "[t]he universal jurisdiction that the Belgian State attributes to itself under Article 7 of the Law in question" constituted a "violation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereignty equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations".

Secondly, it claimed that "[t]he non-recognition, on the basis of Article 5... of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office" constituted a "violation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations".

18. On the same day that it filed its Application instituting proceedings, the Congo submitted a request to the Court for the indication of a provisional measure under Article 41 of the Statute of the Court. During the hearings devoted to consideration of that request, the Court was informed that in November 2000 a ministerial reshuffle had taken place in the Congo, following which Mr. Yerodia had ceased to hold office as Minister for Foreign Affairs and had been entrusted with the portfolio of Minister of Education. Belgium accordingly claimed that the Congo's Application had become moot and asked the Court, as has already been recalled, to remove the case from the List. By Order of 8 December 2000, the Court rejected both Belgium's submissions to that effect and also the Congo's request for the indication of provisional measures (see paragraph 4 above).

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today.

20. On 12 September 2001, the Belgian National Central Bureau of Interpol requested the Interpol General Secretariat to issue a Red Notice in respect of Mr. Yerodia. Such notices concern individuals whose arrest is requested with a view to extradition. On 19 October 2001, at the public sittings held to hear the oral arguments of the Parties in the case, Belgium informed the Court that Interpol had responded on 27 September 2001 with a request for additional information, and that no Red Notice had yet been circulated.

21. Although the Application of the Congo originally advanced two separate legal grounds (see paragraph 17 above), the submissions of the Congo in its Memorial and the final submissions which it presented at the end of the oral proceedings refer only to a violation "in regard to the... Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers" (see paragraphs 11 and 12 above).

   * * *

22. In their written pleadings, and in oral argument, the Parties addressed issues of jurisdiction and admissibility as well as the merits (see paragraphs 5 and 6 above). In this connection, Belgium raised certain objections which the Court will begin by addressing.

   * * *

23. The first objection presented by Belgium reads as follows:

   "That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the... Government of the Congo, there is no longer a 'legal dispute' between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case."

24. Belgium does not deny that such a legal dispute existed between the Parties at the time when the Congo filed its Application instituting proceedings, and that the Court was properly seised by that Application. However, it contends that the question is not whether a legal dispute
existed at that time, but whether a legal dispute exists at the present time. Belgium refers in this respect inter alia to the Northern Cameroons case, in which the Court found that it "may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties" (I.C.J. Reports 1963, pp. 33-34), as well as to the Nuclear Tests cases (Australia v. France) (New Zealand v. France), in which the Court stated the following: "The Court, as a court of law, is called upon to resolve existing disputes between States... The dispute brought before it must therefore continue to exist at the time when the Court makes its decision" (I.C.J. Reports 1974, pp. 270-271, para. 55; p. 476, para. 58). Belgium argues that the position of Mr. Yerodia as Minister for Foreign Affairs was central to the Congo's Application instituting proceedings, and emphasizes that there has been a change of circumstances at the very heart of the case, in view of the fact that Mr. Yerodia was relieved of his position as Minister for Foreign Affairs in November 2000 and that, since 15 April 2001, he has occupied no position in the Government of the Congo (see paragraphs 18 and 19 above). According to Belgium, while there may still be a difference of opinion between the Parties on the scope and content of international law governing the immunities of a Minister for Foreign Affairs, the difference of opinion has now become a matter of abstract, rather than of practical, concern. The result, in Belgium's view, is that the case has become an attempt by the Congo to "seek an advisory opinion from the Court", and no longer a "concrete case" involving an "actual controversy" between the Parties, and that the Court accordingly lacks jurisdiction in the case.

25. The Congo rejects this objection of Belgium. It contends that there is indeed a legal dispute between the Parties, in that the Congo claims that the arrest warrant was issued in violation of the immunity of its Minister for Foreign Affairs, that that warrant was unlawful ab initio, and that this legal defect persists despite the subsequent changes in the position occupied by the individual concerned, while Belgium maintains that the issue of the arrest warrant was not contrary to international law. The Congo adds that the termination of Mr. Yerodia's official duties in no way operated to effect the wrongful act and the injury that flowed from it, for which the Congo continues to seek redress.

26. The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction (see Notteboom, Preliminary Objection, Judgment, I.C.J. Reports 1958, p. 122; Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957, p. 142; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 23-24, para. 38; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 129, para. 37).

27. Article 36, paragraph 2, of the Statute of the Court provides:

"The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation."

On 17 October 2000, the date that the Congo's Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with the above provision: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case.

Moreover, it is not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. Such a dispute was clearly a legal dispute within the meaning of the Court's jurisprudence, namely "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" in which "the claim of one party is positively opposed by the other" (Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 17, para. 22; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 122-123, para. 21).

28. The Court accordingly concludes that at the time that it was seised
of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium’s first objection must therefore be rejected.

* * *

29. The second objection presented by Belgium is the following:

“That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the Government of the Congo, the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case.”

30. Belgium also relies in support of this objection on the Northern Cameroons case, in which the Court considered that it would not be a proper discharge of its duties to proceed further in a case in which any judgment that the Court might pronounce would be “without object” (I.C.J. Reports 1963, p. 38), and on the Nuclear Tests cases, in which the Court saw “no reason to allow the continuance of proceedings which it knows are bound to be fruitless” (I.C.J. Reports 1974, p. 271, para. 58; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. It relies in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo — to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered — remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

* * *

32. The Court has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon (see Questions of Interpretation and Application of the 1971 Mont-


However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo’s submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium’s second objection must accordingly be rejected.

* * *

33. The third Belgian objection is put as follows:

“That the case as it now stands is materially different to that set out in the [Congo’s] Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible.”

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual dimension on which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until the very last moment, of the substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (see Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to initiate proceedings afresh or, at the very least, apply to the Court for permission to amend its initial Application.
35. In response, the Congo denies that there has been a substantial amendment of the terms of its Application, and insists that it has presented no new claim, whether of substance or of form, that would have transformed the subject-matter of the dispute. The Congo maintains that it has done nothing through the various stages in the proceedings but “condense and refine” its claims, as do most States that appear before the Court, and that it is simply making use of the right of parties to amend their submissions until the end of the oral proceedings.

* *

36. The Court notes, in accordance with settled jurisprudence, that “cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character” (Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78, p. 173; cf. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 427, para. 80; see also Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 264-267, in particular paras. 69 and 70). However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law. The Congo’s final submissions arise “directly out of the question which is the subject-matter of that Application” (Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 69, para. 72; see also Temple of Preah Vihear, Merits Judgment, I.C.J. Reports 1982, p. 36).

In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium’s third objection must accordingly be rejected.

* * *

37. The fourth Belgian objection reads as follows:

“That, in the light of the new circumstances concerning Mr. Yerodia, the case has assumed the character of an action of diplomatic protection but one in which the individual being pro-

ected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible.”

38. In this respect, Belgium accepts that, when the case was first instituted, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name in respect of the alleged violation by Belgium of the immunity of the Congo’s Foreign Minister. However, according to Belgium, the case was radically transformed after the Application was filed, namely on 15 April 2001, when Mr. Yerodia ceased to be a member of the Congolese Government. Belgium maintains that two of the requests made of the Court in the Congo’s final submissions in practice now concern the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fall within the remit of an action of diplomatic protection. It adds that the individual concerned has not exhausted all available remedies under Belgian law a necessary condition before the Court can espouse the cause of one of its nationals in international proceedings.

39. The Congo, on the other hand, denies that this is an action for diplomatic protection. It maintains that it is bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs. The Congo further denies the availability of remedies under Belgian law. It points out in this regard that it is only when the Crown Prosecutor has become seised of the case file and makes submissions to the Chambre du conseil that the accused can defend himself before the Chambre and seek to have the charge dismissed.

* *

40. The Court notes that the Congo has never sought to invoke before it Mr. Yerodia’s personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application (see Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959, p. 26; Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989, p. 42, para. 49). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed
(see Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp 25-26, paras. 43-44; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 130-131, paras. 42-43). Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium’s fourth objection must accordingly be rejected.

41. As a subsidiary argument, Belgium further contends that “[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, . . . the non ultra petita rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo’s] final submissions”. Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge’s lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction in absentia. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the “exercise of an excessive universal jurisdiction” being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can “represent a valid counterweight to the observance of immunities”.

43. The Court would recall the well-established principle that “it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions” (Asylum, Judgment, I.C.J. Reports 1950, p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the non ultra petita rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

* * *

44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo’s Application, that the Application is not without object and that accordingly the case is not moot and that the Application is admissible. Thus, the Court now turns to the merits of the case.

* * *

45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium’s claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo’s submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

* * *

47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability
and to immunity from criminal process being "absolute or complete", that is to say, they are subject to no exception. Accordingly, the Congo contends that no criminal prosecution may be brought against a Minister for Foreign Affairs in a foreign court as long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign State representative enjoying such immunity to perform his or her functions freely and without let or hindrance. The Congo adds that the immunity thus accorded to Ministers for Foreign Affairs when in office covers all their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as "official acts".

48. The Congo states further that it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused's official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a "ground of exemption from his criminal responsibility or a ground for mitigation of sentence". The Congo then stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.

49. Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.

50. Belgium further states that, in the circumstances of the present case, Mr. Yerodia enjoyed no immunity at the time when he is alleged to have committed the acts of which he is accused, and that there is no evidence that he was then acting in any official capacity. It observes that the arrest warrant was issued against Mr. Yerodia personally.

51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

52. A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preamble that the purpose of diplomatic privileges and immunities is "to secure the efficient performance of the functions of diplomatic missions as representing States". It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963, to which the Congo and Belgium are also parties.

The Congo and Belgium further cite the New York Convention on Special Missions of 8 December 1969, to which they are not, however, parties. They recall that under Article 21, paragraph 2, of that Convention:

"The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law."

These conventions provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, for
example, Article 7, paragraph 2 (a), of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State’s relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that chargés d'affaires are accredited.

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an “official” capacity, and those claimed to have been performed in a “private” capacity, or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an “official” visit or a “private” visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an “official” capacity or a “private” capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

56. The Court will now address Belgium’s argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the Pinochet and Qaddafi cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the Pinochet decision recognizes an exception to the immunity rule when Lord Millett stated that “international law cannot be supposed to have established a crime having the character of a jure imperii at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose”, or when Lord Phillips of Worth Matravers said that “no established rule of international law requires state immunity ratione materiae to be accorded in respect of prosecution for an international crime”. As to the French Court of Cassation, Belgium contends that, in holding that, “under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State”, the Court explicitly recognized the existence of such exceptions.

57. The Court, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the Pinochet and Qaddafi cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the Pinochet case, the Congo cites Lord Browne-Wilkinson’s statement that “[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . . .”. According to the Congo, the
French Court of Cassation adopted the same position in its Qaddafi judgment, in affirming that “international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State”.

As regards the instruments creating international criminal tribunals and the latter’s jurisprudence, these, in the Congo’s view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

* * *

58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium’s argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose or States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries’ courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter’s Statute expressly provides, in Article 27, paragraph 2, that “[i]mmunities or special procedural rules which may attach to the
offical capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.

* * *

62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

“(By issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereignty equality among States.)”

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a “coercive legal act” which violates the Congo’s immunity and sovereign rights, inasmuch as it seeks to “subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach” and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo’s view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium “thus cast upon one of the most prominent members of its Government”. The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo’s former President, In the Congo’s view, Belgium “thus manifestly an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition”. The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly “no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related” to that of the Belgian State. The Congo observes that, in such circumstances, “there would be a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere”.

65. Belgium rejects the Congo’s argument on the ground that “the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the (Congo)”.

With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium, Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.

66. In respect of the legal effects of the arrest warrant outside Belgium, Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly “to establish a legal basis for the arrest of Mr. Yerodia... and his subsequent extradition to Belgium”, the warrant had no legal effect unless it was validated or completed by some prior act “requiring the arrest of Mr. Yerodia by the relevant authorities in a third State”. Belgium further argues that “[i]f a State had executed the arrest warrant, it might infringe Mr. [Yerodia’s] criminal immunity”, but that “the Party directly responsible for that infringement would have been that State and not Belgium”.

* * *

67. The Court will first recall that the “international arrest warrant in absentia”, issued on 11 April 2000 by an investigating judge of the Brussels Tribunal de première instance, is directed against Mr. Yerodia,
stating that he is "currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa". The warrant states that Mr. Yerodia is charged with being "the perpetrator or co-perpetrator" of:

"— Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)

— Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)."

The warrant refers to "various speeches inciting racial hatred" and to "particularly virulent remarks" allegedly made by Mr. Yerodia during "public addresses reported by the media" on 4 August and 27 August 1998. It adds:

"These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunts (the Tutsi enemy) andlynchings.

The speeches inciting racial hatred thus are said to have resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials.

68. The warrant further states that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The investigating judge does, however, observe in the warrant that "the rule concerning the absence of immunity under humanitarian law would appear ... to require some qualification in respect of immunity from enforcement" and explains as follows:

"Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on 'official visits'). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for ensnaring the individual concerned in what would then have to be labelled a trap. In the contrary case, failure to respect this undertaking could give rise to the host State's international responsibility."

69. The arrest warrant concludes with the following order:

"We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;

We order the warden of the prison to receive the accused and to keep him (her) in custody in the detention centre pursuant to this arrest warrant;

We require all those exercising public authority to whom this warrant shall be shown to lend all assistance in executing it."

70. The Court notes that the issuance, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given to "all bailiffs and agents of public authority ... to execute this arrest warrant" (see paragraph 69 above) and from the assertion in the warrant that "the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement". The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court is bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

71. The Court also notes that Belgium admits that the purpose of the international circulation of the disputed arrest warrant was "to establish a legal basis for the arrest of Mr. Yerodia ... abroad and his subsequent extradition to Belgium". The Respondent maintains, however, that the enforcement of the warrant in third States was "dependent on some further preliminary steps having been taken" and that, given the "inchoate" quality of the warrant as regards third States, there was no "infringement of the sovereignty of the [Congo]". It further points out that no Interpol Red Notice was requested until 12 September 2001, when Mr. Yerodia no longer held ministerial office.

The Court cannot subscribe to this view. As in the case of the warrant's issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yero-
dia's immunity as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations. Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant, even in the absence of "further steps" by Belgium, could have resulted, in particular, in his arrest while abroad. The Court observes in this respect that Belgium itself cites information to the effect that Mr. Yerodia, "on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium," adding that "[h]is, moreover, is what the [Congo] ... hints when it writes that the arrest warrant 'sometimes forced Minister Yerodia to travel by roundabout routes'". Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo requests the Court to adjudge and declare that:

"A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;

The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;

Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continue to exist. It argues that the warrant is unlawful ab initio, that "[i]t is fundamentally flawed" and that it cannot therefore have any legal effect today. It points out that the purpose of its request is reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It states that, inasmuch as the wrongful act consisted in an internal legal instrument, only the "withdrawal" and "cancellation" of the latter can provide appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court to cancel Belgium, not to determine the means whereby Belgium is to comply with its decision. It explains that the withdrawal and cancellation of the warrant, by the means that Belgium deems most suitable, "are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/restitution itself". The Congo maintains that the Court is consequently only being requested to declare that Belgium, by way of reparation for the injury to the rights of the Congo, be required to withdraw and cancel this warrant by the means of its choice.

74. Belgium for its part maintains that a finding by the Court that the immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had been violated would in no way entail an obligation to cancel the arrest warrant. It points out that the arrest warrant is still operative and that "there is no suggestion that it presently infringes the immunity of the Congo's Minister for Foreign Affairs". Belgium considers that what the Congo is in reality asking of the Court in its third and fourth formal submissions is that the Court should direct Belgium as to the method by which it should give effect to a judgment of the Court finding that the warrant had infringed the immunity of the Congo's Minister for Foreign Affairs.

75. The Court has already concluded (see paragraphs 70 and 71) that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the Factory at Chorzów:

"[t]he essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the conse-
quences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed” (P.C.I.J., Series A, No. 17, p. 47).

In the present case, “the situation which would, in all probability, have existed if [the illegal act] had not been committed” cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy; in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment’s implications might be for third States, and the Court cannot therefore accept the Congo’s submissions on this point.

* * *

78. For these reasons,

THE COURT,

(1) (A) By fifteen votes to one,

Rejects the objections of the Kingdom of Belgium relating to jurisdiction, mootness and admissibility;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgs, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: Judge Oda;

(B) By fifteen votes to one,

Finds that it has jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 17 October 2000;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgs, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: Judge Oda;

(C) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is not without object and that accordingly the case is not moot;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgs, Parra-Aranguren,

Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: Judge Oda;

(D) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgs, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: Judge Oda;

(2) By thirteen votes to three,

Finds that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgs, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; Judge ad hoc Bula-Bula;

AGAINST: Judges Oda, Al-Khasawneh; Judge ad hoc Van den Wyngaert;

(3) By ten votes to six,

Finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; Judge ad hoc Bula-Bula;

AGAINST: Judges Oda, Higgs, Kooijmans, Al-Khasawneh, Buergenthal; Judge ad hoc Van den Wyngaert.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Demo-
cratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

(Signed) Gilbert Gillaume,
President.

(Signed) Philippe Couvreur,
Registrar.

President Gillaume appends a separate opinion to the Judgment of the Court; Judge Oda appends a dissenting opinion to the Judgment of the Court; Judge Ranjeva appends a declaration to the Judgment of the Court; Judge Koroma appends a separate opinion to the Judgment of the Court; Judges Higgins, Koymans and Buergenthal append a joint separate opinion to the Judgment of the Court; Judge Rezek appends a separate opinion to the Judgment of the Court; Judge Al-Khasawneh appends a dissenting opinion to the Judgment of the Court; Judge ad hoc Bula-Bula appends a separate opinion to the Judgment of the Court; Judge ad hoc Van den Wyngaert appends a dissenting opinion to the Judgment of the Court.

(Initialled) G.G.
(Initialled) Ph.C.
International Court of Justice


Judgment

I.C.J. Reports 2002
JOINT SEPARATE OPINION OF JUDGES HIGGINS, KOOIJMANS AND BUERGENTHAL

Necessity of a finding on jurisdiction — Reasoning on jurisdiction not precluded by ultra petita rule
Status of universal jurisdiction to be tested by reference to the sources of international law — Few examples of universal jurisdiction within national legislation or case law of national courts — Examination of jurisdictional basis of multilateral treaties on grave offences do not evidence established practice of either obligatory or voluntary universal criminal jurisdiction — Aut dedere aut prosequi — Contemporary trends suggesting universal jurisdiction in absentia not precluded — The “Lotus” case — Evidence that national courts and international tribunals intended to have parallel roles in acting against impunity — Universal jurisdiction not predicated upon presence of accused in territory, nor limited to piracy — Necessary safeguards in exercising such a jurisdiction — Rejection of Belgium’s argument that it had in fact exercised no extraterritorial criminal jurisdiction.

The immunities of an incumbent Minister for Foreign Affairs and their role in society — Rejection of assimilation with Head of State immunities — Trend to preclude immunity when charged with international crimes — Immunity not precluded in the particular circumstances of this case — Role of international law to balance values it seeks to protect — Narrow interpretation to be given to “official acts” when immunities of an ex-Minister for Foreign Affairs under review.

No basis in international law for Court’s order to withdraw warrant.

1. We generally agree with what the Court has to say on the issues of jurisdiction and admissibility and also with the conclusions it reaches. There are, however, reservations that we find it necessary to make, both on what the Court has said and what it has chosen not to say when it deals with the merits. Moreover, we consider that the Court erred in ordering Belgium to cancel the outstanding arrest warrant.

2. In its Judgment the Court says nothing on the question of whether — quite apart from the status of Mr. Yerodia at the relevant time — the Belgian magistracy was entitled under international law to issue an arrest warrant for someone not at that time within its territory and pass it to Interpol. It has, in effect, acceded to the common wish of the Parties that the Court should not pronounce upon the key issue of jurisdiction that divided them, but should rather pass immediately to the question of immunity as it applied to the facts of this case.

3. In our opinion it was not only desirable, but indeed necessary, that the Court should have stated its position on this issue of jurisdiction. The reasons are various. “Immunity” is the common shorthand phrase for “immunity from jurisdiction”. If there is no jurisdiction en principe, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise. The Court, in passing over the question of jurisdiction, has given the impression that “immunity” is a free-standing topic of international law. It is not. “Immunity” and “jurisdiction” are inextricably linked. Whether there is “immunity” in any given instance will depend not only upon the status of Mr. Yerodia but also upon what type of jurisdiction, and on what basis, the Belgian authorities were seeking to assert it.

4. While the notion of “immunity” depends, conceptually, upon a pre-existing jurisdiction, there is a distinct corpus of law that applies to each. What can be cited to support an argument about the one is not always relevant to an understanding of the other. In by-passing the issue of jurisdiction the Court has encouraged a regrettable current tendency (which the oral and written pleadings in this case have not wholly avoided) to conflate the two issues.

5. Only if it is fully appreciated that there are two distinct norms of international law in play (albeit that the one — immunity — can arise only if the other — jurisdiction — exists) can the larger picture be seen. One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights. The difficult task that international law today faces is to provide that stability in international relations by a means other than the impunity of those responsible for major human rights violations. This challenge is reflected in the present dispute and the Court should surely be engaged in this task, even as it fulfills its function of resolving a dispute that has arisen before it. But through choosing to look at half the story — immunity — it is not in a position to do so.

6. As Mr. Yerodia was a non-national of Belgium and the alleged offences described in the arrest warrant occurred outside of the territory over which Belgium has jurisdiction, the victims being non-Belgians, the arrest warrant was necessarily predicated on a universal jurisdiction. Indeed, both it and the enabling legislation of 1993 and 1999 expressly say so. Moreover, Mr. Yerodia himself was outside of Belgium at the time the warrant was issued.

7. In its Application instituting proceedings (p. 7), the Democratic Republic of the Congo complained that Article 7 of the Belgian Law:
“establishes the universal applicability of the Law and the universal jurisdiction of the Belgian courts in respect of ‘serious violations of international humanitarian law’, without even making such applicability and jurisdiction conditional on the presence of the accused on Belgian territory. It is clearly this unlimited jurisdiction which the Belgian State confers upon itself which explains the issue of the arrest warrant against Mr. Yerodia Ndumbasi, against whom it is patently evident that no basis of territorial or in personam jurisdiction, nor any jurisdiction based on the protection of the security or dignity of the Kingdom of Belgium, could have been invoked.”

In its Memorial, the Congo denied that

“international law recognized such an enlarged criminal jurisdiction as that which Belgium purported to exercise, namely in respect of incidents of international humanitarian law when the accused was not within the prosecuting State’s territory” (Memorial of Congo, para. 87). [Translation by the Registry.]

In its oral submissions the Congo once again stated that it was not opposed to the principle of universal jurisdiction per se. But the assertion of a universal jurisdiction over perpetrators of crimes was not an obligation under international law, only an option. The exercise of universal jurisdiction required, in the Congo’s view, that the sovereignty of the other State be not infringed and an absence of any breach of an obligation founded in international law (ibid.). The Congo stated that it had no intention of discussing the existence of the principle of universal jurisdiction, nor of placing obstacles in the way of any emerging custom regarding universal jurisdiction (ibid., p. 30). As the oral proceedings drew to a close, the Congo acknowledged that the Court might have to pronounce on certain aspects of universal jurisdiction, but it did not request the Court to do so, as the question did not interest it directly (CR 2001/10, p. 11). It was interested to have a ruling from the Court on Belgium’s obligations to the Congo in the light of Mr. Yerodia’s immunity at the relevant time. The final submissions as contained in the Application were amended so as to remove any request for the Court to make a determination on the issue of universal jurisdiction.

8. Belgium in its Counter-Memorial insisted that there was a general obligation on States under customary international law to prosecute perpetrators of crimes. It conceded, however, that where such persons were non-nationals, outside of its territory, there was no obligation but rather an available option (Counter-Memorial of Belgium, para. 3.3.25). No territorial presence was required for the exercise of jurisdiction where the offence violated the fundamental interests of the international community (Counter-Memorial of Belgium, paras. 3.3.44-3.3.52). In Belgium’s view an investigation or prosecution mounted against a person outside its territory did not violate any rule of international law, and was accepted both in international practice and in the internal practice of States, being a necessary means of fighting impunity (Counter-Memorial of Belgium, paras. 3.3.28-3.3.74).

9. These submissions were reprimed in oral argument, while noting that the Congo “no longer contest[ed] the exercise of universal jurisdiction by default” (CR 2001/9, pp. 8-13). Belgium, too, was eventually content that the Court should pronounce simply on the immunity issue.

10. That the Congo should have gradually come to the view that its interests were best served by reliance on its arguments on immunity, was understandable. So was Belgium’s satisfaction that the Court was being asked to pronounce on immunity and not on whether the issue and circumstances of an international arrest warrant required the presence of the accused on its territory. Whether the Court should accommodate this consensus is another matter.

11. Certainly it is not required to do so by virtue of the ultra petita rule. In the Counter-Memorial Belgium quotes the locus classicus for the non ultra petita rule, the Asylum (Interpretation) case:

“it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions” (Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, Judgment, J.C.J. Reports 1950, p. 402; Counter-Memorial of Belgium, para. 2.75; emphasis added).

It also quotes Rostenne who said: “It does not confer jurisdiction on the Court or detract jurisdiction from it. It limits the extent to which the Court may go in its decision.” (Counter-Memorial of Belgium, para. 2.77)

12. Close reading of these quotations shows that Belgium is wrong if it wishes to convey to the Court that the non ultra petita rule would bar it from addressing matters not included in the submissions. It only precludes the Court from deciding upon such matters in the operative part of the Judgment since that is the place where the submissions are dealt with. But it certainly does not prevent the Court from considering in its reasoning issues which it deems relevant for its conclusions. As Sir Gerald Fitzmaurice said:
“unless certain distinctions are drawn, there is a danger that [the non ultra petita rule] might hamper the tribunal in coming to a correct decision, and might even cause it to arrive at a legally incorrect one, by compelling it to neglect juridically relevant factors” (The Law and Procedure of the International Court of Justice, 1986, Vol. II, pp. 529-530).

13. Thus the ultra petita rule can operate to preclude a finding of the Court, in the dispositif, on a question not asked in the final submissions by a party. But the Court should not, because one or more of the parties finds it more comfortable for its position, forfeit necessary steps on the way to the finding it does make in the dispositif. The Court has acknowledged this in paragraph 43 of the present Judgment. But having reserved the right to deal with aspects of universal jurisdiction in its reasoning, “should it deem this necessary or desirable”, the Court says nothing more on the matter.

14. This may be contrasted with the approach of the Court in the Advisory Opinion request put to it in Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (I.C.J. Reports 1962, pp. 156-157). (The Court was constrained by the request put to it, rather than by the final submissions of the Applicant, but the point of principle remains the same.) The Court was asked by the General Assembly whether the expenditures incurred in connection with UNEF and ONUC constituted “expenses of the organization” for purposes of Article 17, paragraph 2, of the Charter.

15. France had in fact proposed an amendment to this request, whereby the Court would have been asked to consider whether the expenditures in question were made in conformity with the provisions of the Charter, before proceeding to the question asked. This proposal was rejected. The Court stated:

“The rejection of the French amendment does not constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were ‘decided on in conformity with the Charter’, if the Court finds such consideration appropriate. It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion.” (Ibid., p. 157.)

The Court further stated that it

“has been asked to answer a specific question related to certain identified expenditures which have actually been made, but the Court would not adequately discharge the obligation incumbent on it unless it examined in some detail various problems raised by the question which the General Assembly has asked” (Ibid., p. 158).

16. For all the reasons expounded above, the Court should have “found it appropriate” to deal with the question of whether the issue and international circulation of a warrant based on universal jurisdiction in the absence of Mr. Yerodia’s presence on Belgian territory was unlawful. This should have been done before making a finding on immunity from jurisdiction, and the Court should indeed have “examined in some detail various problems raised” by the request as formulated by the Congo in its final submissions.

17. In agreeing to pronounce upon the question of immunity without addressing the question of a jurisdiction from which there could be immunity, the Court has allowed itself to be manoeuvred into answering a hypothetical question. During the course of the oral pleadings Belgium drew attention to the fact that Mr. Yerodia had ceased to hold any ministerial office in the Government of the Democratic Republic of the Congo. In Belgium’s view, this meant that the Court should declare the request to pronounce upon immunity to be inadmissible. In Belgium’s view the case had become one “about legal principle and the speculative consequences for the immunities of Foreign Ministers from the possible action of a Belgian judge” (CR 2001/8, p. 26, para. 43). The dispute was “a difference of opinion of an abstract nature” (CR 2001/8, p. 36, para. 71). The Court should not “enter into a debate which it may well come to see as essentially an academic exercise” (CR 2001/9, p. 7, para. 4 [translation by the Registry]).

18. In its Judgment the Court rightly rejects those contentions (see Judgment, paras. 30-32). But nothing is more academic, or abstract, or speculative, than pronouncing on an immunity from a jurisdiction that may, or may not, exist. It is regrettable that the Court has not followed the logic of its own findings in the Certain Expenses case, and in this Judgment addressed in the necessary depth the question of whether the Belgian authorities could legitimately have invoked universal jurisdiction in issuing and circulating the arrest warrant for the charges contained therein, and for a person outside the territorial jurisdiction at the moment of the issue of the warrant. Only if the answer to these is in the affirmative does the question arise: “Nevertheless, was Mr. Yerodia immune from such exercise of jurisdiction, and by reference to what moment of time is that question to be answered?”

* * *

19. We therefore turn to the question whether States are entitled to exercise jurisdiction over persons having no connection with the forum State when the accused is not present in the State’s territory. The necessary point of departure must be the sources of international law identified in Article 38, paragraph 1 (e), of the Statute of the Court, together with obligations imposed upon all United Nations Members by Security Council resolutions, or by such General Assembly resolutions as meet the
criteria enunciated by the Court in the case concerning Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (I.C.J. Reports 1996, p. 226, para. 70).

20. Our analysis may begin with national legislation, to see if it evidences a State practice. Save for the Belgian legislation of 10 February 1999, national legislation, whether in fulfilment of international treaty obligations to make certain international crime offences also in national law, or otherwise, does not suggest a universal jurisdiction over these offences. Various examples typify the more qualified practice. The Australian War Crimes Act of 1945, as amended in 1988, provides for the prosecution in Australia of crimes committed between 1 September 1939 and 8 May 1945 by persons who were Australian citizens or residents at the times of being charged with the offences (Arts. 9 and 11). The United Kingdom War Crimes Act of 1991 enables proceedings to be brought for murder, manslaughter or culpable homicide, committed between 1 September 1935 and 5 June 1945, in a place that was part of Germany or under German occupation, and in circumstances where the accused was at the time, or has become, a British citizen or resident of the United Kingdom. The statutory jurisdiction provided for by France, Germany and (in even broader terms) the Netherlands, refer for their jurisdictional basis to the jurisdictional provisions in those international treaties to which the legislation was intended to give effect. It should be noted, however, that the German Government on 16 January 2002 has submitted a legislative proposal to the German Parliament, section 1 of which provides:

“This Code governs all the punishable acts listed herein violating public international law, [and] in the case of felonies listed herein [this Code governs] even if the act was committed abroad and does not show any link to [Germany].”

The Criminal Code of Canada 1985 allows the execution of jurisdiction when at the time of the act or omission the accused was a Canadian citizen or “employed by Canada in a civilian or military capacity”; or the “victim is a Canadian citizen or a citizen of a State that is allied with Canada in an armed conflict”, or when “at the time of the act or omission Canada could, in conformity with international law, exercise jurisdiction over the person on the basis of the person’s presence in Canada” (Art. 7).

21. All of these illustrate the trend to provide for the trial and punishment under international law of certain crimes that have been committed extraterritorially. But none of them, nor the many others that have been studied by the Court, represent a classical assertion of a universal jurisdiction over particular offences committed elsewhere by persons having no relationship or connection with the forum State.

22. The case law under these provisions has largely been cautious so far as reliance on universal jurisdiction is concerned. In the Pinochet case in the English courts, the jurisdictional basis was clearly treaty based, with the double criminality rule required for extradition being met by English legislation in September 1988, after which date torture committed abroad was a crime in the United Kingdom as it already was in Spain. In Australia the Federal Court referred to a group of crimes over which international law granted universal jurisdiction, even though national enabling legislation would also be needed (Nuliyarimma, 1999: genocide). The High Court confirmed the authority of the legislature to confer jurisdiction on the courts to exercise a universal jurisdiction over war crimes (Polyukhovych, 1991). In Austria (whose Penal Code emphasizes the double-criminality requirement), the Supreme Court found that it had jurisdiction over persons charged with genocide, given that there was not a functioning legal system in the State where the crimes had been committed nor a functioning international criminal tribunal at that point in time (Cvjetkovic, 1994). In France it has been held by a juge d’instruction that the Genocide Convention does not provide for universal jurisdiction (in re Javor, reversed in the Cour d’Appel on other grounds. The Cour de Cassation ruling equally does not suggest universal jurisdiction). The Munyeshyaka finding by the Cour d’Appel (1998) relies for a finding — at first sight inconsistent — upon cross-reference into the Statute of the International Tribunal for Rwanda as the jurisdictional basis. In the Qaddafi case the Cour d’Appel relied on passive personality and not on universal jurisdiction (in the Cour de Cassation it was immunity that assumed central importance).

23. In the Bouterse case the Amsterdam Court of Appeal concluded that torture was a crime against humanity, and as such an “extraterritorial jurisdiction” could be exercised over a non-national. However, in the Hoge Raad, the Dutch Supreme Court attached conditions to this exercise of extraterritorial jurisdiction (nationality, or presence within the Netherlands at the moment of arrest) on the basis of national legislation.

24. By contrast, a universal jurisdiction has been asserted by the Bavarian Higher Regional Court in respect of a prosecution for genocide (the accused in this case being arrested in Germany). And the case law of the United States has been somewhat more ready to invoke “universal jurisdiction”, though considerations of passive personality have also been of key importance (Yonis, 1988; Bin Laden, 2000).

25. An even more ambiguous answer is to be derived from a study of the provisions of certain important treaties of the last 30 years, and the obligations imposed by the parties themselves.

26. In some of the literature on the subject it is asserted that the great international treaties on crimes and offences evidence universality as a ground for the exercise of jurisdiction recognized in international law. (See the interesting recent article of Luis Benavides, “The Universal Juris-
357

This is an obligation to assert territorial jurisdiction, though the travaux préparatoires do reveal an understanding that this obligation was not intended to affect the right of a State to exercise criminal jurisdiction on its own nationals for acts committed outside the State (A/C.6/SR.134, p. 5). Article VI also provides a potential grant of non-territorial competence to a possible future international tribunal — even this not being automatic under the Genocide Convention but being restricted to those Contracting Parties which would accept its jurisdiction. In recent years it has been suggested in the literature that Article VI does not prevent a State from exercising universal jurisdiction in a genocide case. (And see, more generally, Restatement (Third) of the Foreign Relations Law of the United States (1987), §404.)

28. Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention, all of 12 August 1949, provide:

"Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, ... grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."

29. Article 85, paragraph 1, of the First Additional Protocol to the 1949 Geneva Convention incorporates this provision by reference.

30. The stated purpose of the provision was that the offences would not be left unpunished (the extradition provisions playing their role in this objective). It may immediately be noted that this is an early form of the aux depre en ai due to be seen in later conventions. But the obligation to prosecute is primary, making it even stronger.

31. No territorial or nationality linkage is envisaged, suggesting a true

universality principle (see also Henzelin, Le principe de l'universalité en droit pénal international: droit et obligation pour les États de poursuivre et juger selon le principe de l'universalité, 2000, pp. 334-336). But a different interpretation is given in the authoritative Pictet Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1952, which contends that this obligation was understood as being an obligation upon States parties to search for offenders who may be on their territory. Is it a true example of universality, if the obligation to search is restricted to the own territory? Does the obligation to search imply an obligation to prosecute in absentia, if the search had no result?

32. As no case has touched upon this point, the jurisdictional matter remains to be judicially tested. In fact, there has been a remarkably modest corpus of national case law emanating from the jurisdictional possibilities provided in the Geneva Conventions or in Additional Protocol I.

33. The Single Convention on Narcotics and Drugs, 1961, provides in Article 36, paragraph 2, that:

"(a) (iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgment given."

34. Diverse views were expressed as to whether the State where the offence was committed should have first right to prosecute the offender (E/CN.7/AC.3/9, 11 September 1958, p. 17, fn. 43; cf. E/CN.7/AC.3/9 and Add.1, E/CONF.34/1/Add.1, 6 January 1961, p. 23). Nevertheless, the principle of "primary universal repression" found its way into the text, notwithstanding the strong objections of States such as the United States, New Zealand and India that their national laws only envisaged the prosecution of persons for offences occurring within their national borders. (The development of the concept of "impact jurisdiction" or "effects jurisdiction" has in more recent years allowed continued reliance on territoriality while stretching far the jurisdictional arm.) The compromise reached was to make the provisions of Article 36, paragraph 2 (iv), "subject to the constitutional limitations of a Party, its legal system and domestic law". But the possibility of a universal jurisdiction was not denounced as contrary to international law.

35. The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, making preambular reference to the "urgent need" to make such acts "punishable as an offence and to provide for appropriate measures with respect to prosecution and extradition of
offenders”, provided in Article 4(1) for an obligation to take such measures as may be necessary to establish jurisdiction over these offences and other acts of violence against passengers or crew:

“(a) when the offence is committed on board an aircraft registered in that State;
(b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
(c) when the offence is committed on board an aircraft leased without crew to a lessee who has its principal place of business or, if the lessee has no such place of business, his permanent residence, in that State”.

Article 4(2) provided for a comparable obligation to establish jurisdiction where the alleged offender was present in the territory and if he was not extradited pursuant to Article 8 by the territory. Thus, too, was a treaty provision for aut dedere aut prosequi, of which the limit was in turn based on the principle of “primary universal repression”. The jurisdictional bases provided for in Article 4(1)(b) and 4(2), requiring no territorial connection beyond the landing of the aircraft or the presence of the accused, were adopted only after prolonged discussion. The travaux préparatoires show States for whom mere presence was an insufficient ground for jurisdiction beginning reluctantly to support this particular type of formula because of the gravity of the offence. Thus the representative of the United Kingdom stated that his country “would see great difficulty in assuming jurisdiction merely on the ground that an aircraft carrying a hijacker had landed in United Kingdom territory”. Further,

“ normally his country did not accept the principle that the mere presence of an alleged offender within the jurisdiction of a State entitled that State to try him. In view, however, of the gravity of the offence . . . he was prepared to support . . . [the proposal on mandatory jurisdiction on the part of the State where a hijacker is found].” (Hague Conference, p. 75, para. 18.)

36. It is also to be noted that Article 4, paragraphs 1 and 2, provides for the mandatory exercise of jurisdiction in the absence of extradition; but does not preclude criminal jurisdiction exercised on alternative grounds of jurisdiction in accordance with national law (though those possibilities are not made compulsory under the Convention).

37. Comparable jurisdictional provisions are to be found in Articles 5 and 8 of the International Convention against the Taking of Hostages of 17 December 1979. The obligation enunciated in Article 8 whereby a State party shall “without exception whatsoever and whether or not the offence was committed in its territory” submit the case for prosecution if it does not extradite the alleged offender, was again regarded as necessary by the majority, given the nature of the crimes (Summary Record, Ad Hoc Committee on the Drafting of an International Convention against the Taking of Hostages (A/AC.188/SR.5, 7, 8, 11, 14, 15, 16, 17, 23, 24 and 35)). The United Kingdom cautioned against moving to universal criminal jurisdiction (ibid., A/AC.188/SR.24, para. 27) while others (Poland, A/AC.188/SR.23, para. 18; Mexico, A/AC.188/SR.16, para. 11) felt the introduction of the principle of universal jurisdiction to be essential. The USSR observed that no State could exercise jurisdiction over crimes committed in another State by nationals of that State without contravening Article 2, paragraph 7, of the Charter. The Convention provisions were in its view to apply only to hostage taking that was a manifestation of international terrorism — another example of initial and understandable positions on jurisdiction being modified in the face of the exceptional gravity of the offence.

38. The Convention against Torture, of 10 December 1984, establishes in Article 5 an obligation to establish jurisdiction

“(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
(b) When the alleged offender is a national of that State;
(c) When the victim is a national of that State if that State considers it appropriate.”

If the person alleged to have committed the offence is found in the territory of a State party and is not extradited, submission of the case to the prosecuting authorities shall follow (Art. 7). Other grounds of criminal jurisdiction exercised in accordance with the relevant national law are not excluded (Art. 5, para. 3), making clear that Article 5, paragraphs 1 and 2, must not be interpreted a contrario. (See J. H. Burgers and H. Danelius, The United Nations Convention against Torture, 1988, p. 133.)

39. The passage of time changes perceptions. The jurisdictional ground that in 1961 had been referred to as the principle of “primary universal repression” came now to be widely referred to by delegates as “universal jurisdiction” — moreover, a universal jurisdiction thought appropriate, since torture, like piracy, could be considered an “offence against the law of nations” (United States: E/CN.4/1367, 1980). Australia, France, the Netherlands and the United Kingdom eventually dropped their objection that “universal jurisdiction” over torture would create problems under their domestic legal systems. (See E/CN.4/1984/72.)

40. This short historical survey may be summarized as follows.
41. The parties to these treaties agreed both to grounds of jurisdiction
and as to the obligation to take the measures necessary to establish such jurisdiction. The specified grounds relied on links of nationality of the offender, or the ship or aircraft concerned, or of the victim. See, for example, Article 4 (1), Hague Convention; Article 3 (1), Tokyo Convention; Article 5, Hostages Convention; Article 5, Torture Convention. These may properly be described as treaty-based broad extraterritorial jurisdiction. But in addition to these were the parallel provisions whereby a State party in whose jurisdiction the alleged perpetrator of such offences is found shall prosecute him or extradite him. By the loose use of language the latter has come to be referred to as "universal jurisdiction", though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.

* * *

42. Whether this obligation (whether described as the duty to establish universal jurisdiction, or, more accurately, the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events) is an obligation only of treaty law, inter partes, or whether it is now, at least as regards the offences articulated in the treaties, an obligation of customary international law was pleaded by the Parties in this case but not addressed in any great detail.

43. Nor was the question of whether any such general obligation applies to crimes against humanity, given that those too are regarded everywhere as comparably heinous crimes. Accordingly, we offer no view on these aspects.

44. However, we note that the inaccurately termed "universal jurisdiction principle" in these treaties is a principle of obligation, while the question in this case is whether Belgium had the right to issue and circulate the arrest warrant if it so chose.

If a dispassionate analysis of State practice and Court decisions suggests that no such jurisdiction is presently being exercised, the writings of eminent jurists are much more mixed. The large literature contains vigorous exchanges of views (which have been duly studied by the Court) suggesting profound differences of opinion. But these writings, important and stimulating as they may be, cannot of themselves and without reference to the other sources of international law, evidence the existence of a jurisdictional norm. The assertion that certain treaties and court decisions rely on universal jurisdiction, which in fact they do not, does not evidence an international practice recognized as custom. And the policy arguments advanced in some of the writings can certainly suggest why a practice or a court decision should be regarded as desirable, or indeed lawful; but contrary arguments are advanced, too, and in any event these also cannot serve to substantiate an international practice where virtually none exists.

45. That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable. As we have seen, virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction. This does not necessarily indicate, however, that such an exercise would be unlawful. In the first place, national legislation reflects the circumstances in which a State provides in its own law the ability to exercise jurisdiction. But a State is not required to legislate up to the full scope of the jurisdiction allowed by international law. The war crimes legislation of Australia and the United Kingdom afford examples of countries making more confined choices for the exercise of jurisdiction. Further, many countries have no national legislation for the exercise of well recognized forms of extraterritorial jurisdiction, sometimes notwithstanding treaty obligations to enable themselves so to act. National legislation may be illuminating as to the issue of universal jurisdiction, but not conclusive as to its legality. Moreover, while none of the national case law to which we have referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an opinio juris on the illegality of such a jurisdiction. In short, national legislation and case law — that is, State practice — is neutral as to exercise of universal jurisdiction.

46. There are, moreover, certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful. The duty to prosecute under those treaties which contain the aut dedere aut prosequi provisions opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality (whether as perpetrator or victim). The 1949 Geneva Conventions lend support to this possibility, and are widely regarded as today reflecting customary international law. (See, for example, Cherif Bassiouni, International Criminal Law, Vol. III: Enforcement, 2nd ed., 1999, p. 228; Theodor Meron, "International Criminalization of Internal Atrocities", 89 AJIL (1995), p. 576.)

47. The contemporary trends, reflecting international relations as they stand at the beginning of the new century, are striking. The movement is towards bases of jurisdiction other than territoriality. "Effects" or "impact" jurisdiction is embraced both by the United States and, with certain qualifications, by the European Union. Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in
the legislation of various countries (the United States, Ch. 113A, 1986
Omnibus Diplomatic and Antiterrorism Act; France, Art. 689, Code of
Criminal Procedure, 1975), and today meets with relatively little oppo-
sition, at least so far as a particular category of offences is concerned.

48. In civil matters we already see the beginnings of a very broad form
of extraterritorial jurisdiction. Under the Alien Tort Claims Act, the
United States, basing itself on a law of 1789, has asserted a jurisdiction
both over human rights violations and over major violations of interna-
tional law, perpetrated by non-nationals overseas. Such jurisdiction, with
the possibility of ordering payment of damages, has been exercised with
respect to torture committed in a variety of countries (Paraguay, Chile,
Argentina, Guatemala), and with respect to other major human rights
violations in yet other countries. While this unilateral exercise of the
function of guardian of international values has been much commented
on, it has not attracted the approbation of States generally.

49. Belgium — and also many writers on this subject — find support
for the exercise of a universal criminal jurisdiction in absentia in the
"Lotus" case. Although the case was clearly decided on the basis of juris-
diction over damage to a vessel of the Turkish navy and to Turkish
nationals, it is the famous dictum of the Permanent Court which has
attracted particular attention. The Court stated that:

"[T]he first and foremost restriction imposed by international law
upon a State is that — failing the existence of a permissive rule to
the contrary — it may not exercise its power in any form in the terri-

ty of another State. In this sense jurisdiction is certainly territo-
rial: it cannot be exercised by a State outside its territory except by
virtue of a permissive rule derived from international custom or con-
vention.

It does not, however, follow that international law prohibits a
State from exercising jurisdiction in its own territory, in respect of
any case which relates to acts which have taken place abroad, and in
which it cannot rely on some permissive rule of international law.
Such a view would only be tenable if international law contained a
general prohibition to States to extend the application of their laws and
the jurisdiction of their courts to persons, property and acts out-
side their territory, and if, as an exception to this general prohibi-
tion, it allowed States to do so in certain specific cases. But this is
certainly not the case under international law as it stands at present.
For from laying down a general prohibition to the effect that States
may not extend the application of their laws and the jurisdiction of
their courts to persons, property and acts outside their territory, it
leaves them in this respect a wide measure of discretion which is only

limited in certain cases by prohibitive rules; as regards other cases,
every State remains free to adopt the principles which it regards as
best and most suitable." (P.C.I.J., Series A, No. 10, pp. 18-19.)

The Permanent Court acknowledged that consideration had to be given
as to whether these principles would apply equally in the field of criminal
jurisdiction, or whether closer connections might there be required. The
Court noted the importance of the territorial character of criminal law
but also the fact that all or nearly all systems of law extend their action to
offences committed outside the territory of the State which adopts them,
and they do so in ways which vary from State to State. After examining
the issue the Court finally concluded that for an exercise of extraterrito-
rial criminal jurisdiction (other than within the territory of another State)
it was equally necessary to "prove the existence of a principle of interna-
tional law restricting the discretion of States as regards criminal legisla-
tion".

50. The application of this celebrated dictum would have clear attend-
ant dangers in some fields of international law. (See, on this point,
Judge Shahabuddeen’s dissenting opinion in the case concerning Legality
of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J.
Reports 1996, pp. 394-396.) Nevertheless, it represents a continuing
potential in the context of jurisdiction over international crimes.

51. That being said, the dictum represents the high water mark of
laissez-faire in international relations, and an era that has been signifi-
cantly overtaken by other tendencies. The underlying idea of universal
jurisdiction properly so-called (as in the case of piracy, and possibly
in the Geneva Conventions of 1949), as well as the aut dedere aut pro-
sequi variation, is a common endeavour in the face of atrocities. The
series of multilateral treaties with their special jurisdictional provisions
reflect a determination by the international community that those
engaged in war crimes, hijacking, hostage taking, torture should not
go unpunished. Although crimes against humanity are not yet the
object of a distinct convention, a comparable international indignation
at such acts is not to be doubted. And those States and academic writers
who claim the right to act unilaterally to assert a universal criminal
jurisdiction over persons committing such acts, invoke the concept of
acting as "agents for the international community". This vertical notion
of the authority of action is significantly different from the horizontal
system of international law envisaged in the "Lotus" case.

At the same time, the international consensus that the perpetrators of
international crimes should not go unpunished is being advanced by a
flexible strategy, in which newly established international criminal tribu-
nals, treaty obligations and national courts all have their part to play. We
reject the suggestion that the battle against impunity is "made over" to
international treaties and tribunals, with national courts having no com-
petence in such matters. Great care has been taken when formulating the relevant treaty provisions not to exclude other grounds of jurisdiction that may be exercised on a voluntary basis. (See Article 4 (3), Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Article 5 (3), International Convention against Taking of Hostages, 1979; Article 5 (3), Convention against Torture; Article 9, Statute of the International Criminal Tribunal for the former Yugoslavia; and Article 19, Rome Statute of the International Criminal Court.)

52. We may thus agree with the authors of Oppenheim’s International Law (9th ed., p. 998), that:

“While no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect.”

**

53. This brings us once more to the particular point that divides the Parties in this case: is it a precondition of the assertion of universal jurisdiction that the accused be within the territory?

54. Considerable confusion surrounds this topic, not helped by the fact that legislators, courts and writers alike frequently fail to specify the precise temporal moment at which any such requirement is to be in play. Is the presence of the accused within the jurisdiction said to be required at the time the offence was committed? At the time the arrest warrant is issued? Or at the time of the trial itself? An examination of national legislation, cases and writings reveals a wide variety of temporal linkages to the assertion of jurisdiction. This incoherent practice cannot be said to evidence a precondition to any exercise of universal criminal jurisdiction. The fact that in the past the only clear example of an agreed exercise of universal jurisdiction in respect of piracy, outside of any territorial jurisdiction, is not determinative. The only prohibitive rule (repeated by the Permanent Court in the “Lotus” case) is that criminal jurisdiction should not be exercised, without permission, within the territory of another State. The Belgian arrest warrant envisaged the arrest of Mr. Yerodia in Belgium, or the possibility of his arrest in third States at the discretion of the States concerned. This would in principle seem to violate no existing prohibiting rule of international law.

55. In criminal law, in particular, it is said that evidence-gathering requires territorial presence. But this point goes to any extraterritoriality, including those that are well established and not just to universal jurisdiction.

56. Some jurisdictions provide for trial in absentia; others do not. If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law.

57. On what basis is it claimed, alternatively, that an arrest warrant may not be issued for non-nationals in respect of offences occurring outside the jurisdiction? The textual provisions themselves of the 1949 Geneva Convention and the First Additional Protocol give no support to this view. The great treaties on aerial offences, hijacking, narcotics and torture are built around the concept of aut dedere aut prosequi. Definitionally, this envisages presence on the territory. There cannot be an obligation to extradite someone you choose not to try unless that person is within your reach. National legislation, enacted to give effect to these treaties, quite naturally also may make mention of the necessity of the presence of the accused. These sensible realities are critical for the obligatory exercise of aut dedere aut prosequi jurisdiction, but cannot be interpreted a contrario so as to exclude a voluntary exercise of a universal jurisdiction.

58. If the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the aut dedere principle) which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction.

**

59. If, as we believe to be the case, a State may choose to exercise a universal criminal jurisdiction in absentia, it must also ensure that certain safeguards are in place. They are absolutely essential to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations between States.

No exercise of criminal jurisdiction may occur which fails to respect the inviolability or infringes the immunities of the person concerned. We return below to certain aspects of this facet, but will say at this juncture that commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate those principles. The function served by the international law of immunities does not require that States fail to keep themselves informed.

A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned. The Court makes reference to these elements in the context of this case at paragraph 16 of its Judgment.

Further, such charges may only be laid by a prosecutor or juge d'instruction who acts in full independence, without links to or control
by the government of that State. Moreover, the desired equilibrium between the battle against impunity and the promotion of good inter-State relations will only be maintained if there are some special circumstances that do require the exercise of an international criminal jurisdiction and if this has been brought to the attention of the prosecutor or juge d'instruction. For example, persons related to the victims of the case will have requested the commencement of legal proceedings.

* * *

60. It is equally necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community.

61. Piracy is the classical example. This jurisdiction was, of course, exercised on the high seas and not as an enforcement jurisdiction within the territory of a non-agreeing State. But this historical fact does not mean that universal jurisdiction only exists with regard to crimes committed on the high seas or in other places outside national territorial jurisdiction. Of decisive importance is that this jurisdiction was regarded as lawful because the international community regarded piracy as damaging to the interests of all. War crimes and crimes against humanity are no less harmful to the interests of all because they do not usually occur on the high seas. War crimes (already since 1949 perhaps a treaty-based provision for universal jurisdiction) may be added to the list. The specification of their content is largely based upon the 1949 Conventions and those parts of the 1977 Additional Protocols that reflect general international law. Recent years have also seen the phenomenon of an alignment of national jurisdictional legislation on war crimes, specifying those crimes under the statutes of the ICTY, ICTR and the intended ICC.

62. The substantive content of the concept of crimes against humanity, and its status as crimes warranting the exercise of universal jurisdiction, is undergoing change. Article 6(c) of the Charter of the International Military Tribunal of 8 August 1945 envisaged them as a category linked with those crimes over which the Tribunal had jurisdiction (war crimes, crimes against the peace). In 1950 the International Law Commission defined them as murder, extermination, enslavement, deportation or other inhuman acts perpetrated on the citizen population, or persecutions on political, racial or religious grounds if in exercise of, or in connection with, any crime against peace or a war crime (Yearbook of the International Law Commission, 1950, Principle VI (c), pp. 374-377). Later definitions of crimes against humanity both widened the subject-matter, to include such offences as torture and rape, and de-coupled the link to other earlier established crimes. Crimes against humanity are now regarded as a distinct category. Thus the 1996 Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission at its 48th session, provides that crimes against humanity

“means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or any organization or group:

(a) Murder;
(b) Extermination;
(c) Torture;
(d) Enslavement;
(e) Persecution on political, racial, religious or ethnic grounds;
(f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
(g) Arbitrary deportation or forcible transfer of population;
(h) Arbitrary imprisonment;
(i) Forced disappearance of persons;
(j) Rape, enforced prostitution and other forms of sexual abuse;
(k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm”.

63. The Belgian legislation of 1999 asserts a universal jurisdiction over acts broadly defined as “grave breaches of international humanitarian law”, and the list is a compendium of war crimes and the Draft Codes of Offences listing of crimes against humanity, with genocide being added. Genocide is also included as a listed “crime against humanity” in the 1968 Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity, as well as being included in the ICTY, ICTR and ICC Statutes.

64. The arrest warrant issued against Mr. Yerodia accuses him both of war crimes and of crimes against humanity. As regards the latter, charges of incitement to racial hatred, which are said to have led to murders and lynchings, were specified. Fitting of this charge within the generally understood substantive context of crimes against humanity is not without its problems. “Racial hatred” would need to be assimilated to “persecution on racial grounds”, or, on the particular facts, to mass murder and extermination. Incitement to perform any of these acts is not in terms listed in the usual definitions of crimes against humanity, nor is it explicitly mentioned in the Statutes of the ICTY or the ICTR, nor in the Rome
Statute for the ICC. However, Article 7 (1) of the ICTY and Article 6 (1) of the ICTR do stipulate that

“any person who planned, instigated, ordered, committed or otherwise aided or abetted in the planning, preparation or execution of a crime referred to [in the relevant articles: crimes against humanity being among them] shall be individually responsible for the crime”.

In the Akayesu Judgment (96-4-T) a Chamber of the ICTR has held that liability for a crime against humanity includes liability through incitement to commit the crime concerned (paras. 481-482). The matter is dealt with in a comparable way in Article 25 (3) of the Rome Statute.

65. It would seem (without in any way pronouncing upon whether Mr. Yerodia did or did not perform the acts with which he is charged in the warrant) that the acts alleged do fall within the concept of “crimes against humanity” and would be within that small category in respect of which an exercise of universal jurisdiction is not precluded under international law.

* * *

66. A related point can usefully be dealt with at this juncture. Belgium contended that, regardless of how international law stood on the matter of universal jurisdiction, it had in fact exercised no such jurisdiction. Thus, according to Belgium, there was neither a violation of any immunities that Mr. Yerodia might have, nor any infringement of the sovereignty of the Congo. To this end, Belgium, in its Counter-Memorial, observed that immunity from enforcement of the warrant was carefully provided for “representatives of foreign States who visit Belgium on the basis of any official invitation. In such circumstances, the warrant makes clear that the person concerned would be immune from enforcement in Belgium” (Counter-Memorial of Belgium, para. 1.12). Belgium further observed that the arrest warrant

“has no legal effect at all either in or as regards the DRC. Although the warrant was circulated internationally for information by Interpol in June 2000, it was not the subject of a Red Notice. Even had it been, the legal effect of Red Notices is such that, for the DRC, it would not have amounted to a request for provisional arrest, let alone a formal request for extradition.” (Counter-Memorial of Belgium, para. 3.1.12. [Translation by the Registry.])

67. It was explained to the Court that a primary purpose in issuing an international warrant was to learn the whereabouts of a person. Mr. Yerodia’s whereabouts were known at all times.

68. We have not found persuasive the answers offered by Belgium to a question put to it by Judge Koroma, as to what the purpose of the warrant was, if it was indeed so carefully formulated as to render it unenforceable.

69. We do not feel it can be said that, given these explanations by Belgium, there was no exercise of jurisdiction as such that could attract immunity or infringe the Congo’s sovereignty. If a State issues an arrest warrant against the national of another State, that other State is entitled to treat it as such — certainly unless the issuing State draws to the attention of the national State the clauses and provisions said to vacate the warrant of all efficacy. Belgium has conceded that the purpose of the international circulation of the warrant was “to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium”. An international arrest warrant, even though a Red Notice has not yet been linked, is analogous to the locking-on of radar to an aircraft: it is already a statement of willingness and ability to act and as such may be perceived as a threat so to do at a moment of Belgium’s choosing. Even if the action of a third State is required, the ground has been prepared.

* * *

70. We now turn to the findings of the Court on the impact of the issue of circulation of the warrant on the inviolability and immunity of Mr. Yerodia.

71. As to the matter of immunity, although we agree in general with what has been said in the Court’s Judgment with regard to the specific issue put before it, we nevertheless feel that the approach chosen by the Court has to a certain extent transformed the character of the case before it. By focusing exclusively on the immunity issue, while at the same time bypassing the question of jurisdiction, the impression is created that immunity has value per se, whereas in reality it is an exception to a normative rule which would otherwise apply. It reflects, therefore, an interest which in certain circumstances prevails over an otherwise predominant interest, it is an exception to a jurisdiction which normally can be exercised and it can only be invoked when the latter exists. It represents an interest of its own that must always be balanced, however, against the interest of that norm to which it is an exception.

72. An example is the evolution the concept of State immunity in civil law matters has undergone over time. The original concept of absolute immunity, based on status (par in parem non habet imperium) has been replaced by that of restrictive immunity; within the latter a distinction was made between acta jure imperii and acta jure gestionis but immunity is granted only for the former. The meaning of these two notions is not carved in stone, however; it is subject to a continuously changing inter-
364

364

74. The increasing recognition of the importance of ensuring that the perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law. Now it is generally recognized that in the case of such crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility. It has also given rise to a tendency, in the case of international crimes, to grant procedural immunity from jurisdiction only for as long as the suspected State official is in office.

75. These trends reflect a balancing of interests. On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity. Moreover, a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited. The law of privileges and immunities, however, retains its importance since immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.

76. Such is the backdrop of the case submitted to the Court. Belgium claims that under international law it is permitted to initiate criminal proceedings against a State official who is under suspicion of having committed crimes which are generally condemned by the international community; and it contends that because of the nature of these crimes the individual in question is no longer shielded by personal immunity. The Congo does not deny that a Foreign Minister is responsible in international law for all of his acts. It asserts instead that he has absolute personal immunity from criminal jurisdiction as long as he is in office and that his status must be assimilated in this respect to that of a Head of State (Memorial of Congo, p. 30).

77. Each of the Parties, therefore, gives particular emphasis in its argument to one set of interests referred to above: Belgium to that of the prevention of impunity, the Congo to that of the prevention of unwarranted outside interference as the result of an excessive curtailment of immunities and an excessive extension of jurisdiction.

78. In the Judgment, the Court diminishes somewhat the significance of Belgium's arguments. After having emphasized — and we could not agree more — that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy immunity in respect of any crimes they might have committed (para. 60), the Court goes on to say that these immunities do not represent a bar to criminal prosecution in certain circumstances (para. 61). We feel less than sanguine about examples given by the Court of such circumstances. The chance that a Minister for Foreign Affairs will be tried in his own country in accordance with the relevant rules of domestic law or that his immunity will be waived by his own State is not high as long as there has been no change of power, whereas the existence of a competent international criminal court to initiate criminal proceedings is rare; moreover, it is quite risky to expect too much of a future international criminal court in this respect. The only credible alternative therefore seems to be the possibility of starting proceedings in a foreign court after the suspected person ceases to hold the office of Foreign Minister. This alternative, however, can also be easily forestalled by an unco-operative government that keeps the Minister in office for an as yet indeterminate period.

79. We wish to point out, however, that the frequently expressed conviction of the international community that perpetrators of grave and inhuman international crimes should not go unpunished does not ipso facto mean that immunities are unavailable whenever impunity would be the outcome. The nature of such crimes and the circumstances under which they are committed, usually by making use of the State apparatus, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him or her immunity from criminal process. But immunities serve other purposes which have their own intrinsic value and to which we referred in paragraph 77 above. International law.
seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other. A State may exercise the criminal jurisdiction which it has under international law, but in doing so it is subject to other legal obligations, whether they pertain to the non-exercise of power in the territory of another State or to the required respect for the law of diplomatic relations or, as in the present case, to the procedural immunities of State officials. In view of the worldwide aversion to these crimes, such immunities have to be recognized with restraint, in particular when there is reason to believe that crimes have been committed which have been universally condemned in international conventions. It is, therefore, necessary to analyse carefully the immunities which under customary international law are due to high State officials and, in particular, to Ministers for Foreign Affairs.

80. Under traditional customary law the Head of State was seen as personifying the sovereign State. The immunity to which he was entitled was therefore predicated on status, just like the State he or she symbolized. Whereas State practice in this regard is extremely scarce, the immunities to which other high State officials (like Heads of Government and Ministers for Foreign Affairs) are entitled have generally been considered in the literature as merely functional. (Cf. Arthur Watts, “The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers”, Recueil des cours de l’Académie de droit international de La Haye, 1994, Vol. 247, pp. 102-103.)

81. We have found no basis for the argument that Ministers for Foreign Affairs are entitled to the same immunities as Heads of State. In this regard, it should be pointed out that paragraph 3.2 of the International Law Commission’s Draft Articles on Jurisdictional Immunities of States and their Property of 1991, which contained a saving clause for the privileges and immunities of Heads of State, failed to include a similar provision for those of Ministers for Foreign Affairs (or Heads of Government). In its commentary, the ILC stated that mentioning the privileges and immunities of Ministers for Foreign Affairs would raise the issues of the basis and the extent of their jurisdictional immunity. In the opinion of the ILC these immunities were clearly not identical to those of Heads of State.

82. The Institut de droit international took a similar position in 2001 with regard to Foreign Ministers. Its resolution on the Immunity of Heads of State, based on a thorough report on all relevant State practice, states expressly that these “shall enjoy, in criminal matters, immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity”. But the Institut, which in this resolution did assimilate the position of Head of Government to that of Head of State, carefully avoided doing the same with regard to the Foreign Minister.

83. We agree, therefore, with the Court that the purpose of the immunities attaching to Ministers for Foreign Affairs under customary international law is to ensure the free performance of their functions on behalf of their respective States (Judgment, para. 53). During their term of office, they must therefore be able to travel freely whenever the need to do so arises. There is broad agreement in the literature that a Minister for Foreign Affairs is entitled to full immunity during official visits in the exercise of his function. This was also recognized by the Belgian investigating judge in the arrest warrant of 11 April 2000. The Foreign Minister must also be immune whenever and wherever engaged in the functions required by his office and when in transit therefor.

84. Whether he is also entitled to immunities during private travels and what is the scope of any such immunities, is far less clear. Certainly, he or she may not be subjected to measures which would prevent effective performance of the functions of a Foreign Minister. Detention or arrest would constitute such a measure and must therefore be considered an infringement of the inviolability and immunity from criminal process to which a Foreign Minister is entitled. The arrest warrant of 11 April 2000 was directly enforceable in Belgium and would have obliged the police authorities to arrest Mr. Yerodia had he visited that country for non-official reasons. The very issuance of the warrant therefore must be considered to constitute an infringement on the inviolability to which Mr. Yerodia was entitled as long as he held the office of Minister for Foreign Affairs of the Congo.

85. Nonetheless, that immunity prevails only as long as the Minister is in office and continues to shield him or her after that time only for “official” acts. It is now increasingly claimed in the literature (see for example, Andrea Bianchi, “Denying State Immunity to Violators of Human Rights”, 46 Austrian Journal of Public and International Law (1994), pp. 227-228) that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform (Goff, J. (as he then was) and Lord Wilberforce articulated this test in the case of 1st Congreso del Partido (1978) QB 500 at 528 and (1983) AC 244 at 268, respectively). This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions. (For an early example, see the judgment of the Israel Supreme Court in the Eichmann case, Supreme Court, 29 May 1952, 36 International Law Reports, p. 312.) See also the speeches of Lords Hutton and Phillips of Worth Matravers in R. v. Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet (“Pinochet I”); and of Lords Steyn and Nicholls of Birkenhead in “Pinochet II”, as well as the
judgment of the Court of Appeal of Amsterdam in the Bouterse case (Gerechtshof Amsterdam, 20 November 2000, para. 4.2.)

* * *

86. We have voted against paragraph (3) of the dispositif for several reasons.

87. In paragraph (3) of the dispositif, the Court “finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated". In making this finding, the Court relies on the proposition enunciated in the Factory at Chorzów case pursuant to which “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would have existed if that act had not been committed" (P.C.I.J., Series A. No. 17, p. 47). Having previously found that the issuance and circulation of the warrant by Belgium was illegal under international law, the Court concludes that it must be withdrawn because “the warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs”.

88. We have been puzzled by the Court’s reliance on the Factory at Chorzów case to support its finding in paragraph (3) of the dispositif. It would seem that the Court regards its order for the cancellation of the warrant as a form of restitutio in integrum. Even in the very different circumstances which faced the Permanent Court in the Factory at Chorzów case, restitutio in integrum proved possible. Nor do we believe that restoration of the status quo ante is possible here, given that Mr. Yerodia is no longer Minister for Foreign Affairs.

89. Moreover — and this is more important — the Judgment suggests that what is at issue here is a continuing illegality, considering that a call for the withdrawal of an instrument is generally perceived as relating to the cessation of a continuing international wrong (International Law Commission, Commentary on Article 30 of the Articles of State Responsibility, A/56/10 (2001), p. 216). However, the Court’s finding in the instant case that the issuance and circulation of the warrant was illegal, a conclusion which we share, was based on the fact that these acts took place at a time when Mr. Yerodia was Minister for Foreign Affairs. As soon as he ceased to be Minister for Foreign Affairs, the illegal consequences attaching to the warrant also ceased. The mere fact that the warrant continues to identify Mr. Yerodia as Minister for Foreign Affairs changes nothing in this regard as a matter of international law, although it may well be that a misnamed arrest warrant, which is all it now is, may be deemed to be defective as a matter of Belgian domestic law; but that

(Signed) Rosalyn Higgins.
(Signed) Pieter Kooiman.
(Signed) Thomas Buergenthal.
International Court of Justice

Questions relating to the Obligation to Prosecute or Extradite
(Belgium v. Senegal)
Judgment of 20 July 2012
TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Paragraphs</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-14</td>
</tr>
<tr>
<td>15-41</td>
</tr>
<tr>
<td>42-63</td>
</tr>
<tr>
<td>44-55</td>
</tr>
<tr>
<td>56-63</td>
</tr>
<tr>
<td>64-70</td>
</tr>
<tr>
<td>71-117</td>
</tr>
<tr>
<td>79-88</td>
</tr>
<tr>
<td>89-115</td>
</tr>
<tr>
<td>92-95</td>
</tr>
<tr>
<td>96-105</td>
</tr>
<tr>
<td>106-117</td>
</tr>
<tr>
<td>118-121</td>
</tr>
<tr>
<td>122</td>
</tr>
</tbody>
</table>

**CHRONOLOGY OF THE PROCEDURE**

**I. HISTORICAL AND FACTUAL BACKGROUND**

**II. JURISDICTION OF THE COURT**

A. The existence of a dispute
   B. Other conditions for jurisdiction

**III. ADMISSIBILITY OF BELGIUM’S CLAIMS**

**IV. THE ALLEGED VIOLATIONS OF THE CONVENTION AGAINST TORTURE**

A. The alleged breach of the obligation laid down in Article 6, paragraph 2, of the Convention
   B. The alleged breach of the obligation laid down in Article 7, paragraph 1, of the Convention
      1. The nature and meaning of the obligation laid down in Article 7, paragraph 1
      2. The temporal scope of the obligation laid down in Article 7, paragraph 1
      3. Implementation of the obligation laid down in Article 7, paragraph 1

**V. REMEDIES**

**OPERATIVE CLAUSE**
INTERNATIONAL COURT OF JUSTICE

YEAR 2012

20 July 2012

General List No. 144

QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE

(BELGIUM v. SENEGAL)

Historical and factual background.

Complaints filed against Mr. Habré in Senegal and in Belgium — Belgium’s first extradition request — Senegal’s referral of the “Hissène Habré case” to the African Union — Decision of the United Nations Committee against Torture — Senegalese legislative and constitutional reforms — Judgment of the Court of Justice of the Economic Community of West African States — Belgium’s second, third and fourth extradition requests.

Other conditions for jurisdiction under Article 30, paragraph 1, of CAT — Dispute could not be settled through negotiation — Belgium requested that dispute be submitted to arbitration — At least six months have passed after the request for arbitration.

The Court has jurisdiction to entertain the dispute concerning Article 6, paragraph 2, and Article 7, paragraph 1, of CAT — No need to consider whether the Court has jurisdiction on the basis of the declarations under Article 36, paragraph 2, of the Statute.

Admissibility of Belgium’s claims — Claims based on Belgium’s status as a party to CAT — Claims based on the existence of a special interest of Belgium — Object and purpose of CAT — Obligations erga omnes partes — State party’s right to make a claim concerning the cessation of an alleged breach by another State party — Belgium has standing as a State party to CAT to invoke the responsibility of Senegal for alleged breaches — Claims of Belgium based on Article 6, paragraph 2, and Article 7, paragraph 1, of CAT are admissible — No need to pronounce on whether Belgium has a special interest.

The alleged violations of the Convention against Torture.

Article 5, paragraph 2, of CAT as a condition for performance of other CAT obligations — Absence of the necessary legislation until 2007 affected Senegal’s implementation of obligations in Article 6, paragraph 2, and Article 7, paragraph 1.

The alleged breach of the obligation under Article 6, paragraph 2, of CAT — Preliminary inquiry required as soon as suspect is identified in territory of State — The Court finds that Senegalese authorities did not immediately initiate preliminary inquiry once they had reason to suspect Mr. Habré of being responsible for acts of torture.

The alleged breach of the obligation under Article 7, paragraph 1, of CAT — State must submit case for prosecution irrespective of existence of a prior extradition request — Institution of proceedings in light of evidence against suspect — Prosecution as an obligation under CAT — Extradition as an option under CAT.
The temporal scope of the obligation under Article 7, paragraph 1 — Prohibition of torture is part of customary international law and a peremptory norm (jus cogens) — Obligation to prosecute applies to facts having occurred after entry into force of CAT for a State — Article 28 of the Vienna Convention on the Law of Treaties — Decision of the Committee against Torture — Senegal’s obligation to prosecute does not apply to acts before entry into force of CAT for Senegal — Belgium entitled since becoming a Party to CAT to request the Court to rule on Senegal’s compliance with Article 7, paragraph 1.

Implementation of the obligation under Article 7, paragraph 1 — Senegal’s duty to comply with its obligations under CAT not affected by decision of Court of Justice of the Economic Community of West African States — Financial difficulties raised by Senegal cannot justify failure to initiate proceedings against Mr. Habré — Referral of the matter to the African Union cannot justify Senegal’s delays in complying with its obligations under CAT — Article 27 of the Vienna Convention on the Law of Treaties — Object and purpose of CAT and the need to undertake proceedings without delay — Failure to take all measures necessary for the implementation of Article 7, paragraph 1 — Breach by Senegal of that provision.

Remedies.

Purpose of Article 6, paragraph 2, and Article 7, paragraph 1 — Senegal’s international responsibility engaged for failure to comply with its obligations under these provisions — Senegal required to cease this continuing wrongful act — Senegal’s obligation to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré.

JUDGMENT

Present: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaia, Sebutinde; Judges ad hoc Sur, Kirsch; Registrar Couvreur.

In the case concerning questions relating to the obligation to prosecute or extradite,
Mr. Geoffrey Eekhout, Attaché, Permanent Representation of the Kingdom of Belgium to the International Organizations in The Hague,

Mr. Jonas Perilleux, Attaché, International Humanitarian Law Division, Federal Public Service for Justice,

as Advisers,

and

the Republic of Senegal,

represented by

H.E. Mr. Cheikh Tidiane Thiam, Professor, Ambassador, Director-General of Legal and Consular Affairs, Ministry of Foreign Affairs and Senegalese Abroad,

as Agent;

H.E. Mr. Amadou Kebe, Ambassador of the Republic of Senegal to the Kingdom of the Netherlands,

Mr. François Diouf, Magistrate, Director of Criminal Affairs and Pardons, Ministry of Justice,

as Co-Agents;

Professor Serigne Diop, Mediator of the Republic,

Mr. Abdoulaye Dianko, Agent judiciaire de l’Etat,

Mr. Ibrahima Bakhom, Magistrate,

Mr. Oumar Gaye, Magistrate,

as Counsel;

Mr. Moustapha Ly, First Counsellor, Embassy of Senegal in The Hague,

Mr. Moustapha Sow, First Counsellor, Embassy of Senegal in The Hague,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 19 February 2009, the Kingdom of Belgium (hereinafter “Belgium”) filed in the Registry of the Court an Application instituting proceedings against the Republic of Senegal (hereinafter “Senegal”) in respect of a dispute concerning “Senegal’s compliance with its obligation to prosecute Mr. H[sène] Habré, former President of the Republic of Chad[,] or to extradite him to Belgium for the purposes of criminal proceedings”. Belgium based its claims on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter “the Convention against Torture” or the “Convention”), as well as on customary international law.

In its Application, Belgium invoked, as the basis for the jurisdiction of the Court, Article 30, paragraph 1, of the Convention against Torture and the declarations made under Article 36, paragraph 2, of the Statute of the Court, by Belgium on 17 June 1958 and by Senegal on 2 December 1985.

2. In accordance with Article 40, paragraph 2, of the Statute, the Application was communicated to the Government of Senegal by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. On 19 February 2009, immediately after the filing of its Application, Belgium, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court, filed in the Registry of the Court a Request for the indication of provisional measures and asked the Court “to indicate, pending a final judgment on the merits”, provisional measures requiring the Respondent to take “all the steps within its power to keep Mr. H. Habré under the control and surveillance of the judicial authorities of Senegal so that the rules of international law with which Belgium requests compliance may be correctly applied”.

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each availed itself of its right under Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case: Belgium chose Mr. Philippe Kirsch and Senegal Mr. Serge Sur.

5. By an Order of 28 May 2009, the Court, having heard the Parties, found that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures (Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, p. 156, para. 76).

6. By an Order of 9 July 2009, the Court fixed 9 July 2010 and 11 July 2011 as the time-limits for the filing of the Memorial of Belgium and the Counter-Memorial of Senegal, respectively. The Memorial of Belgium was duly filed within the time-limit so prescribed.

7. At the request of Senegal, the President of the Court, by an Order of 11 July 2011, extended to 29 August 2011 the time-limit for the filing of the Counter-Memorial. That pleading was duly filed within the time-limit thus extended.
8. At a meeting held by the President of the Court with the Agents of the Parties on 10 October 2011, the Parties indicated that they did not consider a second round of written pleadings to be necessary and that they wished the Court to fix the date of the opening of the hearings as soon as possible. The Court considered that it was sufficiently informed of the arguments on the issues of fact and law on which the Parties relied and that the submission of further written pleadings did not appear necessary. The case thus became ready for hearing.

9. In conformity with Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and annexed documents would be made accessible to the public at the opening of the oral proceedings. The pleadings without their annexes were also put on the Court’s website.

10. Public hearings were held between 12 March 2012 and 21 March 2012, during which the Court heard the oral arguments and replies of:

**For Belgium:**
- Mr. Paul Rietjens,
- Mr. Gérard Dive,
- Mr. Eric David,
- Sir Michael Wood,
- Mr. Daniel Müller.

**For Senegal:**
- H.E. Mr. Cheikh Tidiane Thiam,
- Mr. Oumar Gaye,
- Mr. François Diouf,
- Mr. Ibrahima Bakhoum,
- Mr. Abdoulaye Dianko.

11. At the hearing, questions were put by Members of the Court to the Parties, to which replies were given orally and in writing. In accordance with Article 72 of the Rules of Court, each Party submitted its written comments on the written replies provided by the other Party.

12. In its Application, Belgium presented the following submissions:

“Belgium respectfully requests the Court to adjudge and declare that:

— the Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice;

— failing the prosecution of Mr. H. Habré, the Republic of Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts.

Belgium reserves the right to revise or supplement the terms of this Application.”

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

**On behalf of the Government of Belgium,**

in the Memorial:

“For the reasons set out in this Memorial, the Kingdom of Belgium requests the International Court of Justice to adjudge and declare that:

1. (a) Senegal breached its international obligations by failing to incorporate in its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(b) Senegal has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and under customary international law by failing to bring criminal proceedings against Mr. Hissène Habré for acts characterized in particular as crimes of torture, genocide, war crimes and crimes against humanity alleged against him as perpetrator, co-perpetrator or accomplice, or to extradite him to Belgium for the purposes of such criminal proceedings;

(c) Senegal may not invoke financial or other difficulties to justify the breaches of its international obligations.

2. Senegal is required to cease these internationally wrongful acts

(a) by submitting without delay the Hissène Habré case to its competent authorities for prosecution; or

(b) failing that, by extraditing Mr. Habré to Belgium.

Belgium reserves the right to revise or amend these submissions as appropriate, in accordance with the provisions of the Statute and the Rules of Court.”
On behalf of the Government of Senegal,

in the Counter-Memorial:

“For the reasons set out in this Counter-Memorial, the State of Senegal requests the International Court of Justice to adjudge and declare that:

1. Principally, it cannot adjudicate on the merits of the Application filed by the Kingdom of Belgium because it lacks jurisdiction as a result of the absence of a dispute between Belgium and Senegal, and the inadmissibility of that Application;

2. In the alternative, Senegal has not breached any of the provisions of the 1984 Convention against Torture, in particular those prescribing the obligation to ‘extradite or try’ (Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention), or, more generally, any rule of customary international law;

3. In taking the various measures that have been described, Senegal is fulfilling its commitments as a State Party to the 1984 Convention against Torture;

4. In taking the appropriate measures and steps to prepare for the trial of Mr. Habré, Senegal is complying with the declaration by which it made a commitment before the Court.

Senegal reserves the right to revise or amend these submissions, as appropriate, in accordance with the provisions of the Statute and the Rules of Court.”

14. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Belgium,
at the hearing of 19 March 2012:

“For the reasons set out in its Memorial and during the oral proceedings, the Kingdom of Belgium requests the International Court of Justice to adjudge and declare that:

1. (a) Senegal breached its international obligations by failing to incorporate in due time in its domestic law the provisions necessary to enable the Senegalese judicial authorities to exercise the universal jurisdiction provided for in Article 5, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(b) Senegal has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and under other rules of international law by failing to bring criminal proceedings against Hissène Habré for acts characterized in particular as crimes of torture, war crimes, crimes against humanity and the crime of genocide alleged against him as perpetrator, co-perpetrator or accomplice, or, otherwise, to extradite him to Belgium for the purposes of such criminal proceedings;

(c) Senegal may not invoke financial or other difficulties to justify the breaches of its international obligations.

2. Senegal is required to cease these internationally wrongful acts

(a) by submitting without delay the Hissène Habré case to its competent authorities for prosecution; or

(b) failing that, by extraditing Hissène Habré to Belgium without further ado.”

On behalf of the Government of Senegal,
at the hearing of 21 March 2012:

“In the light of all the arguments and reasons contained in its Counter-Memorial, in its oral pleadings and in the replies to the questions put to it by judges, whereby Senegal has declared and sought to demonstrate that, in the present case, it has duly fulfilled its international commitments and has not committed any internationally wrongful act, [Senegal asks] the Court . . . to find in its favour on the following submissions and to adjudge and declare that:

1. Principally, it cannot adjudicate on the merits of the Application filed by the Kingdom of Belgium because it lacks jurisdiction as a result of the absence of a dispute between Belgium and Senegal, and the inadmissibility of that Application;

2. In the alternative, should it find that it has jurisdiction and that Belgium’s Application is admissible, that Senegal has not breached any of the provisions of the 1984 Convention against Torture, in particular those prescribing the obligation to ‘try or extradite’ (Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention), or, more generally, any other rule of conventional law, general international law or customary international law in this area;

3. In taking the various measures that have been described, Senegal is fulfilling its commitments as a State Party to the 1984 Convention against Torture;

4. In taking the appropriate measures and steps to prepare for the trial of Mr. H. Habré, Senegal is complying with the declaration by which it made a commitment before the Court;

5. It consequently rejects all the requests set forth in the Application of the Kingdom of Belgium.”

* *

* *
I. HISTORICAL AND FACTUAL BACKGROUND

15. The Court will begin with a brief description of the historical and factual background to the present case.

16. After taking power on 7 June 1982 at the head of a rebellion, Mr. Hissène Habré was President of the Republic of Chad for eight years, during which time large-scale violations of human rights were allegedly committed, including arrests of actual or presumed political opponents, detentions without trial or under inhumane conditions, mistreatment, torture, extrajudicial executions and enforced disappearances. Mr. Habré was overthrown on 1 December 1990 by his former defence and security adviser, Mr. Idriss Déby, current President of Chad. After a brief stay in Cameroon, he requested political asylum from the Chadian Government, a request which was granted. He then settled in Dakar, where he has been living ever since.

17. On 25 January 2000, seven Chadian nationals residing in Chad, together with an association of victims, filed with the senior investigating judge at the Dakar Tribunal regional hors classe a complaint with civil-party application against Mr. Habré on account of crimes alleged to have been committed during his presidency. On 3 February 2000, the senior investigating judge, after having conducted a questioning at first appearance to establish Mr. Habré’s identity and having informed him of the acts said to be attributable to him, indicted Mr. Habré for having “aided or abetted X . . . in the commission of crimes against humanity and acts of torture and barbarity” and placed him under house arrest.

18. On 18 February 2000, Mr. Habré filed an application with the Chambre d’accusation of the Dakar Court of Appeal for annulment of the proceedings against him, arguing that the courts of Senegal had no jurisdiction; that there was no legal basis for the proceedings; that they were time-barred; and that they violated the Senegalese Constitution, the Senegalese Penal Code and the Convention Against Torture. In a judgment of 4 July 2000, that Chamber of the Court of Appeal found that the investigating judge lacked jurisdiction and annulled the proceedings against Mr. Habré, on the ground that they concerned crimes committed outside the Senegalese territory by a foreign national against foreign nationals and that they would involve the exercise of universal jurisdiction, while the Senegalese Code of Criminal Procedure then in force did not provide for such jurisdiction. In a judgment of 20 March 2001, the Senegalese Court of Cassation dismissed an appeal by the civil complainants against the judgment of 4 July 2000, confirming that the investigating judge had no jurisdiction.

19. On 30 November 2000, a Belgian national of Chadian origin filed a complaint with civil-party application against Mr. Habré with a Belgian investigating judge for, inter alia, serious violations of international humanitarian law, crimes of torture and the crime of genocide. Between 30 November 2000 and 11 December 2001, another 20 persons filed similar complaints against Mr. Habré for acts of the same nature, before the same judge. These complaints, relating to the period 1982 to 1990, and filed by persons with dual Belgian-Chadian nationality and eighteen Chadians, were based on crimes covered by the Belgian Law of 16 June 1993 concerning the punishment of serious violations of international humanitarian law, as amended by the Law of 10 February 1999 (hereinafter the “1993/1999 Law”), and by the Convention against Torture. The Convention was ratified by Senegal on 21 August 1986, without reservation, and became binding on it on 26 June 1987, the date of its entry into force. Belgium ratified the Convention on 25 June 1999, without reservation, and became bound by it on 25 July 1999.

20. After finding that the acts complained of — extermination, torture, persecution and enforced disappearances — could be characterized as “crimes against humanity” under the 1993/1999 Law, the Belgian investigating judge issued two international letters rogatory, to Senegal and Chad, on 19 September and 3 October 2001, respectively. In the first of these, he sought to obtain a copy of the record of all proceedings concerning Mr. Habré pending before the Senegalese judicial authorities; on 22 November 2001 Senegal provided Belgium with that file. The second letter rogatory sought to establish judicial co-operation between Belgium and Chad, in particular requesting that Belgian authorities be permitted to interview the Chadian complainants and witnesses, to have access to relevant records and to visit relevant sites. This letter rogatory was executed in Chad by the Belgian investigating judge between 26 February and 8 March 2002. Furthermore, in response to a question put by the Belgian investigating judge on 27 March 2002, asking whether Mr. Habré enjoyed any immunity from jurisdiction as a former Head of State, the Minister of Justice of Chad stated, in a letter dated 7 October 2002, that the Sovereign National Conference, held in N’Djamena from 15 January to 7 April 1993, had officially lifted from the former President all immunity from legal process. Between 2002 and 2005, various investigative steps were taken in Belgium, including examining complainants and witnesses, as well as analysing the documents provided by the Chadian authorities in execution of the letter rogatory.

21. On 19 September 2005, the Belgian investigating judge issued an international warrant in absentia for the arrest of Mr. Habré, indicted as the perpetrator or co-perpetrator, inter alia, of serious violations of international humanitarian law, torture, genocide, crimes against humanity and war crimes. By Note Verbale of 22 September 2005, Belgium transmitted the international arrest warrant to Senegal and requested the extradition of Mr. Habré. On 27 September 2005, Interpol — of which Belgium and Senegal have been members since 7 September 1923 and 4 September 1961, respectively — circulated a “red notice” concerning Mr. Habré, which serves as a request for provisional arrest with a view to extradition.

22. In a judgment of 25 November 2005, the Chambre d’accusation of the Dakar Court of Appeal ruled on Belgium’s extradition request, holding that, as “a court of ordinary law, [it could] not extend its jurisdiction to matters relating to the investigation or prosecution of a Head of State for acts allegedly committed during his presidency”, that Mr. Habré should “be given jurisdictional immunity”, which “is intended to survive the cessation of his duties as President of the Republic”; and that it could not therefore “adjudicate the lawfulness of [the] proceedings and the validity of the arrest warrant against a Head of State”.

23. The day after the delivery of the judgment of 25 November 2005, Senegal referred to the African Union the issue of Mr. Habré. In July 2006, the Union’s Assembly of Heads of State and Government, by Decision 127 (VII), inter alia, “decid[ed] to consider the Hissène Habré case as falling within the competence of the African Union, . . . mandate[d] the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial”
mandated the Chairperson of the [African Union, in consultation with the Chairperson of the Commission of the Union, to provide Senegal with the necessary assistance for the effective conduct of the trial.

24. In view of the judgment of 25 November 2005 of the Chambre d’accusation of the Dakar Court of Appeal, Belgium asked Senegal, in a Note Verbale of 30 November 2005, to inform it about the implications of this judicial decision for Belgium’s request for extradition, the current stage of the proceedings, and whether Senegal could reply officially to the request for extradition and provide explanations about its position pursuant to the said decision. In response, in a Note Verbale of 7 December 2005 Senegal stated inter alia that, following the judgment in question, it had referred the Habré case to the African Union, and that this “prefigured a concerted approach on an African scale to issues that fall in principle under the States’ national sovereignty”. By Note Verbale of 23 December 2005, Senegal explained that the judgment of the Chambre d’accusation put an end to the judicial stage of the proceedings, that it had taken the decision to refer the “Hissène Habré case” to the African Union (see paragraphs 23 above and 36 below), and that this decision should consequently be considered as reflecting its position following the judgment of the Chambre d’accusation.

25. By Note Verbale of 11 January 2006, Belgium, referring to the ongoing negotiation procedure provided for in Article 30 of the Convention against Torture and taking note of the referral of the “Hissène Habré case” to the African Union, stated that it interpreted the said Convention, and more specifically the obligation aut dedere aut judicare provided for in Article 7 thereof, “as imposing obligations only on a State, in this case, in the context of the extradition request of Mr. Hissène Habré, the Republic of Senegal”. Belgium further asked Senegal to “kindly notify it of its final decision to grant or refuse the ... extradition application” in respect of Mr. Habré, according to Belgium. Senegal did not reply to this Note. By Note Verbale of 9 March 2006, Belgium again referred to the ongoing negotiation procedure provided for in Article 30 and explained that it interpreted Article 4, Article 5, paragraphs (1) (c) and (2), Article 7, paragraph (1), Article 8 paragraphs (1), (2) and (4), and Article 9, paragraph (1), of the Convention as “establishing the obligation, for a State in whose territory a person alleged to have committed any offence referred to in Article 4 of the Convention is found, to extradite him if it does not prosecute him for the offences mentioned in that Article”. Consequently, Belgium asked Senegal to “be so kind as to inform it as to whether its decision to refer the Hissène Habré case to the African Union [was] to be interpreted as meaning that the Senegalese authorities no longer intended to extradite him to Belgium or to have him judged by their own Courts”.

26. By Note Verbale dated 4 May 2006, having noted the absence of an official response from the Senegalese authorities to its earlier Notes and communications, Belgium again made it clear that it interpreted Article 7 of the Convention against Torture as requiring the State on whose territory the alleged offender is located to extradite him if it does not prosecute him, and stated that the “decision to refer the Hissène Habré case to the African Union” could not relieve Senegal of its obligation to either judge or extradite the person accused of these offences in accordance with the relevant articles of the Convention. It added that an unresolved dispute regarding this interpretation would lead to recourse to the arbitration procedure provided for in Article 30 of the Convention. By Note Verbale of 9 May 2006, Senegal explained that its Notes Verbales of 7 and 23 December 2005 constituted a response to Belgium’s request for extradition. It stated that, by referring to the case to the African Union, Senegal, in order not to create a legal impasse, was acting in accordance with the spirit of the “aut dedere aut judicare” principle. Finally, it took note of “the possibility of recourse to the arbitration procedure provided for in Article 30 of the Convention”. In a Note Verbale of 20 June 2006, which Senegal claims not to have received, Belgium “noted that the attempted negotiation with Senegal, which started in November 2005, had not succeeded” and accordingly asked Senegal to submit the dispute to arbitration “under conditions to be agreed mutually”, in accordance with Article 30 of the Convention. Furthermore, according to a report of the Belgian Embassy in Dakar following a meeting held on 21 June 2006 between the Secretary-General of the Senegalese Ministry of Foreign Affairs and the Belgian Ambassador, the latter expressly invited Senegal to adopt a clear position on the request to submit the matter to arbitration. According to the same report, the Senegalese authorities took note of the Belgian request for arbitration and the Belgian Ambassador drew their attention to the fact that the six month time-limit under Article 30 (see paragraph 42 below) began to run from that point.

27. The United Nations Committee against Torture considered a communication submitted by several persons, including Mr. Suleymane Guengueng, one of the Chadian nationals who had filed a complaint against Mr. Habré with the senior investigating judge at the Dakar Tribunal régional hors classe on 25 January 2000 (see paragraph 17 above). In its decision of 17 May 2006, the Committee found that Senegal had not adopted such “measures as may be necessary” to establish its jurisdiction over the crimes listed in the Convention, in violation of Articles 5, paragraph 2, of the latter. The Committee also stated that Senegal had failed to perform its obligations under Article 7, paragraph 1, of the Convention, to submit the case concerning Mr. Habré to its competent authorities for the purpose of prosecution or, in the alternative, since a request for extradition had been made by Belgium, to comply with that request. Furthermore, the Committee gave Senegal 90 days to provide information “on the measures it had taken to give effect to its recommendations”. In a Note Verbale of 11 January 2006, Belgium, referring to the ongoing negotiation procedure provided for in Article 30 of the Convention against Torture and taking note of the referral of the “Hissène Habré case” to the African Union, stated that it interpreted the said Convention, and more specifically the obligation aut dedere aut judicare provided for in Article 7 thereof, “as imposing obligations only on a State, in this case, in the context of the extradition request of Mr. Hissène Habré, the Republic of Senegal”. Belgium further asked Senegal to “kindly notify it of its final decision to grant or refuse the ... extradition application” in respect of Mr. Habré, according to Belgium. Senegal did not reply to this Note. By Note Verbale of 9 March 2006, Belgium again referred to the ongoing negotiation procedure provided for in Article 30 and explained that it interpreted Article 4, Article 5, paragraphs (1) (c) and (2), Article 7, paragraph (1), Article 8 paragraphs (1), (2) and (4), and Article 9, paragraph (1), of the Convention as “establishing the obligation, for a State in whose territory a person alleged to have committed any offence referred to in Article 4 of the Convention is found, to extradite him if it does not prosecute him for the offences mentioned in that Article”. Consequently, Belgium asked Senegal to “be so kind as to inform it as to whether its decision to refer the Hissène Habré case to the African Union [was] to be interpreted as meaning that the Senegalese authorities no longer intended to extradite him to Belgium or to have him judged by their own Courts”.

28. In 2007, Senegal implemented a number of legislative reforms in order to bring its domestic law into conformity with Article 4, paragraph 2, of the Convention against Torture. The new Articles 431-1 to 431-5 of its Penal Code defined and formally proscribed the crime of genocide, crimes against humanity, war crimes and other violations of international humanitarian law. In addition, under the terms of the new Article 431-6 of the Penal Code, any individual could “be tried or sentenced for acts or omissions ... which at the time and place where they were committed, were regarded as a criminal offence according to the general principles of law recognized by the community of nations, whether or not they constituted a legal transgression in force at that time and in that place”.

Furthermore, Article 669 of the Senegalese Code of Criminal Procedure was amended to read as follows:

"Any foreigner who, outside the territory of the Republic, has been accused of being the perpetrator of or accomplice to one of the crimes referred to in Articles 431-1 to 431-5 of the Penal Code ... may be prosecuted and tried according to the provisions of Senegalese laws or laws applicable in Senegal, if he is under the jurisdiction of Senegal or if a victim is resident in the territory of the Republic of Senegal, or if the Government obtains his extradition."
A new Article 664 was also incorporated into the Code of Criminal Procedure, which became effective before the act was committed. The third subparagraph applies that when it was committed, was defined as an act committed under the principles of international law concerning acts of genocide, crimes against humanity, and crimes against the peace.

In 2008, Senegal amended Article 9 of its Constitution in order to provide for an exception to the principle of non-retroactivity of its criminal laws: although the second subparagraph of that Article provides that "[n]o one may be convicted other than by virtue of a law which became effective before the act was committed", the third subparagraph stipulates that "[n]o one may be convicted other than by virtue of a law which became effective before the act was committed when it was committed, was defined as an act committed under the principles of international law concerning acts of genocide, crimes against humanity, and crimes against the peace." However, the provisions of the preceding subparagraph shall not prejudice the prosecution, trial, and punishment of any person for any act or omission which preceded the act when it was committed.

On 19 February 2009, Belgium filed in the Registry the Application instituting the present proceedings before the Court (see paragraph 1 above). On 8 April 2009, during the hearings relating to the request for provisional measures submitted by Belgium in the present case (see paragraphs 3 and 5 above), Senegal stated that it would not allow Mr. Habré to leave its territory while the case was pending. (see Judgment of 15 December 2009, pp. 155 and 156). Senegal also recalled that the Assembly of the African Union, during its eighth ordinary session held on 29 and 30 January 2007, had declared before the Court that it would not allow Mr. Habré to leave its territory, while the case was pending.

Senegal informed Belgium of these legislative reforms by Notes Verbales dated 20 and 21 February 2007. In its Note Verbale of 20 February 2007, Belgium informed Senegal, in a Note Verbale of 20 June 2006, "of its wish to constitute an arbitral tribunal to resolve the difference of opinion in the absence of finding a solution by means of negotiation as stipulated by Article 30 of the Convention against Torture."

Senegal also recalled that it had informed Senegal that it would not allow Mr. Habré to leave its territory, while the case was pending. Belgium invited Senegal to present its observations on the Afghan case. Belgium also invited Senegal to present its observations on the Afghan case, and Senegal made a declaration accepting its jurisdiction to entertain such applications, under Article 34, paragraph 6, of the Protocol to the African Charter on Human and Peoples' Rights (Ruf 1986, No. 80).

Senegal also recalled that it had informed Senegal that it would not allow Mr. Habré to leave its territory, while the case was pending. Belgium invited Senegal to present its observations on the Afghan case. Belgium also invited Senegal to present its observations on the Afghan case, and Senegal made a declaration accepting its jurisdiction to entertain such applications, under Article 34, paragraph 6, of the Protocol to the African Charter on Human and Peoples' Rights (Ruf 1986, No. 80).

Belgium filed an appeal against Mr. Habré's conviction and sentence in the High Court of Justice of the Court of Justice of the Economic Community of West African States (hereinafter the "ECOWAS Court of Justice") on 15 December 2009, in which Mr. Habré requested the Court to find that his human rights would be violated by Senegal if proceedings were instituted by that State. Senegal expressed its willingness to accept the offer of the ECOWAS Court of Justice to hear an appeal by Mr. Habré against his conviction and sentence in the issuing of the judgment of 15 December 2009.)
evidence existed pointing to potential violations of Mr. Habré’s human rights as a result of Senegal’s constitutional and legislative reforms, that Court held that Senegal should respect the rulings handed down by its national courts and, in particular, abide by the principle of res judicata, and ordered it accordingly to comply with the absolute principle of non-retroactivity. It further found that the mandate which Senegal received from the African Union was in fact to devise and propose all the necessary arrangements for the prosecution and trial of Mr. Habré to take place, within the strict framework of special ad hoc international proceedings (ECOWAS Court of Justice, *Hissène Habré v. Republic of Senegal*, Judgment No. ECW/CCJ/JUD/06/10 of 18 November 2010).

36. Following the delivery of the above-mentioned judgment by the ECOWAS Court of Justice, in January 2011 the Assembly of African Union Heads of State and Government “request[ed] the Commission to undertake consultations with the Government of Senegal in order to finalize the modalities for the expeditious trial of Hissène Habré through a special tribunal with an international character consistent with the ECOWAS Court of Justice Decision”.

At its seventeenth session, held in July 2011, the Assembly “confirm[ed] the mandate given to Senegal to try Hissène Habré on behalf of Africa” and “urge[d] [the latter] to carry out its legal responsibility in accordance with the United Nations Convention against Torture[,] the decision of the United Nations … Committee against Torture[,] as well as the said mandate to put Hissène Habré on trial expeditiously or extradite him to any other country willing to put him on trial”.

37. By Note Verbale of 15 March 2011, Belgium transmitted to the Senegalese authorities a second request for the extradition of Mr. Habré. On 18 August 2011, the Chambre d’accusation of the Dakar Court of Appeal declared this second request for extradition inadmissible because it was not accompanied by the documents required under Senegalese Law No. 71-77 of 28 December 1971 (hereinafter the “Senegalese Law on Extradition”), in particular documents disclosing the existence of criminal proceedings alleged to have been instituted against Mr. Habré in Belgium and the legal basis of those proceedings, as required by Article 9 of the Law on Extradition, and “any record of the interrogation of the individual whose extradition is requested, as required by … Article 13 of the [same] Law”. The Chambre d’accusation further observed that Belgium had instituted proceedings against Senegal before the International Court of Justice; it therefore concluded that “the dispute [was] still pending before the said Court, which had[d] sole competence to settle the question of the disputed interpretation by the two States of the extent and scope of the obligation aut dedere aut judicare under Article 4 of the … Convention [against Torture]”.

38. By Note Verbale of 5 September 2011, Belgium transmitted to Senegal a third request for the extradition of Mr. Habré. On 10 January 2012, the Chambre d’accusation of the Dakar Court of Appeal declared this request for extradition inadmissible on the grounds that the copy of the international arrest warrant placed on the file was not authentic, as required by Article 9 of the Senegalese Law on Extradition. Furthermore, it stated that “the report on the arrest, detention and questioning of the individual whose extradition [was] requested [was] not appended to the case file as required by Article 13 of the above-mentioned Law”.

40. By Note Verbale of 17 January 2012, Belgium addressed to Senegal, through the Embassy of Senegal in Brussels, a fourth request for the extradition of Mr. Habré. On 23 January 2012, the Embassy acknowledged receipt of the said Note and its annexes. It further stated that all those documents had been transmitted to the competent authorities in Senegal. By letter dated 14 May 2012, the Senegalese Ministry of Justice informed the Ministry of Foreign Affairs of Senegal that the extradition request had been transmitted in due course “as is, to the Public Prosecutor at the Dakar Court of Appeal, with the instruction to bring it before the Chambre d’accusation once the necessary legal formalities had been completed”.

41. At its eighteenth session, held in January 2012, the Assembly of the Heads of State and Government of the African Union observed that the Dakar Court of Appeal had not yet taken a decision on Belgium’s fourth request for extradition. It noted that Rwanda was prepared to organize Mr. Habré’s trial and “request[ed] the Commission [of the African Union] to continue consultations with partner countries and institutions and the Republic of Senegal[,] and subsequently with the Republic of Rwanda[,] with a view to ensuring the expeditious trial of Hissène Habré and to consider the practical modalities as well as the legal and financial implications of the trial”.

II. JURISDICTION OF THE COURT

42. To found the jurisdiction of the Court, Belgium relies on Article 30, paragraph 1, of the Convention against Torture and on the declarations made by the Parties under Article 36, paragraph 2, of the Court’s Statute. Article 30, paragraph 1, of the Convention reads as follows:

“Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.”

Belgium’s declaration under Article 36, paragraph 2, of the Court’s Statute was made on 17 June 1958, and reads in the relevant part as follows:

“[Belgium] recognize[s] as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the Court, in legal disputes arising after 13 July 1948 concerning situations or facts subsequent to that date, except those in regard to which the parties have agreed or may agree to have recourse to another method of pacific settlement.”
Senegal's declaration was made on 2 December 1985, and reads in the relevant part as follows:

"[Senegal] accepts on condition of reciprocity as compulsory ipso facto and without special convention, in relation to any other State accepting the same obligation, the jurisdiction of the Court over all legal disputes arising after the present declaration, concerning:

— the interpretation of a treaty;
— any question of international law;
— the existence of any fact which, if established, would constitute a breach of an international obligation;
— the nature or extent of the reparation to be made for the breach of international obligation.

This declaration is made on condition of reciprocity on the part of all States. However, Senegal may reject the Court's competence in respect of:

— disputes in regard to which the parties have agreed to have recourse to some other method of settlement;
— disputes with regard to questions which, under international law, fall exclusively within the jurisdiction of Senegal."

43. Senegal contests the existence of the Court’s jurisdiction on either basis, maintaining that the conditions set forth in the relevant instruments have not been met and, in the first place, that there is no dispute between the Parties.

A. The existence of a dispute

44. In the claims included in its Application, Belgium requested the Court to adjudge and declare that "the Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice; failing the prosecution of Mr. H. Habré, the Republic of Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts". According to Belgium’s final submissions, the Court is requested to find that Senegal breached its obligations under Article 5, paragraph 2, of the Convention against Torture, and that, by failing to take action in relation to Mr. Habré’s alleged crimes, Senegal has breached and continues to breach its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of that instrument and under certain other rules of international law.

Senegal submits that there is no dispute between the Parties with regard to the interpretation or application of the Convention against Torture or any other relevant rule of international law and that, as a consequence, the Court lacks jurisdiction.

45. The Court observes that the Parties have thus presented radically divergent views about the existence of a dispute between them and, if any dispute exists, its subject-matter. Given that the existence of a dispute is a condition of its jurisdiction under both bases of jurisdiction invoked by Belgium, the Court will first examine this issue.

46. The Court recalls that, in order to establish whether a dispute exists, "[i]t must be shown that the claim of one party is positively opposed by the other" (South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328). The Court has previously stated that "[w]hether there exists an international dispute is a matter for objective determination" (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74) and that "[t]he Court's determination must turn on an examination of the facts. The matter is one of substance, not of form." (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, para. 30.) The Court has also noted that the “dispute must in principle exist at the time the Application is submitted to the Court” (ibid., para. 30).

47. The first request made in 2010 by Belgium in the submissions contained in its Memorial and then in 2012 in its final submissions, is that the Court should declare that Senegal breached Article 5, paragraph 2, of the Convention against Torture, which requires a State party to the Convention to "take such measures as may be necessary to establish its jurisdiction" over acts of torture when the alleged offender is "present in any territory under its jurisdiction" and that State does not extradite him to one of the States referred to in paragraph 1 of the same article. Belgium argues that Senegal did not enact "in a timely manner" provisions of national legislation allowing its judicial authorities to exercise jurisdiction over acts of torture allegedly committed abroad by a foreign national who is present on its territory. Senegal does not contest that it compiled only in 2007 with its obligation under Article 5, paragraph 2, but maintains that it has done so adequately by adopting Law No. 2007-05, which amended Article 669 of its Code of Criminal Procedure in order to extend the jurisdiction of Senegalese courts over certain offences, including torture, allegedly committed by a foreign national outside Senegal’s territory, irrespective of the nationality of the victim (see paragraph 28 above).

Senegal also points out that Article 9 of its Constitution was amended in 2008 so that the principle of non-retroactivity in criminal matters would not prevent the prosecution of an individual for genocide, crimes against humanity or war crimes if the acts in question were crimes under international law at the time when they were committed (see paragraph 31 above).

Belgium acknowledges that Senegal has finally complied with its obligation under Article 5, paragraph 2, but contends that the fact that Senegal did not comply with its obligation in a timely manner produced negative consequences concerning the implementation of some other obligations under the Convention.

48. The Court finds that any dispute that may have existed between the Parties with regard to the interpretation or application of Article 5, paragraph 2, of the Convention had ended by the time the Application was filed. Thus, the Court lacks jurisdiction to decide on Belgium’s claim relating to the obligation under Article 5, paragraph 2. However, this does not prevent the Court from considering the consequences that Senegal’s conduct in relation to the measures required by this provision may have had on its compliance with certain other obligations under the Convention, should the Court have jurisdiction in that regard.
49. Belgium further contends that Senegal breached its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture. These provisions respectively require a State party to the Convention, when a person who has allegedly committed an act of torture is found on its territory, to hold "a preliminary inquiry into the facts" and, "if it does not extradite him", to "submit the case to its competent authorities for the purpose of prosecution". Senegal maintains that there is no dispute with regard to the interpretation or application of these provisions, as there is no dispute between the Parties concerning the existence and scope of the obligations contained therein, and that it has met those obligations.

50. Before submitting its Application to the Court, Belgium on several occasions requested Senegal to comply with its obligation under the Convention "to extradite or judge" Mr. Habré for the alleged acts of torture (see paragraphs 25-26 and 30 above). For instance, a Note Verbale of 9 March 2006 addressed by the Belgian Embassy in Dakar to the Ministry of Foreign Affairs of Senegal (see paragraph 25 above) referred to a number of provisions of the Convention, including Article 7, and stated that the Convention had to be understood "as requiring the State on whose territory the alleged author of an offence under Article 4 of the aforesaid Convention is located to extradite this offender, unless it has judged him on the basis of the charges covered by said article".

Similarly, a Note Verbale of 4 May 2006 addressed by the Belgian Ministry of Foreign Affairs to the Ambassador of Senegal in Brussels (see paragraph 26 above) declared that "Belgium interprets Article 7 of the Convention against Torture as requiring the State on whose territory the alleged offender is located to extradite him unless it has judged him". While the emphasis in Belgium's Notes Verbales and also in Belgium's Application is on extradition, in its pleadings Belgium stresses the obligation to submit Mr. Habré's case to prosecution. This does not change the substance of the claim. Extradition and prosecution are alternative ways to combat impunity in accordance with Article 7, paragraph 1. In the above-mentioned diplomatic exchanges, the request by Belgium that Senegal comply with the obligation to hold a preliminary inquiry into the facts of Mr. Habré's case may be considered as implicit, since that inquiry should normally take place before prosecution.

51. In its diplomatic exchanges with Belgium, Senegal contended that it was complying with its obligations under the Convention. For instance, in a Note Verbale of 9 May 2006 addressed to the Belgian Ministry of Foreign Affairs, Senegal's Embassy in Brussels wrote that "with regard to the interpretation of Article 7 of the Convention..., the Embassy considers that by referring the Hissène Habré case to the African Union, Senegal, in order not to create a legal impasse, is acting in accordance with the spirit of the principle 'aut dedere aut punire' the essential aim of which is to ensure that no torturer can escape from justice by going to another country".

Senegal's denial that there has been a breach appears to be based on its contention that Article 6, paragraph 2, and Article 7, paragraph 1, grant a State party some latitude with regard to the time within which it may take the actions required. As was acknowledged by Senegal, "[a]t issue before the Court is a difference between two States as to how the execution of an obligation arising from an international instrument to which both States are parties should be understood".

52. Given that Belgium's claims based on the interpretation and application of Articles 6, paragraph 2, and 7, paragraph 1, of the Convention were positively opposed by Senegal, the Court considers that a dispute in this regard existed by the time of the filing of the Application. The Court notes that this dispute still exists.

53. The Application of Belgium also includes a request that the Court declare that Senegal breached an obligation under customary international law to bring criminal proceedings against Mr. H. Habré for crimes against humanity allegedly committed by him. This submission has been later extended to cover war crimes and genocide. On this point, Senegal also contends that no dispute has arisen between the Parties.

54. While it is the case that the Belgian international arrest warrant transmitted to Senegal with a request for extradition on 22 September 2005 (see paragraph 21 above) referred to violations of international humanitarian law, torture, genocide, crimes against humanity, war crimes, murder and other crimes, neither document stated or implied that Senegal had an obligation under international law to exercise its jurisdiction over those crimes if it did not extradite Mr. Habré. In terms of the Court's jurisdiction, what matters is whether, on the date when the Application was filed, a dispute existed between the Parties regarding the obligation for Senegal, under customary international law, to take measures in respect of the above-mentioned crimes attributed to Mr. Habré. In the light of the diplomatic exchanges between the Parties reviewed above (see paragraphs 21-30), the Court considers that such a dispute did not exist on that date. The only obligations referred to in the diplomatic correspondence between the Parties are those under the Convention against Torture. It is noteworthy that even in a Note Verbale handed over to Senegal on 16 December 2008, barely two months before the date of the Application, Belgium only stated that its proposals concerning judicial co-operation were without prejudice to "the difference of opinion existing between Belgium and Senegal regarding the application and interpretation of the obligations resulting from the relevant provisions of the [Convention against Torture]", without mentioning the prosecution or extradition in respect of other crimes. In the same Note Verbale, Belgium referred only to the crime of torture when acknowledging the amendments to the legislation and Constitution of Senegal, although those amendments were not limited to that crime. Under those circumstances, there was no reason for Senegal to address at all in its relations with Belgium the issue of the prosecution of alleged crimes of Mr. Habré under customary international law. The facts which constituted those alleged crimes may have been closely connected to the alleged acts of torture. However, the issue whether there exists an obligation for a State to prosecute crimes under customary international law that were allegedly committed by a foreign national abroad is clearly distinct from any question of compliance with that State's obligations under the Convention against Torture and raises quite different legal problems.
55. The Court concludes that, at the time of the filing of the Application, the dispute between the Parties did not relate to breaches of obligations under customary international law and that it thus has no jurisdiction to decide on Belgium’s claims related thereto.

It is thus only with regard to the dispute concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention against Torture that the Court will have to find whether there exists a legal basis of jurisdiction.

B. Other conditions for jurisdiction

56. The Court will turn to the other conditions which should be met for it to have jurisdiction under Article 30, paragraph 1, of the Convention against Torture (see paragraph 27 above). These conditions are that the dispute cannot be settled through negotiation and that, after a request for arbitration has been made by one of the Parties, they have been unable to agree on the organization of the arbitral tribunal within six months from the request. The Court will consider these conditions in turn.

57. With regard to the first of these conditions, the Court must begin by ascertaining whether there was, “at the very least[,] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute” (Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, para. 157). According to the Court’s jurisprudence, “the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked” (ibid., para. 159). The requirement that the dispute “cannot be settled through negotiation” could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that, as the Court noted with regard to a similarly worded provision, “no reasonable probability exists that further negotiations would lead to a settlement” (South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 345).

58. Several exchanges of correspondence and various meetings were held between the Parties concerning the case of Mr. Habré, when Belgium insisted on Senegal’s compliance with the obligation to judge or extradite him. Belgium expressly stated that it was acting within the framework of the negotiating process under Article 30 of the Convention against Torture in Notes Verbales addressed to Senegal on 11 January 2006, 9 March 2006, 4 May 2006 and 20 June 2006 (see paragraphs 25-26 above). The same approach results from a report sent by the Belgian Ambassador in Dakar on 21 June 2006 concerning a meeting with the Secretary-General of the Ministry of Foreign Affairs of Senegal (see paragraph 26 above). Senegal did not object to the characterization by Belgium of the diplomatic exchanges as negotiations.

59. In view of Senegal’s position that, even though it did not agree on extradition and had difficulties in proceeding towards prosecution, it was nevertheless complying with its obligations under the Convention (for instance, in the Note Verbale of 9 May 2006; see paragraph 26 above), negotiations did not make any progress towards resolving the dispute. This was observed by Belgium in a Note Verbale of 20 June 2006 (see paragraph 26 above). There was no change in the respective positions of the Parties concerning the prosecution of Mr. Habré’s alleged acts of torture during the period covered by the above exchanges. The fact that, as results from the pleadings of the Parties, their basic positions have not subsequently evolved confirms that negotiations did not and could not lead to the settlement of the dispute. The Court therefore concludes that the condition set forth in Article 30, paragraph 1, of the Convention that the dispute cannot be settled by negotiation has been met.

60. With regard to the submission to arbitration of the dispute on the interpretation of Article 7 of the Convention against Torture, a Note Verbale of the Belgian Ministry of Foreign Affairs of 4 May 2006 (see paragraph 26 above) observed that “[a]n unresolved dispute regarding this interpretation would lead to recourse to the arbitration procedure provided for in Article 30 of the Convention against Torture”. In a Note Verbale of 9 May 2006 (see paragraph 26 above) the Ambassador of Senegal in Brussels responded that

“As to the possibility of Belgium having recourse to the arbitration procedure provided for in Article 30 of the Convention against Torture, the Embassy can only take note of this, restating the commitment of Senegal to the excellent relationship between the two countries in terms of cooperation and the combating of impunity.”

A direct request to resort to arbitration was made by Belgium in a Note Verbale of 20 June 2006 (see paragraph 26 above). In that Note Verbale, Belgium remarked that “the attempted negotiation with Senegal, which started in November 2005, had not succeeded”; Belgium, “in accordance with Article 30, paragraph 1, of the Convention, consequently asked Senegal to submit the dispute to arbitration under conditions to be agreed mutually”. In its Order of 28 May 2009 on Belgium’s request for the indication of provisional measures, the Court has already observed that this Note Verbale:

“contains an explicit offer from Belgium to Senegal to have recourse to arbitration, pursuant to Article 30, paragraph 1, of the Convention against Torture, in order to settle the dispute concerning the application of the Convention in the case of Mr. Habré” (I.C.J. Reports 2009, p. 150, para. 52).

In a Note Verbale of 8 May 2007 (see paragraph 30 above) Belgium recalled “its wish to constitute an arbitral tribunal” and remarked that it had “received no response from the Republic of Senegal on the issue of this proposal of arbitration”. Although Senegal maintains that it had not received the Note Verbale dated 20 June 2006, it did not mention that matter after having received the Note Verbale of 8 May 2007. On that occasion, there was again no response on the part of Senegal to the request for arbitration.
61. Following its request for arbitration, Belgium did not make any detailed proposal for determining the issues to be submitted to arbitration and the organization of the arbitration proceedings. In the Court’s view, however, this does not mean that the condition that “the Parties are unable to agree on the organization of the arbitration” has not been fulfilled. A State may defer proposals concerning these aspects to the time when a positive response is given in principle to its request to settle the dispute by arbitration. As the Court said with regard to a similar treaty provision:

“the lack of agreement between the parties as to the organization of an arbitration cannot be presumed. The existence of such disagreement can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept.” (Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), jurisdiction and Admissibility, Judgment, I.C.J Reports 2006, p. 41, para. 92.)

The present case is one in which the inability of the Parties to agree on the organization of the arbitration results from the absence of any response on the part of the State to which the request for arbitration was addressed.

62. Article 30, paragraph 1, of the Convention against Torture requires that at least six months should pass after the request for arbitration before the case is submitted to the Court. In the present case, this requirement has been complied with, since the Application was filed over two years after the request for arbitration had been made.

* 

63. Given that the conditions set out in Article 30, paragraph 1, of the Convention against Torture have been met, the Court concludes that it has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

Having reached this conclusion, the Court does not find it necessary to consider whether its jurisdiction also exists with regard to the same dispute on the basis of the declarations made by the Parties under Article 36, paragraph 2, of its Statute.

III. ADMISSIBILITY OF BELGIUM’S CLAIMS

64. Senegal objects to the admissibility of Belgium’s claims. It maintains that “Belgium is not entitled to invoke the international responsibility of Senegal for the alleged breach of its obligation to submit the [Hissène] Habré case to its competent authorities for the purpose of prosecution, unless it extradites him”. In particular, Senegal contends that none of the alleged victims of the acts said to be attributable to Mr. Habré was of Belgian nationality at the time when the acts were committed.

65. Belgium does not dispute the contention that none of the alleged victims was of Belgian nationality at the time of the alleged offences. However, it noted in its Application that “[a]s the present jurisdiction of the Belgian courts is based on the complaint filed by a Belgian national of Chadian origin, the Belgian courts intend to exercise exclusive personal jurisdiction”. In its Application Belgium requested the Court to adjudge and declare that its claim was admissible. In the oral proceedings, Belgium also claimed to be in a “particular position” since “it has availed itself of its right under Article 5 to exercise its jurisdiction and to request extradition”. Moreover, Belgium argued that “[u]nder the Convention, every State party, irrespective of the nationality of the victims, is entitled to claim performance of the obligation concerned, and, therefore, can invoke the responsibility resulting from the failure to perform”. 66. The divergence of views between the Parties concerning Belgium’s entitlement to bring its claims against Senegal before the Court with regard to the application of the Convention in the case of Mr. Habré raises the issue of Belgium’s standing. For that purpose, Belgium based its claims not only on its status as a party to the Convention but also on the existence of a special interest that would distinguish Belgium from the other parties to the Convention and give it a specific entitlement in the case of Mr. Habré.

67. The Court will first consider whether being a party to the Convention is sufficient for a State to be entitled to bring a claim to the Court concerning the cessation of alleged violations by another State party of its obligations under that instrument.

68. As stated in its Preamble, the object and purpose of the Convention is “to make more effective the struggle against torture . . . throughout the world”. The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by each State party to the Convention on the Prevention and Punishment of the Crime of Genocide, with regard to which the Court observed that

“In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d’être of the Convention.” (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J Reports 1951, p. 23.)
69. The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations erga omnes partes, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.

70. For these reasons, the Court concludes that Belgium, as a State party to the Convention against Torture, has standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention in the present proceedings. Therefore, the claims of Belgium based on these provisions are admissible.

As a consequence, there is no need for the Court to pronounce on whether Belgium also has a special interest with respect to Senegal’s compliance with the relevant provisions of the Convention in the case of Mr. Habré.

IV. THE ALLEGED VIOLATIONS OF THE CONVENTION AGAINST TORTURE

71. In its Application instituting proceedings, Belgium requested the Court to adjudge and declare that Senegal is obliged to bring criminal proceedings against Mr. Habré and, failing that, to extradite him to Belgium. In its final submissions, it requested the Court to adjudge and declare that Senegal breached and continues to breach its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention by failing to bring criminal proceedings against Mr. Habré, unless it extradites him.

72. Belgium has pointed out during the proceedings that the obligations deriving from Article 5, paragraph 2, Article 6, paragraph 2, and Article 7, paragraph 1, are closely linked with each other in the context of achieving the object and purpose of the Convention, which according to its Preamble is “to make more effective the struggle against torture”. Hence, incorporating the appropriate legislation into domestic law (Article 5, paragraph 2) would allow the State in whose territory a suspect is present immediately to make a preliminary inquiry into the facts (Article 6, paragraph 2), a necessary step in order to enable that State, with knowledge of the facts, to submit the case to its competent authorities for the purpose of prosecution (Article 7, paragraph 1).

73. Senegal contests Belgium’s allegations and considers that it has not breached any provision of the Convention against Torture. In its view, the Convention breaks down the aut dedere aut judicare obligation into a series of actions which a State should take. Senegal maintains that the measures it has taken hitherto show that it has complied with its international commitments. First, Senegal asserts that it has resolved not to extradite Mr. Habré to organize his trial and to try him. It maintains that it adopted constitutional and legislative reforms in 2007-2008, in accordance with Article 5 of the Convention, to enable it to hold a fair and equitable trial of the alleged perpetrator of the crimes in question reasonably quickly. It further states that it has taken measures to restrict the liberty of Mr. Habré, pursuant to Article 6 of the Convention, as well as measures in preparation for Mr. Habré’s trial, contemplated under the aegis of the African Union, which must be regarded as constituting the first steps towards fulfilling the obligation to prosecute laid down in Article 7 of the Convention. Senegal adds that Belgium cannot dictate precisely how it should fulfil its commitments under the Convention, given that how a State fulfils an international obligation, particularly in a case where the State must take internal measures, is to a very large extent left to the discretion of that State.

74. Although, for the reasons given above, the Court has no jurisdiction in this case over the alleged violation of Article 5, paragraph 2, of the Convention, it notes that the performance by the State of its obligation to establish the universal jurisdiction of its courts over the crime of torture is a necessary condition for enabling a preliminary inquiry (Article 6, paragraph 2), and for submitting the case to its competent authorities for the purpose of prosecution (Article 7, paragraph 1). The purpose of all these obligations is to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the object and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts.

75. The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to co-ordinating their efforts to eliminate any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases. The Convention against Torture thus brings together 150 States which have committed themselves to prosecuting suspects in particular on the basis of universal jurisdiction.

76. The Court considers that by not adopting the necessary legislation until 2007, Senegal delayed the submission of the case to its competent authorities for the purpose of prosecution. Indeed, the Dakar Court of Appeal was led to conclude that the Senegalese courts lacked jurisdiction to entertain proceedings against Mr. Habré, who had been indicted for crimes against humanity, acts of torture and barbarity, in the absence of appropriate legislation allowing such proceedings within the domestic legal order (see paragraph 18 above). The Dakar Court of Appeal held that:

“the Senegalese legislature should, in conjunction with the reform undertaken to the Penal Code, make amendments to Article 669 of the Code of Criminal Procedure by including therein the offence of torture, whereby it would bring itself into conformity with the objectives of the Convention” (Court of Appeal (Dakar), Chambre d’accusation, Public Prosecutor’s Office and François Dionf v. Hissène Habré, Judgment No. 135, 4 July 2000).

This judgment was subsequently upheld by the Senegalese Court of Cassation (Court of Cassation, première chambre statuant en matière pé nale, Souleymane Guengeng et al. v. Hissène Habré, Judgment No. 14, 20 March 2001).
77. Thus, the fact that the required legislation had been adopted only in 2007 necessarily affected Senegal's implementation of the obligations imposed on it by Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

78. The Court, bearing in mind the link which exists between the different provisions of the Convention, will now analyse the alleged breaches of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.

A. The alleged breach of the obligation laid down in Article 6, paragraph 2, of the Convention

79. Under the terms of Article 6, paragraph 2, of the Convention, the State in whose territory a person alleged to have committed acts of torture is present "shall immediately make a preliminary inquiry into the facts".

80. Belgium considers that this procedural obligation is obviously incumbent on Senegal, since the latter must have the most complete information available in order to decide whether there are grounds either to submit the matter to its prosecuting authorities or, when possible, to extradite the suspect. The State in whose territory the suspect is present should take effective measures to gather evidence, if necessary through mutual judicial assistance, by addressing letters rogatory to countries likely to be able to assist it. Belgium takes the view that Senegal, by failing to take these measures, breached the obligation imposed on it by Article 6, paragraph 2, of the Convention. It points out that it nonetheless invited Senegal to issue a letter rogatory, in order to have access to the evidence in the hands of Belgian judges (see paragraph 30 above).

81. In answer to the question put by a Member of the Court concerning the interpretation of the obligation laid down by Article 6, paragraph 2, of the Convention, Belgium has pointed out that the nature of the inquiry required by Article 6, paragraph 2, depends to some extent on the legal system concerned, but also on the particular circumstances of the case. This would be the inquiry carried out before the case was transmitted to the authorities responsible for prosecution, if the State decided to exercise its jurisdiction. Lastly, Belgium recalls that paragraph 4 of this Article provides that interested States must be informed of the findings of the inquiry, so that they may, if necessary, seek the extradition of the alleged offender. According to Belgium, there is no information before the Court suggesting that a preliminary inquiry has been conducted by Senegal, and it concludes from this that Senegal has violated Article 6, paragraph 2, of the Convention.

82. Senegal, in answer to the same question, has maintained that the inquiry is aimed at establishing the facts, but that it does not necessarily lead to prosecution, since the prosecutor may, in the light of the results, consider that there are no grounds for such proceedings. Senegal takes the view that this is simply an obligation of means, which it claims to have fulfilled.

83. In the opinion of the Court, the preliminary inquiry provided for in Article 6, paragraph 2, is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. That inquiry is conducted by those authorities which have the task of drawing up a case file and collecting facts and evidence; this may consist of documents or witness statements relating to the events at issue and to the suspect's possible involvement in the matter concerned. Thus the co-operation of the Chadian authorities should have been sought in this instance, and that of any other State where complaints have been filed in relation to the case, so as to enable the State to fulfill its obligation to make a preliminary inquiry.

84. Moreover, the Convention specifies that, when they are operating on the basis of universal jurisdiction, the authorities concerned must be just as demanding in terms of evidence as when they have jurisdiction by virtue of a link with the case in question. Article 7, paragraph 2, of the Convention thus stipulates:

"In the cases referred to in Article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in Article 5, paragraph 1."

85. The Court observes that Senegal has not included in the case file any material demonstrating that the latter has carried out such an inquiry in respect of Mr. Habré, in accordance with Article 6, paragraph 2, of the Convention. It is not sufficient, as Senegal maintains, for a State party to the Convention to have adopted all the legislative measures required for its implementation; it must also exercise its jurisdiction over any act of torture which is at issue, starting by establishing the facts. The questioning at first appearance which the investigating judge at the Tribunal régional hors classe in Dakar conducted in order to establish Mr. Habré's identity and to inform him of the acts of which he was accused cannot be regarded as performance of the obligation laid down in Article 6, paragraph 2, as it did not involve any inquiry into the charges against Mr. Habré.

86. While the choice of means for conducting the inquiry remains in the hands of the States parties, taking account of the case in question, Article 6, paragraph 2, of the Convention requires that steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case. That provision must be interpreted in the light of the object and purpose of the Convention, which is to make more effective the struggle against torture. The establishment of the facts at issue, which is an essential stage in that process, became imperative in the present case at least since the year 2000, when a complaint was filed in Senegal against Mr. Habré (see paragraph 17 above).

87. The Court observes that a further complaint against Mr. Habré was filed in Dakar in 2008 (see paragraph 32 above), after the legislative and constitutional amendments made in 2007 and 2008, respectively, which were enacted in order to comply with the requirements of Article 5, paragraph 2, of the Convention (see paragraphs 28 and 31 above). But there is nothing in the materials submitted to the Court to indicate that a preliminary inquiry was opened following this second complaint. Indeed, in 2010 Senegal stated before the ECOWAS Court of Justice that no proceedings were pending or prosecution ongoing against Mr. Habré in Senegalese courts.
88. The Court finds that the Senegalese authorities did not immediately initiate a preliminary inquiry as soon as they had reason to suspect Mr. Habré, who was in their territory, of being responsible for acts of torture. That point was reached, at the latest, when the first complaint was filed against Mr. Habré in 2000.

The Court therefore concludes that Senegal has breached its obligation under Article 6, paragraph 2, of the Convention.

B. The alleged breach of the obligation laid down in Article 7, paragraph 1, of the Convention

89. Article 7, paragraph 1, of the Convention provides:

“The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”

90. As is apparent from the travaux préparatoires of the Convention, Article 7, paragraph 1, is based on a similar provision contained in the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970. The obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the “obligation to prosecute”) was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties’ judicial systems. These two conventions emphasize, moreover, that the authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the State concerned (Article 7, paragraph 2, of the Convention against Torture and Article 7 of the Hague Convention of 1970). It follows that the competent authorities involved remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure.

91. The obligation to prosecute provided for in Article 7, paragraph 1, is normally implemented in the context of the Convention Against Torture after the State has performed the other obligations provided for in the preceding articles, which require it to adopt adequate legislation to enable it to criminalize torture, give its courts universal jurisdiction in the matter and make an inquiry into the facts. These obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven. Belgium’s claim relating to the application of Article 7, paragraph 1, raises a certain number of questions regarding the nature and meaning of the obligation contained therein and its temporal scope, as well as its implementation in the present case.

1. The nature and meaning of the obligation laid down in Article 7, paragraph 1

92. According to Belgium, the State is required to prosecute the suspect as soon as the latter is present in its territory, whether or not he has been the subject of a request for extradition to one of the countries referred to in Article 5, paragraph 1 — that is, if the offence was committed within the territory of the latter State, or if one of its nationals is either the alleged perpetrator or the victim — or in Article 5, paragraph 3, that is, another State with criminal jurisdiction exercised in accordance with its internal law. In the cases provided for in Article 5, the State can consent to extradition. This is a possibility afforded by the Convention, and, according to Belgium, that is the meaning of the maxim "aut dedere aut judicare" under the Convention. Thus, if the State does not opt for extradition, its obligation to prosecute remains unaffected. In Belgium’s view, it is only if for one reason or another the State concerned does not prosecute, and a request for extradition is received, that that State has to extradite if it is to avoid being in breach of this central obligation under the Convention.

93. For its part, Senegal takes the view that the Convention certainly requires it to prosecute Mr. Habré, which it claims it has endeavoured to do by following the legal procedure provided for in that instrument, but that it has no obligation to Belgium under the Convention to extradite him.

94. The Court considers that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.

95. However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.

2. The temporal scope of the obligation laid down in Article 7, paragraph 1

96. A Member of the Court asked the Parties, first, whether the obligations incumbent upon Senegal under Article 7, paragraph 1, of the Convention applied to offences alleged to have been committed before 26 June 1987, the date when the Convention entered into force for Senegal, and, secondly, if, in the circumstances of the present case, those obligations extended to offences allegedly committed before 25 June 1999, the date when the Convention entered into force for Belgium (see paragraph 19 above). Those questions relate to the temporal application of Article 7, paragraph 1, of the Convention, according to the time when the offences are alleged to have been committed and the dates of entry into force of the Convention for each of the Parties.

97. In their replies, the Parties agree that acts of torture are regarded by customary international law as international crimes, independently of the Convention.
98. As regards the first aspect of the question put by the Member of the Court, namely whether the Convention applies to offences committed before 26 June 1987, Belgium contends that the alleged breach of the obligation aut dedere aut judicare occurred after the entry into force of the Convention for Senegal, even though the alleged acts occurred before that date. Belgium further argues that Article 7, paragraph 1, is intended to strengthen the existing law by laying down specific procedural obligations, the purpose of which is to ensure that there will be no impunity and that, in these circumstances, those procedural obligations could apply to crimes committed before the entry into force of the Convention for Senegal. For its part, the latter does not deny that the obligation provided for in Article 7, paragraph 1, can apply to offences allegedly committed before 26 June 1987.

99. In the Court’s opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens).

That prohibition is grounded in a widespread international practice and on the opinio juris of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora.

100. However, the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned. Article 28 of the Vienna Convention on the Law of Treaties, which reflects customary law on the matter, provides:

“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of that treaty with respect to that party.”

The Court notes that nothing in the Convention against Torture reveals an intention to require a State party to criminalize, under Article 4, acts of torture that took place prior to its entry into force for that State, or to establish its jurisdiction over such acts in accordance with Article 5. Consequently, in the view of the Court, the obligation to prosecute, under Article 7, paragraph 1, of the Convention does not apply to such acts.

101. The Committee against Torture emphasized, in particular, in its decision of 23 November 1989 in the case of O.R., M.M. and M.S. v. Argentina (Communications Nos. 1/1988, 2/1988 and 3/1988, decision of 23 November 1989, para. 7.5, Official Documents of the General Assembly, Forty-Fifth Session, Supplement No. 44 (UN doc. A/45/44, Ann. V, p. 112)) that “torture” for purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention”. However, when the Committee considered Mr. Habré’s situation, the question of the temporal scope of the obligations contained in the Convention was not raised, nor did the Committee itself address that question (Guengueng et al. v. Senegal (Communication No. 181/2001, decision of 17 May 2006, UN doc. CAT/C/36/D/181/2001)).

102. The Court concludes that Senegal’s obligation to prosecute pursuant to Article 7, paragraph 1, of the Convention does not apply to acts alleged to have been committed before the Convention entered into force for Senegal on 26 June 1987. The Court would recall, however, that the complaints against Mr. Habré include a number of serious offences allegedly committed after that date (see paragraphs 17, 19-21 and 32 above). Consequently, Senegal is under an obligation to submit the allegations concerning those acts to its competent authorities for the purpose of prosecution. Although Senegal is not required under the Convention to institute proceedings concerning acts that were committed before 26 June 1987, nothing in that instrument prevents it from doing so.

103. The Court now comes to the second aspect of the question put by a Member of the Court, namely, what was the effect of the date of entry into force of the Convention, for Belgium, on the scope of the obligation to prosecute. Belgium contends that Senegal was still bound by the obligation to prosecute Mr. Habré after Belgium had itself become party to the Convention, and that it was therefore entitled to invoke before the Court breaches of the Convention occurring after 25 July 1999. Senegal disputes Belgium’s right to engage its responsibility for acts alleged to have occurred prior to that date. It considers that the obligation provided for in Article 7, paragraph 1, belongs to “the category of divisible erga omnes obligations”, in that only the injured State could call for its breach to be sanctioned. Senegal accordingly concludes that Belgium was not entitled to rely on the status of injured State in respect of acts prior to 25 July 1999 and could not seek retroactive application of the Convention.

104. The Court considers that Belgium has been entitled, with effect from 25 July 1999, the date when it became party to the Convention, to request the Court to rule on Senegal’s compliance with its obligation under Article 7, paragraph 1. In the present case, the Court notes that Belgium invokes Senegal’s responsibility for the latter’s conduct starting in the year 2000, when a complaint was filed against Mr. Habré in Senegal (see paragraph 17 above).

105. The Court notes that the previous findings are also valid for the temporal application of Article 6, paragraph 2, of the Convention.

3. Implementation of the obligation laid down in Article 7, paragraph 1

106. Belgium, while recognizing that the time frame for implementation of the obligation to prosecute depends on the circumstances of each case, and in particular on the evidence gathered, considers that the State in whose territory the suspect is present cannot indefinitely delay performing the obligation incumbent upon it to submit the matter to its competent authorities for
The Court is of the opinion that the financial difficulties raised by Senegal cannot justify the fact that it failed to initiate proceedings against Mr. Habré. Nor can the financial difficulties invoked by Senegal (see paragraphs 28-29 and 33 above) justify the fact that it did not take the necessary steps to request that the ad hoc tribunal of an international character, the establishment of which would be more cumbersome.

The Court considers that Senegal's duty to comply with its obligations under the Convention, as set out in Article 7, paragraph 1, of the Convention, is intended to allow the fulfilment of the Convention's object and purpose, which includes the purpose of prosecution. Prosecution is required to achieve the purpose of the Convention, both by putting the rights of the victims and those of the accused into effect.

The Court finds that the obligation provided for in Article 7, paragraph 1, of the Convention requires the domestic authorities to exercise the universal jurisdiction provided for in paragraph 3, of that Convention, in the light of the object and purpose of the Convention. It is for that reason that proceedings should be undertaken without delay.

The Court notes that, in its final submissions, Belgium requests the Court to adjudge and declare, first, that Senegal breached its international obligations by failing to provide, in due time, the financial support necessary to institute proceedings against Mr. Habré; second, that Senegal breached its international obligations by failing to initiate proceedings against Mr. Habré; third, that Senegal breached its international obligations by failing to incorporate in due time into its legislation the provisions of Article 5, paragraph 2, of the Convention, which reflects customary law, in particular by invoking the decisions of its courts as to lack of jurisdiction rendered by its courts in 2000 and 2001, or the fact that it did not adopt the necessary legislation pursuant to Article 5, paragraph 4, of the Convention until 2007.

The Court notes that, in its final submissions, Belgium requests the Court to adjudge and declare, first, that Senegal breached its international obligations by failing to provide, in due time, the financial support necessary to institute proceedings against Mr. Habré; second, that Senegal breached its international obligations by failing to initiate proceedings against Mr. Habré; third, that Senegal breached its international obligations by failing to incorporate in due time into its legislation the provisions of Article 5, paragraph 2, of the Convention, which reflects customary law, in particular by invoking the decisions of its courts as to lack of jurisdiction rendered by its courts in 2000 and 2001, or the fact that it did not adopt the necessary legislation pursuant to Article 5, paragraph 4, of the Convention until 2007.
Torture, and that it has breached and continues to breach its international obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention by failing to bring criminal proceedings against Mr. Habré for the crimes he is alleged to have committed, or, otherwise, to extradite him to Belgium for the purposes of such criminal proceedings. Secondly, Belgium requests the Court to adjudge and declare that Senegal is required to cease these internationally wrongful acts by submitting without delay the “Hissène Habré case” to its competent authorities for the purpose of prosecution, or, failing that, by extraditing Mr. Habré to Belgium without further ado (see paragraph 14 above).

119. The Court recalls that Senegal’s failure to adopt until 2007 the legislative measures necessary to institute proceedings on the basis of universal jurisdiction delayed the implementation of its other obligations under the Convention. The Court further recalls that Senegal was in breach of its obligation under Article 6, paragraph 2, of the Convention to make a preliminary inquiry into the crimes of torture alleged to have been committed by Mr. Habré, as well as of the obligation under Article 7, paragraph 1, to submit the case to its competent authorities for the purpose of prosecution.

120. The purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State Party. The State in whose territory the suspect is present does indeed have the option of extraditing him to a country which has made such a request, but on the condition that it is to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him.

121. The Court emphasizes that, in failing to comply with its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, Senegal has engaged its international responsibility. Consequently, Senegal is required to cease this continuing wrongful act, in accordance with general international law on the responsibility of States for internationally wrongful acts. Senegal must therefore take without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré.

*  
*  

122. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which the Kingdom of Belgium submitted to the Court in its Application filed in the Registry on 19 February 2009;

(2) By fourteen votes to two,

Finds that it has no jurisdiction to entertain the claims of the Kingdom of Belgium relating to alleged breaches, by the Republic of Senegal, of obligations under customary international law;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; Judge ad hoc Kirsch;

AGAINST: Judge Abraham; Judge ad hoc Sur;

(3) By fourteen votes to two,

Finds that the claims of the Kingdom of Belgium based on Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 are admissible;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Donoghue, Gaja, Sebutinde; Judges ad hoc Sur, Kirsch;

AGAINST: Judges Yusuf, Xue;

(4) By fourteen votes to two,

Finds that the Republic of Senegal, by failing to make immediately a preliminary inquiry into the facts relating to the crimes allegedly committed by Mr. Hissène Habré, has breached its obligation under Article 6, paragraph 2, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Greenwood, Donoghue, Gaja, Sebutinde; Judges ad hoc Sur, Kirsch;

AGAINST: Judges Yusuf, Xue;

(5) By fourteen votes to two,

Finds that the Republic of Senegal, by failing to submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, has breached its obligation under Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Donoghue, Gaja, Sebutinde; Judge ad hoc Kirsch;

AGAINST: Judge Xue; Judge ad hoc Sur;
(6) Unanimously, 

Finds that the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twentieth day of July, two thousand and twelve, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Kingdom of Belgium and the Government of the Republic of Senegal, respectively.

(Signed) Peter Tomka,
President.

(Signed) Philippe Couvreur,
Registrar.

Judge Owada appends a declaration to the Judgment of the Court; Judges Abraham, Skotnikov, Cançado Trindade and Yusuf append separate opinions to the Judgment of the Court; Judge Xue appends a dissenting opinion to the Judgment of the Court; Judge Donoghue appends a declaration to the Judgment of the Court; Judge Sebutinde appends a separate opinion to the Judgment of the Court; Judge ad hoc Sur appends a dissenting opinion to the Judgment of the Court.

(Initialled) P. T.

(Initialled) Ph. C.
International Court of Justice

Separate Opinion of Judge Abraham, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)
Judgment of 20 July 2012
SEPARATE OPINION OF JUDGE ABRAHAM

[Translation]

Jurisdiction of the Court to entertain that part of Belgium's claim relating to obligations arising from customary international law — Existence of a dispute in that connection on the day of delivery of the Judgment — Lack of any rule of customary international law requiring Senegal to prosecute Mr. Hissène Habré before its courts for war crimes, crimes against humanity and the crime of genocide — Belgium's claim in that regard unfounded:

1. In this Judgment, the Court rules on the merits of only one part of Belgium's submissions, namely that relating to Senegal’s breach of its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter “the Convention”).

After upholding its jurisdiction over that part of the Application (point 1 of the operative clause) and declaring the Application admissible in that regard (point 3 of the operative clause), the Court finds that Senegal has breached its conventional obligations (points 4 and 5 of the operative clause) and draws the appropriate conclusions, namely that Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him (point 6 of the operative clause).

2. I have voted in favour of all of those points of the operative clause. I approve not only of the conclusions reached by the Court on those various issues but also of the essence of the reasoning followed to reach them, even though I think that the Judgment’s reasoning, in respect of a number of the points considered, would have benefited from being less succinct.

3. However, Belgium did not confine itself to reproaching Senegal with having breached its conventional obligations. The Applicant also contended that Senegal was required to prosecute Mr. Hissène Habré before its courts — unless it extradited him — for acts which could be characterized as war crimes, crimes against humanity and genocide and which do not come within the scope 

ratione materiae of the Convention against Torture. In support of that claim, Belgium invoked customary international law, which, it argued, required Senegal to “prosecute or extradite” any person suspected of having committed acts coming within the categories thus defined.

4. The Court has declared that it lacks jurisdiction to hear that part of Belgium’s Application, despite the fact that the Applicant, in order to found the jurisdiction of the Court, invoked not only Article 30 of the Convention — which could clearly only constitute a valid basis for the Court’s jurisdiction in respect of those submissions relating to the alleged breach of conventional obligations — but also the optional declarations made by the two Parties under Article 36, paragraph 2, of the Statute of the Court, which are general in scope. Hence the Judgment makes no substantive ruling on Belgium’s claims relating to Senegal’s alleged breach of its obligations under customary international law.

5. It is on this point that I have regretfully been obliged to dissociate myself from the majority of my colleagues.

In my view, the Court should have ruled that it has jurisdiction to entertain the Applicant’s submissions relating to customary international law (I). However, I do not think that the Court should have upheld those submissions on the merits: in my opinion, it should have dismissed them as unfounded (II).

I. The Court should have ruled that it has jurisdiction to entertain the Applicant’s submissions based on customary international law

6. In point 2 of the operative clause, the Court

“Finds that it has no jurisdiction to entertain the claims of the Kingdom of Belgium relating to alleged breaches of obligations under customary international law.”

I cannot support that finding, for the reasons which I set out below.

7. The reason why the Court thus declined jurisdiction is set forth in paragraph 55 of the Judgment: “[A]t the time of the filing of the Application, the dispute between the Parties did not relate to breaches of obligations under customary international law.” The conclusion the Court draws is that it has no jurisdiction to decide on the claim set out by Belgium in point 1 (b) of its final submissions (cited in paragraph 14 of the Judgment), because that claim refers to Senegal’s
alleged obligations under customary international law concerning the criminal proceedings which Senegal has alleged it has breached. Belgium has argued that Senegal’s alleged breach of its obligations under customary international law is not a dispute between the Parties and that the Court therefore lacks jurisdiction over the matter. Belgium has pointed out that Senegal has not initiated any criminal proceedings against Mr. Hissène Habré, the alleged perpetrator of the crimes, and that Senegal has not taken any steps to extradite Mr. Habré to Belgium, where he is charged with violating the terms of the African Charter on Human and Peoples’ Rights.

8. I do not dispute the validity of several of the elements of this reasoning. Firstly, it is clear that “the existence of a dispute is a condition of its jurisdiction under both bases of jurisdiction, as indicated in Article 34, paragraph 2, of the Statute of the Court.” Belgium has correctly pointed out that Senegal’s conduct does not constitute a breach of its obligations under customary international law and that there is no dispute between the Parties over Senegal’s alleged failure to comply with these obligations.

9. Secondly, if there is no dispute between the Parties, the Court has no jurisdiction over the matter. Belgium has argued that Senegal’s alleged breach of its obligations under customary international law is not a dispute between the Parties and that the Court therefore lacks jurisdiction over the matter. Belgium has pointed out that Senegal has not initiated any criminal proceedings against Mr. Hissène Habré, the alleged perpetrator of the crimes, and that Senegal has not taken any steps to extradite Mr. Habré to Belgium, where he is charged with violating the terms of the African Charter on Human and Peoples’ Rights.

10. Finally, I can also concur with the finding that, on the date of the present Judgment, a dispute does indeed exist between the Parties regarding the application of customary international law in the present case. Belgium has argued that its conduct to date entails no breach by it of that obligation, for essentially the same reason as those advanced by it in its argument that it was not in breach of its obligation to protect persons from inhuman treatment or torture.

11. My disagreement with the Judgment centres on the fact that the Court confines itself to the situation that prevailed “at the time of the filing of the Application” and refuses to take account of the present situation, as it emerges from the exchanges between the Parties during the judicial proceedings. It is quite certain that, on the date of the present Judgment, a dispute does indeed exist between the Parties regarding the application of customary international law in the present case. Belgium has argued that its conduct to date entails no breach by it of that obligation, for essentially the same reason as those advanced by it in its argument that it was not in breach of its obligation to protect persons from inhuman treatment or torture.

12. However, it is quite certain that, on the date of the present Judgment, a dispute does indeed exist between the Parties regarding the application of customary international law in the present case. Belgium has argued that its conduct to date entails no breach by it of that obligation, for essentially the same reason as those advanced by it in its argument that it was not in breach of its obligation to protect persons from inhuman treatment or torture.
whereas the dispute relating to customary law only became apparent during their exchanges before
the Court.

13. It follows from the above that the crucial question is which date is to be taken in order to
determine the existence of a dispute between the Parties.

14. As a general rule, the conditions governing the jurisdiction of the Court must be fulfilled
on the date when the Application is filed. However, the Court has, for a very long time, shown
reasonable flexibility by accepting that a condition that was initially lacking could be met in the
course of the proceedings, and that if all the conditions for its jurisdiction were fulfilled at
the start of the proceedings, the Court should therefore ascertain whether they had been fulfilled on the
date of its Judgment. This line of case law, which began with the celebrated Mavrommatis
Palestine Concessions case, was confirmed and even extended by the obligation to state reasons,
which was adopted as a matter of principle in the Judgment on the Preliminary Objections in the
Croatia v. Serbia case, in which the Court stated:

“...the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially
unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew — or to initiate fresh proceedings — and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled.” (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 441, para. 85.)

15. It is true that, more recently, in its Judgment in the Georgia v. Russian Federation case
(Judgment of 1 April 2011), the Court referred to the date when the Application was filed in order
to determine whether the condition relating to the existence of a dispute had been met. However,
in that case it found that the condition had indeed been met on the date in question (Application of
the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v.
Russian Federation), Preliminary Objections, Judgment of 1 April 2011, p. 47, para. 113).

16. The Court therefore had no need, in that case, to settle the question of which solution it
should have adopted if the dispute, which had not existed on the date when the Application was
filed, had been clearly constituted on the date of the Judgment. In my opinion, the Georgia v.
Russian Federation precedent does not therefore represent a departure from the former
jurisprudence of the Court.

Moreover, the Court, very prudently, indicated in its statement of reasons, before moving on
to consider specifically the exchanges between Georgia and the Russian Federation, that “[t]he
dispute must in principle exist at the time the Application is submitted to the Court” (ibid., p. 16;
para. 30; emphasis added).

17. It is also true that in the same case, in order to assess whether the requirement for the
Parties to attempt a negotiated settlement of the dispute had been met, the Court referred to the date
of its seisin (ibid., p. 54, para. 141). However, this in fact had no bearing on the solution, since in
the opinion of the Court’s majority — which I did not share — Georgia had never attempted to
engage in negotiations with Russia with a view to resolving their dispute concerning the application of
the International Convention on the Elimination of All Forms of Racial Discrimination, and that
assessment would undoubtedly have been the same for the periods before and after the seisin of the
Court.

18. In the present Judgment, the Court goes a particularly clear step further in the formalistic
approach to the condition relating to the existence of a dispute: this is the first time in the Court’s
entire jurisprudence that it has declined to hear one part of a case on the basis of the lack of a
dispute between the Parties, even though the dispute clearly exists on the date of the Court’s
Judgment and was apparent in the proceedings before the Court. One may wonder what the extent
now is of the position of principle set out by the Court in the Judgment on Preliminary Objections
in the Croatia v. Serbia case. I regret to note that the series of recent judgments does not convey a
great impression of consistency.

19. Let me mention one additional factor which distinguishes the present case from the
Georgia v. Russian Federation precedent and which makes the extremely formalistic solution
adopted here by the Court even more surprising. Whereas the Russian Federation had explicitly
invoked, as grounds of inadmissibility, the lack of a dispute between the Parties crystallized on
date when the Application was filed, Senegal has done nothing of the kind in the present case. It did indeed assert that there was no justiciable dispute before the Court, but not at all for the reasons adopted by the Court in support of point 2 of the operative clause. Senegal’s argument was, in substance, that there was no dispute between it and Belgium in respect of any aspect of the Applicant’s submissions — whether that part relating to conventional obligations or that part based on customary law — for the reason (which applies to the case as a whole) that the Parties did not disagree on the existence and scope of the obligations that were invoked and that the Respondent was making every possible effort to perform those obligations. This argument has no weight, as the Court has found in respect of that part of the submissions relating to conventional law; it should also have been rejected in respect of that part relating to customary law. Thus, the Court has raised ex officio the ground that the dispute relating to compliance with customary obligations did not exist on the date when the Application was filed, since Belgium had failed to address this issue in its previous diplomatic exchanges with Senegal.

20. I do not think that I need address here the procedural question of whether the Court could raise such a ground ex officio — without even notifying Belgium beforehand. For the reasons discussed above, I believe that the Court should simply have noted that a dispute between the Parties as regards compliance with customary international law existed on the date of its Judgment.

II. The Court should have dismissed as ill-founded the Applicant’s submissions relating to the alleged breach of obligations under customary international law

21. Although I disagree with the Judgment in respect of the issue of jurisdiction, as I have just described, I do not believe that the Court should have upheld Belgium’s claims based on customary law. Indeed, in my opinion, there is no rule of customary international law requiring Senegal to prosecute Mr. Habré before its courts, either for the acts of torture, or complicity in torture, that are alleged against him — in that connection, there is indeed an obligation, but it is purely conventional — or for war crimes, crimes against humanity and the crime of genocide, which do not come within the scope of the Convention against Torture — in that regard there is, at present, no obligation under international law.

22. It is true that neither in the written proceedings nor in its oral argument did Senegal dispute the existence of an obligation which, under customary international law, would require it to prosecute Mr. Habré for criminal acts in the above-mentioned categories. But it is clear that if the Court had also accepted jurisdiction over this part of the case — as I believe it should have done — it would have been obliged to rule ex officio on the existence of the rules of customary law which Belgium claimed had been breached. As these are rules which, if they existed, would have universal scope, it stands to reason that it is not sufficient for the two Parties before the Court to agree on the existence of those rules, and, where appropriate, their scope, for the Court to register that agreement and to apply the alleged rules in question. It is for the Court alone to say what the law is and to do so, if necessary, ex officio — even if it is, in fact, somewhat unusual for it to find itself in such a situation.

23. In the present case, the Court found itself in a situation where it could have performed that function, as a result of one of the very many questions put by judges to the Parties at the end of the first round of oral argument.

24. The question was put by my esteemed colleague Judge Greenwood, who, in essence, asked Belgium to demonstrate: (i) that there is State practice in respect of the jurisdiction of domestic courts over war crimes and crimes against humanity when the alleged offences occurred outside the territory of the State in question and when neither the alleged offender nor the victims were nationals of that State; and (ii) that States consider that they are required, in such cases, to prosecute the alleged perpetrator of the offence before their own courts, or to extradite him.

25. The responses given by Belgium, initially during the second round of oral argument and later in a written document, do not come close to establishing the existence of a general practice and an opinio juris which might give rise to a customary obligation upon a country such as Senegal to prosecute a former foreign leader before its courts for crimes such as those of which Mr. Hissène Habré stands accused, unless it extradites him.
26. Let me begin by clarifying the subject-matter of the question that was before the Court in the present case, by distinguishing it from those which the Court, in any event, was not called upon to decide.

27. The Court was not called upon to determine whether the prohibition on acts of torture and other “international crimes” (a phrase I use for convenience, although I doubt its legal relevance), as laid down in the Convention against Torture and in various other multilateral treaties, is of a customary nature and accordingly applies even outside any conventional obligations. The answer is certainly in the affirmative, but that is not the question directly posed by Belgium’s claim in the present case: Senegal has never been reproached with having committed, encouraged or facilitated such crimes. With regard to the prohibition on torture, the Judgment states (para. 99) that it is part of customary law and that it has even become a peremptory norm (jus cogens), but that is clearly a mere obiter dictum, which the Court could have omitted without depriving its reasoning of any vital element.

28. Nor did the Court have to decide whether customary law requires a State to prosecute individuals suspected of having committed crimes of the kind that are alleged here when those persons have the nationality of the State concerned, or when those crimes have been committed in that State’s territory. Mr. Hissène Habré is not Senegalese, and the crimes of which he is suspected were not committed in Senegal. Thus the question of whether there exists in customary law an obligation upon States to exercise “territorial” jurisdiction or “active personal” jurisdiction for the purposes of punishing “international crimes” did not arise in the present case.

29. Nor did the Court have to determine whether there exists a customary obligation for a State to give its courts “passive personal jurisdiction”, that is to say, a title of jurisdiction enabling them to try the alleged perpetrators of “international crimes” when the victim has the nationality of the State concerned. The reply is very probably negative: even the Convention against Torture does not require States parties to give themselves such “passive personal jurisdiction”, since Article 5 (1) (c) only provides for such jurisdiction where the State party “considers it appropriate”. But in any event, the question did not arise in the present case.

30. Finally, and this point deserves particular mention, the present case did not require the Court to determine — in any event not directly — whether customary international law enables States to provide their courts with universal jurisdiction over war crimes, crimes against humanity and the crime of genocide. In that regard, it may be contrasted with the DRC v. Belgium precedent, in which that issue was raised by the Applicant before subsequently being dropped (case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3). In fact, Belgium does not reproach Senegal with exercising universal criminal jurisdiction, but on the contrary with failing to exercise it, whereas, according to the Applicant, international law requires it do so. Consequently, the controversial issue of the legality of universal jurisdiction in international law (see on this point, in particular, the separate opinion of President Guillaume appended to the Judgment in the case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 35) did not arise directly in the present case. Only if the Court had found that international law required States to establish universal criminal jurisdiction over the categories of offences in question would it have ruled, a fortiori, in respect of the legality of such jurisdiction.

If, however, while examining the merits of the case, the Court had found that there is no rule of customary law requiring States to give themselves universal criminal jurisdiction, such a finding would have left entirely open the (separate) question of the legality of universal jurisdiction.

31. The question which the Court could not have avoided answering directly, had it accepted jurisdiction as I believe it should have done, is therefore the following: is there sufficient evidence, based on State practice and opinio juris, of a customary obligation for States to prosecute before their domestic courts individuals suspected of war crimes or crimes against humanity (which presupposes that they have provided their courts with the necessary jurisdiction), when there is no connecting link between the alleged offence and the forum State, that is to say, when the offence was committed outside the territory of that State and neither the offender nor the victim were nationals of that State?

32. In my opinion, the answer to that question is very clearly and indisputably no, regardless of whether or not the suspect is present in the territory of the State in question.
33. Belgium, in response to the question put by the Court, did indeed endeavour to demonstrate that such an obligation exists. However, it fell far short of doing so.

34. In a written document produced in reply to the above-mentioned question, Belgium supplied a list of States having incorporated into their domestic law provisions giving their courts “universal jurisdiction” to try war crimes committed in the course of a non-international conflict, which is the case of the crimes of which Mr. Hissène Habré is accused, and crimes against humanity (or certain of those crimes). It found a total of 51. Among those States, some of them make the exercise of such jurisdiction subject to the presence of the suspect in their territory, while others do not, but the list draws no distinction between the two cases.

35. Nevertheless, the information thus provided is quite insufficient to establish the existence of a customary obligation to prosecute the perpetrators of such crimes on the basis of universal jurisdiction, even when limited to the case where the suspect is present in the territory of the State concerned.

And this is for three reasons.

36. In the first place, the States in question represent only a minority within the international community, which is in any event insufficient to establish the existence of a universal customary rule.

37. Secondly, some of those States may have adopted such legislation on the basis of a particular interpretation of their conventional obligations, for example those under conventions of international humanitarian law regarding war crimes. Apart from the fact that such an interpretation is not universally shared, since other States parties to the same conventions have not taken similar action, such an approach does not demonstrate the existence of an opinio juris, that is to say, a belief that there exists an obligation to establish “universal jurisdiction” outside of any conventional obligations.

38. Thirdly and finally, certain States among the 51 — and probably many of them — may have decided to extend the jurisdiction of their courts over the crimes in question on the basis of a purely unilateral choice and sovereign decision, without in any sense believing that they were required to do so by some international obligation, whether conventional or customary — but solely in the belief that international law entitled them to do so. Here again, the “opinio juris” is lacking.

39. Let me take France, for example, which is included in the “List of 51”, and with which I am well acquainted. In the area which interests us here, France has only given its courts “universal” jurisdiction, that is to say, without any link to where the crime was committed or to the nationality of the perpetrator or the victim, in three instances: (1) for acts of torture; (2) for crimes covered by the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); and (3) for crimes within the jurisdiction of the International Criminal Court (ICC) if the alleged offender usually resides in France. In the first case, France acted in accordance with its conventional obligations deriving from its status as party to the Convention against Torture. In the other two cases it adopted those provisions of its own free and sovereign choice, without considering as far as it was itself concerned — or asserting in relation to others — that States were required to do so.

The presence of France on the list prepared by Belgium, while not erroneous, is thus not an argument for the recognition of a customary international obligation, and doubtless the same could be said for many of the other States on the list.

40. Belgium itself at present no longer claims that it exercises universal jurisdiction, as a general rule, over “international crimes”. Since the provisions of its Code of Criminal Procedure relating to the jurisdiction of its courts were radically modified by the Law of 5 August 2003, Belgium no longer provides those courts with jurisdiction over war crimes and crimes against humanity, except in those cases where it is required to do so under an international legal obligation; in principle, it requires a territorial or personal connection between the alleged crime and itself, a link which must normally exist on the date of the crime or, at the very least, that the suspect should have his principal residence in the territory of the Kingdom. The reason why the Belgian courts continue to investigate the complaints against Mr. Hissène Habré regarding acts other than those which could be characterized as acts of torture is that those complaints were made at a time when
Belgian legislation did provide for universal jurisdiction, and because of the transitional provisions of the Law of 5 August 2003; while withdrawing universal jurisdiction almost completely for the future, the latter provided that certain pending proceedings which had been instituted on the basis of the previous legislation would not be affected by that withdrawal.

* * *

41. In conclusion, I am sure that the claims submitted to the Court by Belgium on the basis of customary international law were, in any event, bound to fail.

The Court’s refusal to find that it has jurisdiction in that regard has therefore not deprived Belgium of a success which, in any case, it could not have obtained.

(Signed) Ronny ABRAHAM.