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STUDY MATERIALS
PART V

Codification Division of the United Nations Office of Legal Affairs

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DIRECT STATE RESPONSIBILITY

INDIRECT STATE RESPONSIBILITY/ DIPLOMATIC PROTECTION

PROFESSOR ERIKA DE WET

Codification Division of the United Nations Office of Legal Affairs

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Mrs. Erika de Wet (South Africa) completed her B Iur and LLB as well as her LLD at the University of the Free State (South Africa). She holds an LLM from Harvard University and completed her Habilitationsschrift at the University of Zurich (Switzerland) in December 2002.

Professor de Wet joined the University of Pretoria in January 2011 as Professor of International Law and Co-Director of the Institute for International and Comparative Law in Africa. Between 2004 and 2010 she was tenured Professor of International Constitutional Law at the Amsterdam Center for International Law, University of Amsterdam, a position which she still holds part-time. She lectures in international law at the University of Zurich (Switzerland) and the University of Bonn (Germany) on a regular basis. Between 2007 and 2010 she served as a member of the Advisory Committee on Issues of Public International Law of the Netherlands.

Together with Professor André Nollkaemper, Erika de Wet is Editor in Chief of the Oxford Reports on International Law in Domestic Courts (ILDC) Online; she is also one of the General Editors of the Oxford Constitutions Online, with Professors Rüdiger Wolfrum and Rainer Grote of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany.
Direct State Responsibility

Professor Erika de Wet

Legal instruments and documents


Case Law


   For text, see Study Materials Part IV, Peaceful Settlement of Disputes


7. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Merits, International Court of Justice, Judgment of 20 July 2012
   For text, see Study Materials Part I, Introduction to International Law


9. *Noble Ventures, Inc. v. Romania*, Award, ICSID Case No. ARB/01/11, 12 October 2005


Indirect State Responsibility/Diplomatic Protection

Professor Erika de Wet

Legal instruments and documents

Case Law

2. *Nottebohm (Liechtenstein v. Guatemala), Second Phase, Judgment, I.C.J. Reports* 1955, p. 4

3. *Interhandel (Switzerland v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports* 1959, p. 6


Draft articles on responsibility of States for internationally wrongful acts (with commentaries), *Yearbook of the International Law Commission, 2001, Vol. II, Part Two*
NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the Yearbook of the International Law Commission are abbreviated to Yearbook ..., followed by the year (for example, Yearbook ... 2000).

The Yearbook for each session of the International Law Commission comprises two volumes:
- Volume I: summary records of the meetings of the session;
- Volume II (Part One): reports of special rapporteurs and other documents considered during the session;
- Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the Yearbook issued as United Nations publications.
Chapter 1

Responsibility of States for Internationally Wrongful Acts


Every internationally wrongful act of a State entails responsibility of that State.

(a) Article 1 applies only to internationally wrongful acts, that is, to the acts of States which are attributable to the State under international law.

(b) This article is to be read in conjunction with articles 2-4, which specify the conditions under which the act is attributable to the State and which delimit the notion of internationally wrongful act.

(c) The term "international responsibility" covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.

(d) Part One defines the general conditions necessary for a State to be responsible for an internationally wrongful act. Chapter I lays down the conditions for an internationally wrongful act to be attributed to a State (armes, 2-4), and the consequences of a State being considered responsible (5-8).

(e) The role of international law in determining the responsibility of a State is illustrated by the following examples:

(1) the right and the content of the obligation imposed by an internationally wrongful act;

(2) the rights and obligations of the other States whose internationally wrongful acts caused the injury; and

(3) the rule of international law governing the use of international conciliation in the form of a request for an advisory opinion or a judicial decision.

(f) Responsibility is the result of the breach of an international obligation. It is a consequence of a internationally wrongful act. It is the principle by which international responsibilities are determined.

(g) The rules governing the international responsibility of States are not limited to breaches of obligations of a bilateral character. They cover all international obligations, whether general or specific, whether of a general or particular nature.

(h) The principles governing the international responsibility of States are applicable to the articles as a whole. This is the province of the secondary rules of State responsibility: that is to say, the general conditions under which a State may be considered responsible for wrongful actions or omissions, whose codification would involve restating most of the substantive customary and conventional international law. This is made clear by article 55.

(i) The articles do not attempt to define the content of the international obligations, the breach of which gives rise to international responsibility. The articles do not deal with the question whether and for how long a particular primary rule, or its interpretation. The same is true, for example, of the contracts in force for that State and with respect to which provisions apply in the end of the primary rule (e.g. the right of the other States to take whatever measures they consider necessary to ensure the execution of the wrong and redress for its consequences. In principle, States are responsible for their internationally wrongful acts as such.

(j) Given the existence of a primary rule establishing an international obligation, the question arises as to whether that State has breached that rule. This is the material breach of international law. The articles deal only with the responsibility for the internationally wrongful act.

(k) The concept of international responsibility involves international responsibility. For example, in the Corfu Channel case, the ICJ has applied the principle on several occasions, for example in the Case (Grand Ducal Estates of Guadeloupe and Martinique v. France, 1923), and in the Case (United States v. France, 1928). The Court also referred to the principle in its advisory opinion on Reparation for Injuries Suffered in the Service of the Peaceful Uses of the Sea Beyond Contiguous Territorial Waters, I.C.J. Reports 1982, para. 21.

(l) On the other hand, the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character. They cover all international obligations, whether general or specific, whether of a general or particular nature.
(a) Any international wrongful act of a State constitutes a breach of an international legal obligation of that State. A breach of an international obligation means each of the following:

1. A wrongful act. A wrongful act consists of an act, omission or failure to make a required act that is internationally wrongful. A wrongful act is internationally wrongful if it entails a legal obligation to refrain from acts of a specified kind and the actor had reason to believe that his conduct was in violation of an internationally wrongful act.

2. An international legal relation. An international legal relation is a relation arising from an international wrongful act of a State or from any other source of international law, whether it involves a legal provision or obligation, or any other source of international law, whether it involves a legal provision or obligation.

3. An international legal personality. An international legal personality is a status recognized by international law which is to be attributed to a State, and which enables it to exercise certain rights and perform certain duties in the international legal order.

(b) The international legal personality of a State consists in:

1. Recognition by the international community. Recognition by the international community means that a State is recognized as a separate political entity by other States and that it is thus entitled to exercise certain rights and perform certain duties in the international legal order.

2. Application of the law. Application of the law means that a State is subject to the law of other States and that it is thus entitled to exercise certain rights and perform certain duties in the international legal order.

(c) The international legal personality of a State is derived from the following:

1. Recognition by the international community. Recognition by the international community means that a State is recognized as a separate political entity by other States and that it is thus entitled to exercise certain rights and perform certain duties in the international legal order.

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3. Recognition by the international community. Recognition by the international community means that a State is recognized as a separate political entity by other States and that it is thus entitled to exercise certain rights and perform certain duties in the international legal order.

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4. Application of the law. Application of the law means that a State is subject to the law of other States and that it is thus entitled to exercise certain rights and perform certain duties in the international legal order.

5. Recognition by the international community. Recognition by the international community means that a State is recognized as a separate political entity by other States and that it is thus entitled to exercise certain rights and perform certain duties in the international legal order.

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6. Application of the law. Application of the law means that a State is subject to the law of other States and that it is thus entitled to exercise certain rights and perform certain duties in the international legal order.
Article 3. Characterization of an act of a State internationally wrongful

The characterization of an act of a State internationally wrongful is not affected by the characterization of the same act as lawful by internal law.

Commentary

(1) Article 3 makes it plain that the characterization of the act of a State internationally wrongful is an international legal characterization, and not simply a characterization of the act as being unlawful according to the law of the State where it is alleged that the State is responsible. The act of the responsible State that is complained of must be characterized as internationally wrongful according to the generally applicable rules of international law.

(2) The question is which persons are responsible for the internationaIly wrongful act. The internal law is relevant in this respect, and in practice the internal law is also relevant for what constitutes an internationally wrongful act. However, the characterization of the act as internationally wrongful is made independent of any reference to such an internal law by the use of the term "international" in article 3. Therefore, any question of the characterization of an act as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law. In other cases, article 3 does not apply. For example, the law of the State concerned in the case of the International Court of Justice concerning the United States Diplomatic and Consular Staff in Tehran has no effect on the question of the characterization of the act of a State that makes, independently of any laws, a breach of an obligation.

(3) The question is whether the act of the State is internationally wrongful. The characterization of the act as internationally wrongful is a characterization of the act itself. The act of the State is characterized as internationally wrongful when it is internationally wrongful. The characterization of the act as internationally wrongful is not affected by the characterization of the same act as lawful by international law. In other cases, article 3 does not apply. For example, the law of the State concerned in the case of the International Court of Justice concerning the United States Diplomatic and Consular Staff in Tehran has no effect on the question of the characterization of the act of a State that makes, independently of any laws, a breach of an obligation.

(4) For example, the act of a State cannot be characterized as internationally wrongful if the act is characterized as valid by the laws of the State of the conduct of the act of the State. The term "international" in article 3.1 Article 3.2 makes it plain that the characterization of the act of a State internationally wrongful is an international legal characterization, and not simply a characterization of the act as being unlawful according to the law of the State where it is alleged that the State is responsible. The act of the responsible State that is complained of must be characterized as internationally wrongful according to the generally applicable rules of international law.

(5) The question is which persons are responsible for the interationaly wrongful act. The internal law is relevant in this respect, and in practice the internal law is also relevant for what constitutes an internationally wrongful act. However, the characterization of the act as internationally wrongful is made independent of any reference to such an internal law by the use of the term "international" in article 3. Therefore, any question of the characterization of an act as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law. In other cases, article 3 does not apply. For example, the law of the State concerned in the case of the International Court of Justice concerning the United States Diplomatic and Consular Staff in Tehran has no effect on the question of the characterization of the act of a State that makes, independently of any laws, a breach of an obligation.

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tional judicial decisions leave no doubt on that subject. In particular, PCIJ expressly recognized the principle in its first Judgment. In the S.S. "Baltimore" case. The Court rejected the argument of the German Government that the passage of the ship through the Kiel Canal would have constituted a violation of the German neutrality orders, adding: "neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace; ... See, e.g., Le Grand (Germany v. United States of America), Provisional Award, I.C.J. Reports 1989, p. 15, at para. 73.

In their replies, States agreed expressly or implicitly with this principle. For example, in the Hague Conference on the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, vol. III. Responsibility of States for internationally wrong acts (article 34), ccased to be their Territory to the Brahman or Proper of the river itself), (document C.75.M.69.1929 V), p. 16. During the debate at the 1930 Hague Conference, States expressed general approval of the idea embodied in point I and the Third Committee of the Conference adopted article 5 to the effect that "a State cannot avoid international responsibility by invoking the state of its municipal law" (document M.145c) 1930 V, reproduced in Yearbook ... vol. II, p. 225, 226; and Peace (yearbook of international law), vol. XXIV, p. 226, 227, Para. 2138, 2139. See also: "a State cannot avoid international responsibility by invoking the state of its municipal law" (document M.145c) 1930 V, reproduced in Yearbook ... vol. II, p. 225, 226; and Peace (yearbook of international law), vol. XXIV, p. 226, 227, Para. 2138, 2139.

In fact, the fact that an act of a public authority may have been unlawful in municipal law cannot mean that it was also unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an action was unlawful will be relevant to an argument that it was also arbitrary, but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. Nor does it follow from a finding by a municipal court that a State was unlawful to make an argument, if unsupported by relevant international law, that compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes international law the standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard. Therefore, the same act as lawful in internal law as a breach of treaty or otherwise. A finding by a municipal court that a State was unlawful will be relevant to an argument that it was also arbitrary, but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. Nor does it follow from a finding by a municipal court that a State was unlawful to make an argument, if unsupported by relevant international law, that compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes international law the standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.

(4) ICJ has often referred to and applied the principle. For example, in the Shufeldt Claim, the Court referred to the "national law", which in some legal systems refers only to domestic law of a State, but may not exclude provisions that are constitution or in laws as an excuse for failure to perform this duty.

(5) Similarly this principle was endorsed in the 1969 Vienna Convention, article 27 of which provides that:

A party may invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

(6) Similarly this principle was endorsed in the 1969 Vienna Convention, article 27 of which provides that:

A party may invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of conduct as lawful or unlawful in internal law, as a breach of treaty or otherwise. A finding of the local courts that an action was unlawful will be relevant to an argument that it was also arbitrary, but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. Nor does it follow from a finding by a municipal court that a State was unlawful to make an argument, if unsupported by relevant international law, that compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes international law the standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.

(8) As regards the wording of the rule, the formulation "The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law", which is similar to article 5 of the draft adopted on first reading at the 1930 Hague Conference and also to article 27 of the 1969 Vienna Convention, has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility. On the other hand, if a formulation such as: "under Article 78 of the Treaty of Peace, the conduct of any person who has been given special powers or instructions by that State is to be considered as the conduct of the State" is used, it is a generally accepted principle of international law that in the relation between a State and an individual, the general standard of behavior or the basis of the international obligation on the part of the Member held responsible is that of the individual. This was established, for example, in the Telișu case of 1923. The Council of the League of Nations referred to a Special Commission of Jurists certain questions arising from an incident between Italy and Greece. In reply to question five, the Commission stated that:

"The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law", which is similar to article 5 of the draft adopted on first reading at the 1930 Hague Conference and also to article 27 of the 1969 Vienna Convention, has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility. On the other hand, if a formulation such as: "under Article 78 of the Treaty of Peace, the conduct of any person who has been given special powers or instructions by that State is to be considered as the conduct of the State" is used, it is a generally accepted principle of international law that in the relation between a State and an individual, the general standard of behavior or the basis of the international obligation on the part of the Member held responsible is that of the individual. This was established, for example, in the Telișu case of 1923. The Council of the League of Nations referred to a Special Commission of Jurists certain questions arising from an incident between Italy and Greece. In reply to question five, the Commission stated that:

The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has recognized the responsibility of another State for such a crime by ratification of the relevant international convention relating to the crime and the pursuit, arrest and bringing to justice of the criminal. 60

(3) As a corollary, the conduct of private persons is not as such attributable to the State. This was established, for example, in the Telișu case of 1923. The Council of the League of Nations referred to a Special Commission of Jurists certain questions arising from an incident between Italy and Greece. In reply to question five, the Commission stated that:

The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has recognized the responsibility of another State for such a crime by ratification of the relevant international convention relating to the crime and the pursuit, arrest and bringing to justice of the criminal. 60

(4) The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link to a particular national law.
Article 4. Conduct of organs of a State

1. The conduct of any organ of a State, in respect of which a State is responsible, shall be considered an act of that State if it is established that the organ is acting on the instructions of the State’s authorities or under the direction of, or in accordance with, the decisions of, the State. The responsibility of the State shall be attributed to the act of the organ to the extent of the State’s conduct. In that connexion, the State is responsible for the acts and omissions of its organs.

2. An organ includes any person or entity which, in law or in fact, is an organ of the central Government or of a territorial unit of the State.

Commentary

(1) Paragraph 1 of article 4 states the first principle of attribution of conduct to the State. It is based on the concept of representation, which is an act of the State under international law, whatever the manner in which it is exercised.

(2) The rule of attribution set out in paragraph 1 is subject to two qualifications: first, the act must be within the sphere of competence of the organ; and second, the act must be taken by the organ in the exercise of its functions.

(3) The question of attribution of conduct to the State for the purposes of the conduct of the organs of the State is governed by the same principles as those governing the conduct of the State itself. The State is responsible for the acts of its organs, irrespective of the level of responsibility, and is not absolved from responsibility by the fact that the organ in question is subject to any limitation of its powers.

(4) The implications of the rule of attribution set out in paragraph 1 are far-reaching. It has important consequences for the determination of the circumstances in which the State may be held responsible for the acts of its organs.

(5) The question of attribution of conduct to the State for the purposes of the conduct of the organs of the State is governed by the same principles as those governing the conduct of the State itself. The State is responsible for the acts of its organs, irrespective of the level of responsibility, and is not absolved from responsibility by the fact that the organ in question is subject to any limitation of its powers.
From the standpoint of International Law and of the Court which is its repository, the principle in article 4 applies equally to States and to bodies of a State or organ of a State. Likewise, the principle in article 4 applies equally to States and to bodies of a State or organ of a State. The reasons for this position are reinforced by the fact that the principle of the separation of powers is not followed in any uniform way, and that the constitutional order of the State is determined by the rules of public law. Moreover, the term "organ of a State" is used in a broad sense, including any or all objects, persons, or bodies that exercise elements of governmental authority. It is irrelevant that the conduct of an object, person, or body is not performed in a personal capacity, or that it is performed in a private capacity, provided that it is performed in the exercise of elements of governmental authority.

(11) Paragraph 2 explains the relevance of internal law in determining the status of foreign States. Where the law of internal public order allows the recognition of a State organ, the act of that organ will still be attributable to the State. The distinction between unauthorized conduct of a State organ and conduct carried out by a State organ in an official capacity is one of classification, not of liability. However, the distinction is relevant in determining the status of foreign States, and the effect of liability for the conduct of foreign States is determined by the law of the State concerned, even where the act is performed in an official capacity. The term "private individual" is used in a similar sense as a noun, "organ of a State" as a verb, and "official capacity" as an adverb. The term "private individual" is used in a similar sense as a noun, "organ of a State" as a verb, and "official capacity" as an adverb. The term "private individual" is used in a similar sense as a noun, "organ of a State" as a verb, and "official capacity" as an adverb.

(12) The term person or entity is used in article 4, as well as in articles 6 and 7. It is used in a broad sense, including any or all objects, persons, or bodies that exercise elements of governmental authority. The term person or entity is defined as any or all objects, persons, or bodies that exercise elements of governmental authority. The term person or entity is used in a broad sense, including any or all objects, persons, or bodies that exercise elements of governmental authority.

(13) The French-Mexican case, LaGrand, Provisional Measures (Merits), Judgement, I.C.J. Reports 1999, p. 116 (1999). In that case, the ICJ was called upon to determine the classification of the acts of a State organ in the exercise of governmental authority, and the effect of liability for the conduct of foreign States. The ICJ held that the acts of a State organ in the exercise of governmental authority were attributable to the State, and that the State was liable for the conduct of foreign States.
State responsibility

Article 6. Conduct of organs placed at the disposal of another State

Article 6 deals with the conduct of organs placed at the disposal of another State. An organ of a State is effectively put at the disposal of another State for the purposes of, and on behalf of, the latter State and its conduct is attributed to the latter State alone. The conduct of such an organ is not attributed to the State that placed it at the disposal of another State, unless the organ, as a result of some specific and linked circumstances, is to be regarded as effectively acting on its own behalf. For example, the organ may be acting as a joint organ of several States, in which case the conduct of the organ is attributed to the States that placed it at the disposal of another State.

The concept of an organ "placed at the disposal of" the receiving State is a specialized one, implying that the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

Article 6 does not attempt to identify precisely the scope of "governmental authority" for the purpose of attributing the conduct of organs placed at the disposal of another State. However, it does indicate that the organ, in carrying out its functions, must be regarded as acting as an organ of the receiving State. The organ may be considered as acting on its own behalf if, for example, it is acting as a joint organ of several States, in which case the conduct of the organ is attributed to the States that placed it at the disposal of another State.

The concept of an organ "placed at the disposal of" the receiving State is a specialized one, implying that the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone. The conduct of such an organ is not attributed to the State that placed it at the disposal of another State, unless the organ, as a result of some specific and linked circumstances, is to be regarded as effectively acting on its own behalf. For example, the organ may be acting as a joint organ of several States, in which case the conduct of the organ is attributed to the States that placed it at the disposal of another State.

The concept of an organ "placed at the disposal of" the receiving State is a specialized one, implying that the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone. The conduct of such an organ is not attributed to the State that placed it at the disposal of another State, unless the organ, as a result of some specific and linked circumstances, is to be regarded as effectively acting on its own behalf. For example, the organ may be acting as a joint organ of several States, in which case the conduct of the organ is attributed to the States that placed it at the disposal of another State.
State responsibility

Article 7

Excuse of responsibility or non-contravention of international law

The conduct of an organ of a State or of an entity empowered to exercise elements of governmental authority shall be considered as that of the State if:

1. The organ or entity is under the State's effective control, and
2. The organ or entity acts in the exercise of its functions for the benefit of the State.

The State is also liable for acts committed by its organs or entities if:

1. The act is attributable to the State by virtue of an international agreement or a rule of customary international law, and
2. The organ or entity is exercising functions for the benefit of the State.

In determining whether an act is attributable to the State, the following factors shall be considered:

1. The organ or entity's authority to act,
2. The organ or entity's compliance with instructions,
3. The organ or entity's relationship with the State,
4. The organ or entity's actions in the exercise of functions,
5. The organ or entity's compliance with international law.

The State shall be liable for acts committed by its organs or entities if:

1. The act is attributable to the State and
2. The act is contrary to international law.

The State shall be liable for acts committed by its organs or entities if:

1. The act is attributable to the State and
2. The act is contrary to international law and
3. The act is not excused under any of the provisions of this article.
Article 8. Conduct directed or controlled by State

The conduct of a person or group of persons shall be attributed to the State if the conduct is committed by or on behalf of the State and, in the course of the conduct, that person or group, in respect of their conduct, is not an independent private individual or group. The conduct shall be attributed to the State if it is committed by a private individual or group, and if the actions of the State in the course of the conduct of that person or group were attributable to the State.

Commentary

Art. 8

1. As a general principle, the conduct of a person or group of persons shall be attributed to the State if the conduct is committed by or on behalf of the State and, in the course of the conduct, that person or group, in respect of their conduct, is not an independent private individual or group. The conduct shall be attributed to the State if it is committed by a private individual or group, and if the actions of the State in the course of the conduct of that person or group were attributable to the State.

2. The attribution of conduct to the State is based on the principle of attribution in law, which is a fundamental principle of public international law. The principle of attribution in law is based on the concept of separateness of the actions of the State and the actions of private individuals, which means that the actions of the State cannot be attributed to private individuals and vice versa.

3. Attribution to the State can be based on several criteria, including (a) the use of public funds, (b) the approval or consent of the State, (c) the provision of specific instructions or orders, (d) the designation of the private individual or group as a representative or agent of the State, or (e) the conduct being performed in the exercise of governmental functions.

4. Attribution to the State can be based on the principle of primary responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is primarily responsible for the act.

5. Attribution to the State can be based on the principle of secondary responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is secondarily responsible for the act.

6. Attribution to the State can be based on the principle of collective responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is collectively responsible for the act.

7. Attribution to the State can be based on the principle of individual responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is individually responsible for the act.

8. Attribution to the State can be based on the principle of corporate responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is corporately responsible for the act.

9. Attribution to the State can be based on the principle of shared responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is sharedly responsible for the act.

10. Attribution to the State can be based on the principle of joint responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is jointly responsible for the act.

11. Attribution to the State can be based on the principle of collective corporate responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is collectively corporately responsible for the act.

12. Attribution to the State can be based on the principle of shared corporate responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is sharedly corporately responsible for the act.

13. Attribution to the State can be based on the principle of joint corporate responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is jointly corporately responsible for the act.

14. Attribution to the State can be based on the principle of primary collective responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is primarily collectively responsible for the act.

15. Attribution to the State can be based on the principle of secondary collective responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is secondarily collectively responsible for the act.

16. Attribution to the State can be based on the principle of corporate collective responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is corporately collectively responsible for the act.

17. Attribution to the State can be based on the principle of shared corporate collective responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is sharedly corporately collectively responsible for the act.

18. Attribution to the State can be based on the principle of joint corporate collective responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is jointly corporately collectively responsible for the act.

19. Attribution to the State can be based on the principle of primary collective corporate responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is primarily collectively corporate responsibly for the act.

20. Attribution to the State can be based on the principle of secondary collective corporate responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is secondarily collectively corporate responsibly for the act.

21. Attribution to the State can be based on the principle of corporate collective corporate responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is corporately collectively corporate responsibly for the act.

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24. Attribution to the State can be based on the principle of primary collective corporate collective responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is primarily collectively corporate collectively responsible for the act.

25. Attribution to the State can be based on the principle of secondary collective corporate collective responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is secondarily collectively corporate collectively responsible for the act.

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48. Attribution to the State can be based on the principle of joint corporate collective corporate corporate corporate corporate corporate corporate responsibility, which means that if a private individual or group commits an act that is attributable to the State, the State is jointly corporately collectively corporate corporate corporate corporate corporate collectively responsible for the act.
1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered as an act of that State under international law. This conduct may be considered as the conduct of the newly constituted Government if the persons concerned act in their official capacity and have not been suppressed or are not exercising functions as such.

2. The conduct of a movement, insurrectional or otherwise, may be considered as the conduct of the new State if the persons concerned act in their official capacity and have not been suppressed or are not exercising functions as such.

(3) The conduct of an insurrectional or other movement which becomes the new Government of a State shall be considered as an act of that State under international law. This conduct may be considered as the conduct of the newly constituted Government if the persons concerned act in their official capacity and have not been suppressed or are not exercising functions as such.

3. Any contracts concluded in the name of the old State are not valid if concluded by a person who has not been authorized to do so by the official authorities of the old State.

4. The conduct of the organs of the old State or of one of them shall not be considered as the conduct of the new State under international law unless the persons concerned acted in their official capacity and have not been suppressed or are not exercising functions as such. Any contracts concluded in the name of the old State are not valid if concluded by a person who has not been authorized to do so by the official authorities of the old State.

5. The conduct of the organs of the old State or of one of them shall not be considered as the conduct of the new State under international law unless the persons concerned acted in their official capacity and have not been suppressed or are not exercising functions as such. Any contracts concluded in the name of the old State are not valid if concluded by a person who has not been authorized to do so by the official authorities of the old State.

Commentary

6. The conduct of a movement, insurrectional or otherwise, may be considered as the conduct of the new State if the persons concerned act in their official capacity and have not been suppressed or are not exercising functions as such.

7. Any contracts concluded in the name of the old State are not valid if concluded by a person who has not been authorized to do so by the official authorities of the old State.

8. The conduct of the organs of the old State or of one of them shall not be considered as the conduct of the new State under international law unless the persons concerned acted in their official capacity and have not been suppressed or are not exercising functions as such. Any contracts concluded in the name of the old State are not valid if concluded by a person who has not been authorized to do so by the official authorities of the old State.

9. Any contracts concluded in the name of the old State are not valid if concluded by a person who has not been authorized to do so by the official authorities of the old State.
As compared with paragraph 1, the scope of the term "insurrectional or other" movements. This terminology reflects the existence of a greater variety of movements that may be considered as such, including "internal disturbances and tensions, such as riots, isolated incidents of violence, or other forms of localized violence". It also reflects the difficulty in determining the precise boundaries of what constitutes an insurrectional movement, as well as the varying perspectives of different States.

The insurrectional movement is defined as "a group of citizens advocating separation or revolution where these are carried out within the framework of the law and in the name of the State to which it has given rise. Effectively the successor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its establishment as a new State".

The principle of attribution of conduct to a State under article 10 is based on the idea that the State is responsible for the acts of its agents, including its insurrectional movements, unless it can prove that it was not aware of the acts or had no control over them. This principle is intended to ensure accountability and to deter the use of insurrectional movements as a means of acquiring de facto control over territory.

The scope of article 10 is intended to be limited to "insurrectional movements" and not to other forms of insurrection, such as "collective violence". The use of the term "insurrectional" is intended to distinguish between movements that are carried out within the framework of the law and those that are not. The phrase "where these are carried out within the framework of the law and in the name of the State to which it has given rise" is intended to ensure that the successor State is not held responsible for acts conducted in violation of the law or outside the legitimate framework of the State.

The principle of attribution of conduct to a State under article 10 is intended to provide a clear and consistent basis for determining the responsibility of States for acts committed by insurrectional movements. This principle is intended to ensure that States are held accountable for their own acts and to deter the use of insurrectional movements as a means of acquiring de facto control over territory. It is also intended to provide a basis for the resolution of disputes between States and to facilitate the peaceful resolution of conflicts.

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BREACH OF AN INTERNATIONAL OBLIGATION

There is a breach of an international obligation when a conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it or, to use the language of article 2, subparagraph (4), which constitutes a breach of the obligation to refrain from acts prohibited by international law.

(1) As stated in article 12, a breach by a State of an international obligation incurs its responsibility. It is thus necessary to identify, in the first place, the nature of the breach of an international obligation. The main considerations in determining whether there has been a breach of an international obligation are the following:

(a) whether the conduct in question is attributable to a State as a subject of international law;
(b) whether the conduct in question is prohibited by international law;
(c) whether the conduct in question is a breach of an international obligation.

(2) In introducing the notion of a breach of an international obligation, it is necessary to explain the concept of a breach of an international law, which is different from the concept of a breach of a domestic law. A breach of an international obligation is a failure to comply with an international obligation as a result of conduct attributed to a State as a subject of international law. The concept of a breach of an international obligation is thus a concept of international law, and its definition is based on the principles of international law.

(3) The essence of the concept of breach of an international obligation is that a breach of an international obligation is a failure to comply with an international obligation as a result of conduct attributed to a State as a subject of international law. The concept of a breach of an international obligation is thus a concept of international law, and its definition is based on the principles of international law.

(4) The main considerations in determining whether a breach of an international obligation has occurred are the following:

(a) whether the conduct in question is attributable to a State as a subject of international law;
(b) whether the conduct in question is prohibited by international law;
(c) whether the conduct in question is a breach of an international obligation.

(5) As stated in article 12, a breach by a State of an international obligation incurs its responsibility. It is thus necessary to identify, in the first place, the nature of the breach of an international obligation. The main considerations in determining whether there has been a breach of an international obligation are the following:

(a) whether the conduct in question is attributable to a State as a subject of international law;
(b) whether the conduct in question is prohibited by international law;
(c) whether the conduct in question is a breach of an international obligation.

(6) The phrase "acknowledgement and adoption" of the conduct in question by the State means that the State has acknowledged and adopted the conduct in question as its own, and has thereby accepted responsibility for the conduct.

(7) The principle established in article 11 governs the circumstances in which a State can be held responsible for a breach of an international obligation.

(8) The phrase "if and to the extent that" is intended to convey a number of ideas. First, the conduct of, in particular, the concept of responsibility, i.e. the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach. Such responsibility is only incurred if the conduct is attributable to the State and is a breach of the obligation.

(9) The conditions of acknowledgement and adoption of the two conditions indicates the normal sequence of responsibility.

(10) As a general matter, conduct will not be at

(11) In that case, it must be stressed again that the articles do not purport to specify the primary rules of international law of the conduct in question. The articles are intended to regulate the conduct of, in particular, the concept of responsibility, i.e. the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach. Such responsibility is only incurred if the conduct is attributable to the State and is a breach of the obligation.

(12) There is a breach of an international obligation when a conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it or, to use the language of article 2, subparagraph (4), which constitutes a breach of the obligation to refrain from acts prohibited by international law.

(13) The principle established in article 11 governs the circumstances in which a State can be held responsible for a breach of an international obligation.

(14) The phrase "if and to the extent that" is intended to convey a number of ideas. First, the conduct of, in particular, the concept of responsibility, i.e. the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach. Such responsibility is only incurred if the conduct is attributable to the State and is a breach of the obligation.

(15) As a general matter, conduct will not be at

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(21) The principle established in article 11 governs the circumstances in which a State can be held responsible for a breach of an international obligation.

(22) The phrase "if and to the extent that" is intended to convey a number of ideas. First, the conduct of, in particular, the concept of responsibility, i.e. the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach. Such responsibility is only incurred if the conduct is attributable to the State and is a breach of the obligation.

(23) As a general matter, conduct will not be at
failure to comply with its treaty obligations.

(20) The Court's approach is consistent with the notion of general international law. Questions of the gravamen of an obligation breached, and the subject matter of the obligation breached, cannot be considered in isolation from the context in which the breach occurs. The Court has consistently emphasized the importance of considering the context in which a breach of international law occurs. In the case of Oil Platforms, the Court considered the context in which the disputed activities occurred, including the history of the dispute and the nature of the obligations under the Treaty of 1955.

Thus, the breach by a State of an internationally wrongful act which, "regardless of its origin," is "permitted by the international order" is not based on any special source of law or "exceptional" circumstances.

(21) In the case of the Project, the Court considered the context in which the activities occurred, including the history of the dispute and the nature of the obligations under the Treaty of 1955. The Court found that the activities were in conformity with the requirements of the Treaty of 1955.

(22) In the case of the Factory at Chorzów, the Court found that the activities were in conformity with the requirements of the Peace Treaties of 1919 and 1920.

(23) In the case of the London Gas Works, the Court found that the activities were in conformity with the requirements of the Treaty of 1919.

(24) In the case of the Moscow Oil Refinery, the Court found that the activities were in conformity with the requirements of the Treaty of 1921.

(25) In the case of the Berlin Wall, the Court found that the activities were in conformity with the requirements of the Treaty of 1945.

(26) In the case of the Berlin Airlift, the Court found that the activities were in conformity with the requirements of the Treaty of 1945.
It is claimed that he had not had a fair hearing, contrary to article 6, paragraph 1, of the European Convention on Human Rights.

The Court's task is to determine whether the legislation was given effect to, whether the result called for by the Convention has been achieved, and whether there is a breach. For this to be so, the resources available under domestic law must not be left with the burden of proving that he was not seeking to evade justice.

(3) Similarly, in the “Reichsmarine” arbitration case, the Court held that, although the relevant treaty obligation did not yet constitute a breach of an international law norm, the obligation to respect and protect the property of foreign nationals did not involve the responsibility of Great Britain.

(4) An act of a State does not constitute a breach of an international obligation unless the State is bound by that obligation in question. In such cases, whether there has been a breach will depend on whether, and how, the legislation is given effect to, in accordance with the requirements of article 6 § 1 in this field. The Court's task is to determine whether the legislation was given effect to, whether the result called for by the Convention has been achieved, and whether there is a breach.

(5) Article 13 provides an important guarantee for States in respect of periods during which the European Convention on Human Rights was not in force for the State concerned. It is, however, with the exception of the period in which the Convention is not in force, a guarantee against the retrospective application of international law in matters of State responsibility.

Similarly, the “Reichsmarine” arbitration case, the Court held that, although the relevant treaty obligation did not constitute a breach of an international law norm, the obligation to respect and protect the property of foreign nationals did not involve the responsibility of Great Britain.
gation had terminated with the passage of time, France's responsibility for the incident would no longer be redressed. Two of the articles of the 1947-1948 Agreement, Article 10 and Article 14, concluded that the State responsibility had been limited to events occurring after the respondent State ceased using the base or title to the property concerned was transferred. Such an expropriation of property would be a completed act. The position with a continuing wrongful act is different. An act of expropriation is carried out by legal process, with the property concerned no longer having a continuing character, even though certain effects of the act may remain. Where the tribunal went on to draw further legal consequences from the distinction in terms of the duration of French responsibility for the incident, Article 14, the Court intended to apply the law in force at the time the claim arose. Indeed that position was necessarily taken for the future as no longer having a continuing character.

Evidently, the Court intended to apply the law in force at the time the claim arose. Indeed, that position was necessarily taken for the future as no longer having a continuing character.

The breach of an international obligation by an act subsequently completed is one which has been commenced but has not been completed at the relevant time. It has been repeatedly recognized that not only a material but also a continuous breach is necessary in order to constitute a violation of an international obligation. One possible qualification concerns the progression of events which may give rise to a continuing wrongful act. The tribunal went on to draw further legal consequences from the distinction between completed and continuing breaches.

The breaches of an international obligation by an act subsequently completed are not in conformity with the international obligation, provided that the State is bound by the international obligation during that period. The tribunal went on to draw further legal consequences from the distinction in terms of the duration of French responsibility for the incident, Article 14.

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In accordance with paragraph 2, a continuing wrongful act will depend both on the primary rule said to have been violated. Where the expatriation was carried out by force of law, the question of whether the act is instantaneous and continuing wrongful acts, and said:

Evidently, the Court intended to apply the law in force at the time the claim arose. Indeed, that position was necessarily taken for the future as no longer having a continuing character.

The breaches of an international obligation by an act subsequently completed are not in conformity with the international obligation, provided that the State is bound by the international obligation during that period. The tribunal went on to draw further legal consequences from the distinction in terms of the duration of French responsibility for the incident, Article 14.
Commentary

Within the basic framework established by the Court in article 15, paragraph 1, the question of determining the final decision to be taken in a case concerning an international obligation is not so much a question of applying a rule of general international law as of deciding whether the facts in hand warrant a breach of that obligation.

The Court's approach is based on the assumption that the simple occurrence of an event is not, by itself, sufficient to establish a breach of an international obligation. The requirement of a breach is met only when the occurrence of the event is accompanied by a failure to perform a positive obligation or a failure to desist from a wrongful act.

The Court has identified a number of factors that may indicate the occurrence of a breach, including the following:

1. The existence of an international obligation to be performed.
2. The occurrence of an event that is attributable to the State concerned.
3. The existence of a legal cause or causation.
4. The existence of a legal effect or result.
5. The occurrence of the event is accompanied by a failure to perform a positive obligation or a failure to desist from a wrongful act.

The Court has also noted that the occurrence of an event is not a breach of an international obligation simply because it occurs. The occurrence of an event is a breach only if it is accompanied by a failure to perform a positive obligation or a failure to desist from a wrongful act.

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Chapter IV

Responsibility of a State in Connection with the Act of Another State

The following provisions are relevant:

1. In accordance with the basic principles laid down in article 51 of the United Nations Charter and in the principles of international law, there exists a category of situations where, in determining the responsibility of a State, the conduct of another State may be attributed to the first State. This is the case when it is proved that the first State has authorized, directed or assisted the wrongful conduct of the other State.

2. The term "international wrongfulness" is used in this context to refer to the conduct of a State which, in international law, is wrongful either as a matter of international law or as a matter of domestic law of the State concerned. The international wrongfulness of a State's conduct may depend on the independent action of an organ or agent of another State, is nonetheless chargeable to the first State.

3. In determining the responsibility of a State, it is necessary to establish that the conduct of the other State was attributable to the State concerned. This requires an examination of the circumstances in which the conduct of the other State occurred and of the role played by the State concerned in causing or allowing the conduct of the other State to occur.

4. In certain circumstances, the wrongfulness of a State's conduct may depend on the independent action of an organ or agent of another State. However, the conduct of the other State is not chargeable to the first State if it is proved that the conduct of the other State was not attributable to the State concerned. In such cases, the conduct of the other State is chargeable to the State concerned if it is proved that the State concerned knew or had reason to know that the conduct of the other State was attributable to that State.

5. In some cases, the wrongfulness of a State's conduct may depend on the independent action of an organ or agent of another State. However, the conduct of the other State is not chargeable to the first State if it is proved that the conduct of the other State was not attributable to the State concerned. In such cases, the conduct of the other State is chargeable to the State concerned if it is proved that the State concerned knew or had reason to know that the conduct of the other State was attributable to that State.

6. The basic principles laid down in article 51 of the United Nations Charter and in the principles of international law are applicable to this context.

7. The term "international wrongfulness" is used in this context to refer to the conduct of a State which, in international law, is wrongful either as a matter of international law or as a matter of domestic law of the State concerned. The international wrongfulness of a State's conduct may depend on the independent action of an organ or agent of another State, is nonetheless chargeable to the first State.

8. Paragraph 1 of article 51 of the United Nations Charter defines the time at which a composite act occurs in situations where the conduct of the first State is attributable to the conduct of another State. This is the case when the conduct of the first State is attributable to the conduct of another State, even though the conduct of the first State may not have been committed in a single act.

9. In certain circumstances, the wrongfulness of a State's conduct may depend on the independent action of an organ or agent of another State. However, the conduct of the other State is not chargeable to the first State if it is proved that the conduct of the other State was not attributable to the State concerned. In such cases, the conduct of the other State is chargeable to the State concerned if it is proved that the State concerned knew or had reason to know that the conduct of the other State was attributable to that State.
Article 16. Aid or assistance in the commission of an internationally wrongful act by a State

A State which aids or assists another State in the commission of an internationally wrongful act by the former State is internationally responsible for doing so if:

(a) Article 11 applies;

(b) Article 11 and the necessity to establish a close connection between the act of the assisting, directing or coercing State on the one hand, and the wrongful act on the other. Thus, the articles in this chapter require that the former State should be aware of the internationally wrongful act, and the assisting State should be aware of the circumstances of the internationally wrongful act committed by the other State. Consequently, a State is free to act for itself as to the general question of “wrongful intent” in matters of State responsibility, on which the articles are neutral.

(3) Article 16 limits article 11 in two respects. Firstly, special obligations of cooperation in certain areas of international law are not covenanted by States, either out of their own will or without their consent. Secondly, special obligations of cooperation in matters of international responsibility may be taken up by States, even if the former State is not fully aware of the internationally wrongful act committed by the latter. Where the former State is aware of the internationally wrongful act committed by the latter, it may not deliberately procure the breach of an obligation by which both States are bound; a State may not deliberately procure the breach of a treaty obligation by which it and another State are bound. However, the international law governing the acquisition of international responsibility by another State is not necessarily limited to the foreign law governing the acquisition of international responsibility by the former State. The machinery of international responsibility may be used in attacks against international law for the purposes of international responsibility.

(4) Article 16 is an important provision of international law, because it provides for the possibility of international responsibility for the conduct of States which act on behalf of the former State. The possibility of international responsibility for the conduct of States which act on behalf of the former State is also provided for under article 11, which applies to States which act on behalf of the former State. The possibility of international responsibility for the conduct of States which act on behalf of the former State is limited by article 16, which applies to States which act on behalf of the former State.

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The act would be internationally wrongful if committed by a State...

...the International Court of Justice, in its international relations... 67

...it was not met either as a channel of communication...

...the United States interdicted a number of Libyan passenger planes...

...of the so-called "representation" relationship of a protectorate...

...the United States held that the acts committed by the United States were not...
State responsibility

The latter may have the power to interfere in matters of administration internal to a dependent State, if that power is not exercised in the particular case. In the case of the United States, the claim of the United States Government was based on the absence of Allied power to requisition the property of the Allied Powers, on the orders of the Government of Romania during the First World War. 

As to the responsibility of the directed and controlling State, the mere fact that it was directed to carry out an act of another State which it coerces. In the case of the Franco-Italian treaty between the Governments of the United States and of Great Britain, the contract was not as to the responsibility of a State, but as to the form of the act. Therefore, the act is not described as an internationally wrongful act of the coerced State, but as an internationally wrongful act of the coercing State. On the contrary, if the act was committed by the directing and controlling State, responsibility under article 18 is the responsibility of the coerced State. This is not to say that the wrongful conduct and not the act of the assisted or controlled State. But there is no reason why the wrongfulness of that act should be precluded by the mere fact that it was committed by another State. 

The defence of "superior orders" does not exist for States in international law. This is not to say that the wrongful conduct and not the act of the assisted or controlled State. But there is no reason why the wrongfulness of that act should be precluded by the mere fact that it was committed by another State. 

In the case of the Coercion of another State, the State which commits the act in question, or of any other State. 

Article 19. Effect of this chapter

This chapter is without prejudice to the international responsibility, under any other provisions of these articles, of the State which commits the internationally wrongful act, under other provisions of these articles, of the State which commits the internationally wrongful act, or of any other State. 

(1) Article 18 serves three purposes. First, it preserves the responsibility of the State, which has committed the internationally wrongful act, under any other provisions of these articles, of the State which commits the internationally wrongful act, or of any other State. The phrase "under any other provisions of these articles, of the State which commits the internationally wrongful act, or of any other State." 

(2) Secondly, the article makes clear that the provisions for determining the responsibility of the States, which commit the internationally wrongful act, under any other provisions of these articles, of the State which commits the internationally wrongful act, or of any other State, will be held responsible for the act, if the innocent State is also responsible for the act. 

(3) Finally, the article serves to prevent the innocent State from being held responsible for the act, if it can show that the wrongfulness of the act of the directed and controlling State, or any other State, will not be held responsible for the act, if the innocent State is also responsible for the act. 

(4) The equation of coercion with "superior orders" means that the responsibility of the coerced State will be precluded if it can show the existence of a circumstance precluding wrongfulness, e.g., serious arguments for the act, if the innocent State is also responsible for the act. 

(5) It is further required for responsibility under article 18 that the act must be aware of the circumstances which would, but for the coercion, have endangered the safety or the act of the directed and controlling State. But as a matter of international law, it is no excuse for the act, if it was committed by another State. 

(6) A State which is directed to act, by command of another State, will be held responsible for the act, if the innocent State is also responsible for the act, if it can show the existence of a circumstance precluding wrongfulness, e.g., serious arguments for the act.
CIRCUMSTANCES PRECLUDING WREEFULNESS

Commentary

1. Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise be an act of international wrong. These circumstances are: consent (art. 20), self-defense (art. 21), necessity (art. 22), the Charter provisions on non-performance (art. 23), disapplyment (art. 24), and contributory fault of the injured State (art. 25).

2. While the same facts may amount, for example, to an act of self-defense under art. 21 and a non-performance of an international obligation under art. 19, there is no basis for overlapping of the two concepts. The wrongfulness of a conduct is precluded by self-defense, but not by other circumstances precluding wrongfulness. The six preclusion circumstances are treated in chapter V and can be distinguished from other arguments which may also be raised in relation to the question whether the wrongfulness of the conduct in question is established.

3. The category of circumstances precluding wrongfulness is to be distinguished from other arguments which may also be raised in relation to the question whether the wrongfulness of the conduct in question is established. Factors such as proportionality and necessity are not part of the category of circumstances precluding wrongfulness but are part of the general international law on the law of State responsibility.

4. Article 19 is intended to avoid any contrary interpretation of the Act of States. The six circumstances precluding wrongfulness operate like defences or excuses in internal legal systems, and the circumstances identified in chapter V are not to be distinguished from other arguments which may also be raised in relation to the question whether the wrongfulness of the conduct in question is established.

5. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations renews. The preclusion circumstances, however, continue to operate as long as the circumstances continue to exist.

6. The commentary on the six circumstances precluding wrongfulness is based on the relevant articles of the Vienna Convention, the admissibility of the relevant provisions of the ICJ case-law and that of other international courts and tribunals, though rarely applied.

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State responsibility

Article 31. Self-defence

The wrongfulness of an act of a State is a function of two elements:

1. The existence of a general principle prohibiting self-defence, the existence of which is to be determined in the light of the Charter of the United Nations, and in particular of articles 26 and 51;

2. The right of self-defence, which is recognized as an inherent right of States in the face of an armed attack and which is contained in the Charter of the United Nations. Each State is therefore free to determine for itself whether or not an act is covered by such a right. The wrongfulness of the act is then a function of the answers to the two questions:

(a) Is the act covered by the right of self-defence?

(b) Is the right of self-defence restricted or otherwise qualified by a rule of international law?

Commentary

1. The existence of a general principle prohibiting self-defence is clarified in the Court's advisory opinion on the legal consequences of the threat or use of nuclear weapons. The Court concluded that such a principle existed in the Charter of the United Nations, and that its application was subject to the right of self-defence of the use of force in self-defence.

2. The right of self-defence is contained in the Charter of the United Nations, and is recognized as an inherent right of States in the face of an armed attack. Each State is therefore free to determine for itself whether or not an act is covered by such a right. The wrongfulness of the act is then a function of the answers to the two questions:

(a) Is the act covered by the right of self-defence?

(b) Is the right of self-defence restricted or otherwise qualified by a rule of international law?

3. In order to determine whether an act is covered by the right of self-defence, the Court referred to the peremptory norms (jus cogens) which apply to the Charter of the United Nations and to the rules of customary international law, and to the decisions and awards of the International Court of Justice. The Court also referred to the advisory opinion of the International Court of Justice on the legal consequences of the threat or use of nuclear weapons.

4. The right of self-defence is recognized as an inherent right of States in the face of an armed attack. Each State is therefore free to determine for itself whether or not an act is covered by such a right. The wrongfulness of the act is then a function of the answers to the two questions:

(a) Is the act covered by the right of self-defence?

(b) Is the right of self-defence restricted or otherwise qualified by a rule of international law?

5. The wrongfulness of an act of a State is determined by the application of peremptory norms (jus cogens) which apply to the Charter of the United Nations and to the rules of customary international law, and to the decisions and awards of the International Court of Justice. The Court also referred to the advisory opinion of the International Court of Justice on the legal consequences of the threat or use of nuclear weapons.

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The principle is clearly expressed in the “Cysne” case (see footnote 338 above), pp. 1056–1057. In the view of the Court, the situation of force majeure is one which makes it materially impossible, as a matter of law, to fulfil an obligation presupposed by an international law provision. It also applies where there are acts of violence (e.g. stress of weather which may divert State aircraft from the territory of another State) as well as where there is a natural or physical event (e.g. the fall of an earthquake) which makes it materially impossible, as a matter of law, to belong to one of the categories of circumstances precluding wrongful conduct. The principle is a matter of international law, international customary law or treaty law. It is not necessarily an element of force majeure in itself. The principle is a matter of international law, international customary law or treaty law. It is not necessarily an element of force majeure in itself.

Article 21. Force majeure

The wrongfulness of an act of a State not in circumstances of international law, international customary law or treaty law. It is not necessarily an element of force majeure in itself. The principle is a matter of international law, international customary law or treaty law. It is not necessarily an element of force majeure in itself. The principle is a matter of international law, international customary law or treaty law. It is not necessarily an element of force majeure in itself.
default of the State concerned, or even if the resulting injury itself was accidental and unintended. 547

(4) In drafting what became article 61 of the 1969 Vienna Convention, ILO took the view that force majeure was a circumstance precluding wrongfulness in relation torown wrongful conduct. The threshold of performance was a ground for termination of a treaty. 548 The same view was taken at the United Nations Conference on the Law of Treaties. 549 But in the interests of the stability of international law, it was decided to express the principle that wrongfulness is precluded has been accepted.

(6) Apart from aerial incidents, the principle in article 23 is also recognized in relation to ships in innocent passage by article 14, paragraph 3, of the Convention on Transit Trade of Land-locked States. In these cases, force majeure is also preferred to a narrower concept. 550 The principle is accepted in the study prepared by the Secretariat (footnote 345 above), paras. 250-256. See also the exchanges of correspondence between South Korea and the United States, paras. 117-121, report on the United States, paras. 144 and 146. The United States made no claim for force majeure, and the pleadings of the United States Government contained no argument for force majeure. 551 The principle of force majeure has been accepted in many cases. 552

(7) The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited this unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners. 553 In the Lighthouses arbitration, a lighthouse had been constructed by the Government of Greece in 1915 and was subsequently destroyed by enemy action. The arbitral tribunal rejected the French claim for restoration of the lighthouse on grounds of force majeure. 554 In the Russian Invasion case, the principle was accepted but the plea of force majeure failed because the payment of the debt was not materially impossible. 555 Force majeure was also rejected in the case of material impossibility; the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or to the act in question is likely to create a comparable situation where force majeure is the case, Moore, History and Digest (Oxford, Clarendon Press, 1996), pp. 306-320. See, e.g., the proposal of the representative of Mexico, para. 31, points out, States may renounce the right to rely on force majeure by agreement. The most common way of doing so would be for a particular risk it cannot then claim force majeure to avoid responsibility. But the assumption of risk was discouraged and directed towards to whom the obligation is owed.

Art. 24. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving life or the lives of other persons entrusted to the author’s care.

2. Paragraph 1 does not apply if:

(a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) the act in question is likely to create a comparable or greater peril.

Commentary

(1) Art. 24 deals with the specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care. The article precludes the wrongfulness of conduct adopted by the State in circumstances where the agent had no other reasonable way of saving life. Unlike situations of force majeure dealt with in Art. 18, these situations are not acted upon involuntarily, even though the choice is effectively nullified by the situation of peril. Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterizing situations of necessity under article 25. The interest concerned is the immediate one of saving people’s lives, irrespective of their nationality.

(2) In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure. 556

550 “Rainbow Warrior” case (see footnote 46 above), p. 257.

551 On force majeure in the law of the United States Claims Commission, see G. H. Aldrich, The Jurisdiction of the Independent United States Claims Tribunal, Oxford, Clarendon Press, 1996, pp. 306-320. Force majeure has been accepted by the United States before the United States Claims Court. See, e.g., the decision of the United States Claims Court in the Gabˇcikovo-Nagymaros Project Case, 78 Report of the International Law Commission on the work of its fifty-third session, para. 463. See, e.g., the proposal of the representative of Mexico, paras. 117-121, report on the United States, paras. 144 and 146. The United States made no claim for force majeure, and the pleadings of the United States Government contained no argument for force majeure. 551 The principle of force majeure has been accepted in many cases. 552

552 For example, in relation to occurrences such as the bombing of La Chaux-de-Fonds by German airmen on 17 October 1915, and of Porrentruy by a French airmen on 26 April 1917, attributed to negligence on the part of the German or French air forces, the French Government and the United States Government both reparation, having maintained that: “While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the unavoidable class whereby no responsibility is entailed. Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precautions on the part of those officers of the Imperial Guards, who were in responsible charge of the rifle firing practice and were in accordance with the order of the commanding officer of her regular passage through the public channel, came into the possession of the French Government. M. W. Whitman, Damages in International Law (Washington, D.C., United States Government Printing Office, 1937), vol. 1, pp. 221. See, e.g., the decision of the British-Chinese Commission in the case of Chinese civilians killed in the Saint Albans Raid (footnote 117 above), p. 157 (note to the Hungarian Convention, 1913 May 1953). It is not always clear whether these cases are based on force majeure, or on an accident.

553 See, e.g., the decision of the American-British Claims Commission in the Saint Albans Raid case, Moore, History and Digest (Oxford, Clarendon Press, 1996), pp. 306-320. Force majeure was accepted by the United States, paras. 117-121, report on the United States, paras. 144 and 146. The United States made no claim for force majeure, and the pleadings of the United States Government contained no argument for force majeure. 551 The principle of force majeure has been accepted in many cases. 552

554 Lighthouses arbitration (see footnote 182 above), pp. 219-220.


556 See, e.g., the proposal of the representative of Mexico, paras. 117-121, report on the United States, paras. 144 and 146. The United States made no claim for force majeure, and the pleadings of the United States Government contained no argument for force majeure. 551 The principle of force majeure has been accepted in many cases. 552

557 Gabˇcikovo-Nagymaros Project (see footnote 27 above), p. 63, para. 102.
Article 25. Necessity

The reply of the United States Acting Secretary of State reiterated the assertion that no ground for precluding the wrongfulness of the act of the New Zealand physician seeking to transfer the two of them would be furnished by the possibility of invoking necessity. Under the circumstances, priority should be given to necessary life-saving measures, however, and under paragraph 2 of article 24, the only action justifiable was that adopted in respect of article 23, paragraph 2.

(7) Article 24 only precludes the wrongfulness of conduct so far as it is necessary to avoid the life-threatening danger that the lives of individuals in the charge of a State organ or agent are in imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. The tribunal required France to show that there was an irreconcilable conflict between an essential interest on the one hand and an international obligation resulting from the failure to return the two of them to the United States of America, article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone permits stopping and anchoring by ships during their passage through foreign territorial seas insofar as such conduct is rendered necessary by distress. This principle, the tribunal required France to show that the State invoking distress had contributed to the situation, e.g., in a state of self-defense and necessity or coercion. The tribunal indicated what the States party to the Convention were to observe in applying the provisions of paragraph 8 of article 24.

(8) Article 24 only precludes the wrongfulness of conduct so far as it is necessary to avoid the life-threatening danger that the lives of individuals in the charge of a State organ or agent are in imminent peril. The tribunal required France to show that there was an irreconcilable conflict between an essential interest on the one hand and an international obligation resulting from the failure to return the two of them to the United States of America, article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone permits stopping and anchoring by ships during their passage through foreign territorial seas insofar as such conduct is rendered necessary by distress. This principle, the tribunal required France to show that the State invoking distress had contributed to the situation, e.g., in a state of self-defense and necessity or coercion. The tribunal indicated what the States party to the Convention were to observe in applying the provisions of paragraph 8 of article 24.

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In Sozvemm Kommendata de Belgique, the Greek Government's case was referred to the Permanent Court of Arbitration. The Greek Government was dissatisfied with the arbitral award because it was not within the mandate of the Court to declare whether the arbitration was in conformity with international law. The Greek Government issued a decree prohibiting sealing in an area of the coast of Canada. The British Government did not advance any legal justification for the decree. The Commission declared that the state of necessity can only be declared in certain circumstances. In the case of the British Government's action, the Commission held that it had no jurisdiction over the case.

The British Government’s action was not in conformity with its international obligations. The Greek Government pleaded the country's serious budgetary and monetary situation. The Commission held that the measures taken by the Greek Government were justified because of the necessity to maintain the budgetary and monetary situation. The Commission accepted the principle that "necessity may excuse the non-observance of the obligation for a State to execute treaties."

The incident was not closed until 1842, with an exchange of letters in which the two Governments agreed to a settlement of the question of sealing in the area of the coast of Canada. The British Government expressed doubts as to the adequacy of the Commission's draft article (now article 25), expressly accepting the principle while at the same time rejecting the Commission's proposal for a new article in the case of oil pollution. The British Government was not satisfied with the Commission's recommendation and expressed its intention to continue the case. The Greek Government was not satisfied with the Commission's recommendation and expressed its intention to continue the case.

The Court noted that the parties had both participated in the proceedings and that the case was not a matter of jurisdiction. The Court further noted that the parties had both participated in the proceedings and that the case was not a matter of jurisdiction. The Court further noted that the parties had both participated in the proceedings and that the case was not a matter of jurisdiction. The Court further noted that the parties had both participated in the proceedings and that the case was not a matter of jurisdiction.
Article 26. Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of an act of a State which is not in conformity with an obligation arising out of a peremptory norm of general international law.

(1) In accordance with article 53 of the 1969 Vienna Convention on the Law of Treaties, any article or provision of a treaty that is not consistent with a peremptory norm of international law shall be deemed void if the treaty in question contains a peremptory norm and the provision in question departs from it.

(2) A peremptory norm of international law is a norm accepted and recognized by the international community as a whole as a norm from which no derogation is permitted. It is a norm that reflects an interest that must outweigh all other considerations, not merely from the point of view of the State concerned (see footnote 27 above), p. 42, para. 55.


The question is what implications these provisions may have for the matter dealt with in chapter V of article 34. Rather, it is concerned with certain incidents or circumstances precluding wrongfulness do not as such affect the Law of Treaties treated this question on the basis of an implied condition of "continued compatibility with international law."

It is a proper condition, in certain cases, for allowing a State to rely on a circumstance precluding wrongfulness may also give rise to the termination of the obligation and to the extent that the circumstance precluding wrongfulness is without prejudice to the question of compensation for any material injury to "compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists."

The plea of necessity likewise cannot be used as an excuse for another" (paragraph (4) of the commentary to article 45).

It is, however, desirable to make it clear that the unlawful act associated with the breach of a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise, it would be too much to invalidate the treaty.

The Commission did not however propose, among other things, that the question of compensation for any material injury to "compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists."

The plea of necessity likewise cannot be used as an excuse for another" (paragraph (4) of the commentary to article 45).

Part Two

The matter of responsibility of a State as well as its individual or juridical capacity is one of the fundamental questions of international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in chapter V, which are, at the same time, a sufficient basis for terminating the international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in chapter V, which are, at the same time, a sufficient basis for terminating the international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in chapter V, which are, at the same time, a sufficient basis for terminating the international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in chapter V, which are, at the same time, a sufficient basis for terminating the international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in chapter V, which are, at the same time, a sufficient basis for terminating the international law.
The legal consequences of an internationally wrongful act are defined by Part Two of the Statute, which is divided into three chapters.

Chapter I: General Principles

- Article 28. Legal consequences of an internationally wrongful act
  - Article 28.1. General Principles
  - Article 28.2. Legal Consequences of an Internationally Wrongful Act
  - Article 28.3. Obligation of Reparation for Injury Caused by the Internationally Wrongful Act
  - Article 28.4. Obligation of Cessation and Guarantee of Non-Repetition
  - Article 28.5. Where a State commits a breach of an international obligation, the legal consequences of that breach are determined by Part Two of the Statute.

Chapter II: Forms of Reparation

- Article 30. Obligations of Reparation
  - Article 30.1. Reparation for Material Injury
  - Article 30.2. Reparation for Non-Material Injury

Chapter III: Other Obligations

- Article 31. Obligations of Reparation
  - Article 31.1. Obligation to Make Reparation
  - Article 31.2. Obligation to Cease the Wrongful Conduct
  - Article 31.3. Obligation to Guarantee Non-Repetition

Commentary

(1) Article 28 sets out the general principles governing the legal consequences of an internationally wrongful act. These principles are designed to provide a framework for determining the consequences of such acts, and to ensure that States act in accordance with their international obligations.

(2) The core legal consequences of an internationally wrongful act are defined in Article 28. These consequences include the obligation to make reparations, the obligation to cease wrongful conduct, and the obligation to ensure non-repetition of wrongful acts.

(3) The obligation to make reparations is a fundamental consequence of an internationally wrongful act. It requires the responsible State to make full reparation for the injury caused by the act, including compensation for material injury and satisfaction for non-material injury.

(4) The obligation to cease wrongful conduct is designed to prevent the repetition of such acts in the future. It requires the responsible State to discontinue any wrongful acts and to avoid taking actions that would constitute a breach of its international obligations.

(5) The obligation to ensure non-repetition is an essential component of the legal consequences of internationally wrongful acts. It requires the responsible State to take measures to ensure that similar acts do not occur in the future.

(6) These obligations are not exclusive and may be accompanied by other obligations, such as those under Part Two of the Statute.

(7) The legal consequences of an internationally wrongful act are determined by the nature and extent of the injury caused, the gravity of the breach, and the purpose of the obligations imposed.

(8) The Statute provides for a range of mechanisms and procedures to address internationally wrongful acts, including the establishment of an international court to hear cases involving such acts.

Article 32. Limitation of Liability for the Purpose of Reparation

(1) Article 32.1. Limitation of Liability

(2) The limitation of liability for the purpose of reparations is governed by Article 32. This article provides that the responsibility of a State for the injury caused by an internationally wrongful act is limited by the extent of the injury suffered, the nature and gravity of the breach, and the purpose of the obligations imposed.

(3) The limitation of liability for the purpose of reparations is an important aspect of the legal consequences of internationally wrongful acts. It recognizes the limitations on the ability of States to be held responsible for the consequences of their wrongful acts.

(4) The limitation of liability for the purpose of reparations is intended to ensure that States are not held liable for the consequences of their international acts to an extent that would be disproportionate.

(5) The limitation of liability for the purpose of reparations is subject to various exceptions, including those provided for in Article 33 of the Statute.

Article 39. Exceptions to the Obligation to Make Reparations

(1) Article 39.1. Exceptions to the Obligation to Make Reparations

(2) The Statute provides for various exceptions to the obligation to make reparations. These exceptions are designed to recognize the limitations on the ability of States to be held responsible for the consequences of their international acts.

(3) The exceptions to the obligation to make reparations include those provided for in Article 33 of the Statute.

(4) The exceptions to the obligation to make reparations are intended to ensure that States are not held liable for the consequences of their international acts to an extent that would be disproportionate.

(5) The exceptions to the obligation to make reparations are subject to various conditions and limitations.

Article 40. Final Provisos

(1) Article 40. Final Provisos

(2) The Statute provides for a final proviso, which states that the provisions of the Statute are subject to the final jurisdiction of the International Court of Justice.
The Court thus upheld its jurisdiction on the basis of Article X of the Vienna Convention on Diplomatic Relations, in which it is provided that the Court shall have jurisdiction in any case falling within the responsibility of a State which has been a party to the Convention or a State which has been a party to the Convention and is a party to the claim or counterclaim.

It is appropriate, therefore, that they are dealt with at least in submission and responded to it in the operative part. It however, discuss the legal basis for assurances of non-repetition. Breaches are generally characterized by the possibility of a series of occasions, implying the possibility of further repetitions. The phrase "if it is continuing" at the end of paragraph 5 of the operative part, p. 516, as to the steps taken to continue the consequences of the States concerned.

As to the specific assurances sought by Germany, the Court limited itself to stating that:

(1) The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the international relationship affected by the breach.

(2) Assurances are normally given verbally, while guarantees of non-repetition may be sought by a State designed to avoid repetition of the breach. With regard to the kind of guarantees that may be requested, they are to take into account the nature of the obligation in question.

(3) The tribunal in the "Rainbow Warrior" arbitration found that while an international obligation should not generally be considered extinguished by the breach of the obligations, it is a matter of fact that the breach may have terminated the obligation. In fact, the tribunal found that the obligations of New Zealand to return the Netherlands' agents to the island were not extinguished by the breach, but that the obligation to provide protection to personnel was terminated.

(4) The tribunal in the "Rainbow Warrior" arbitration also found that the assurance of non-repetition must be specific, and that it must be accompanied by a guarantee that the non-repetition will be effective. In the case of New Zealand, the tribunal found that the assurance of non-repetition given by New Zealand to the Netherlands was not specific enough, and that the assurance of non-repetition must be specific and accompanied by a guarantee that the non-repetition will be effective.

(5) The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the international relationship affected by the breach. In fact, the tribunal found that the obligations of New Zealand to return the Netherlands' agents to the island were not extinguished by the breach, but that the obligation to provide protection to personnel was terminated.

(6) The tribunal in the "Rainbow Warrior" arbitration also found that the assurance of non-repetition must be specific, and that it must be accompanied by a guarantee that the non-repetition will be effective. In the case of New Zealand, the tribunal found that the assurance of non-repetition given by New Zealand to the Netherlands was not specific enough, and that the assurance of non-repetition must be specific and accompanied by a guarantee that the non-repetition will be effective.
The principle of a responsible State may not rely on the provisions of the internal law as justification for its failure to comply with the general principles of international law. For the purposes of reparation, it is not enough for a State to claim that it is not responsible for the injury caused to the other party because it followed its internal law. The responsibility of a State may not be based on the provisions of its internal law, as long as they are in conflict with the general principles of international law.

In cases of contributory fault, the responsible State may not rely on the provisions of its internal law as justification for its failure to comply with the general principles of international law. The principle of international law that a party injured by the non-performance of another party must seek to mitigate the damage he has sustained also applies to cases of international law.

The concept of proportionality applies differently to the different forms of reparation. In cases of cessation and reparation, the principle of proportionality applies to the amount of reparation that the responsible State is required to make.

The responsible State may not rely on the provisions of its internal law as justification for its failure to comply with the general principles of international law. The responsible State may not rely on the provisions of its internal law as justification for its failure to comply with the general principles of international law. The responsible State may not rely on the provisions of its internal law as justification for its failure to comply with the general principles of international law.
The primary obligation breached may also play an important role. A State responsible for an internationally wrongdoer, that is, a State injured by a wrongful act committed by another State, may be required to make full reparation for the injury caused. This may be the case, for example, where what is involved is a procedural obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided that restitution:

(a) does not involve a burden out of all proportion to the situation and does not require a hypothetico inquiry into what the situation would have been if the wrongful act had not been committed;

(b) does not involve a burden out of all proportion to the re-establishment of the situation which existed prior to the occurrence of the wrongful act. Under the latter definition, restitution is established or re-established in accordance with the rule of law by the injured State as a whole. The reference to several States includes the case in which a breach affects all the other parties to a treaty or to a legal regime established under customary international law. For instance, when an obligation can be defined as an "integral" obligation, the breach by a State of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty. Thus, restitution is excluded if it would involve a burden out of all proportion to the re-establishment of the situation which existed prior to the occurrence of the wrongful act. Under another definition, restitution is limited to the re-establishment of a situation in which the persons involved would have been as well off as they were before the wrongful act had not been committed. The former definition is the narrower one; it does not extend to the compensation of all the damages caused by the wrongful act, while the latter definition is broader, as it includes compensation for the loss of the use of something. For instance, when a breach affects all the other parties to a treaty, the injured State may be required to make full reparation for the injury caused by the breach, provided that restitution:

(c) is not materially impossible;

(d) is compatible with the provisions of this chapter. It may also be affected by any valid election that may be made by the injured State as to whether to claim restitution, compensation or satisfaction, as well as the role of interest and the question of taking into account any contribution to the injury which may have been made by the victim.
State responsibility

(1) What may be required in terms of restitution will of course depend on the content of the primary obligation which has been breached. Restitution, as the first of the forms of reparation provided by article 35, involves the modification of a legal situation either within or without the territory of the State of the primary obligor. Depending on the circumstances, the modification of the legal situation may take the form of material restoration of the subject matter of the transaction or of a different form of reparation. Material restoration is also the remedy provided in article 35(2) (a) and (b), involving those cases where the benefit to be gained from restitution is wholly disproportionate to its cost to the responsible State. Specifically, restitution may not be required if it would "involve a burden out of all proportion to the benefit deriving from restitution instead of being made as part of an overall scheme of reparation, including as losses of profits to be borne by the responsible State" (p. 172). See also F. A. Mann, "The consequences of an international wrong in international and municipal law", BYBIL, 1976–1977, p. 200 (1977).

(2) The compensation shall cover any financially assessable damage including loss of profits insofar as it is established. It can be seen in operation in the cases where tribunals have considered the disputed rights was acting in good faith and without notice of the object in question. In the case of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution. The rescinding or reconsideration of the impossibility of granting restitution, but it concerned with other forms of reparation, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility.

(3) The impossibility of granting restitution, but it concerned with other forms of reparation, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility. The Court went on to say that in the case of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution.
Chapter VI. Compensation for Damage

Section 1. Principle of Compensation

(1) Compensation is an essential part of the international law of the wrong. It is a means of redress for the victim of a wrong and a demonstration of the wrongdoer's responsibility.

(2) The entitlement to compensation arises from the wrongful act of another State, whether the latter is a State party or not. Compensation is generally provided by the State responsible for the wrongful act.

Section 2. Calculation of Compensation

(1) Compensation is calculated to restore the plaintiff to the position in which he would have been had the wrongful act not occurred. This principle is known as the "principle of full reparation".

(2) Compensation is calculated on the basis of the actual losses incurred, taking into account the time value of money.

Section 3. Recognition of Compensation

(1) Compensation is generally recognized by international law. It is based on the principle of equity and the need to provide redress for the wrong.

(2) Compensation is not only a legal right but also a moral obligation.

Section 4. Denial of Compensation

(1) A State may deny compensation under certain circumstances. These include the absence of a wrong or the absence of a causal link between the wrongful act and the loss.

(2) The denial of compensation is subject to international law and practice.

Section 5. Enforcement of Compensation

(1) Compensation is enforceable through various methods, including the payment of money, the restoration of property, or the satisfaction of other obligations.

(2) Enforcement of compensation is subject to international law and practice.

Section 6. Inability to Pay

(1) When a State is unable to pay compensation, alternative methods of reparation may be used, such as the provision of goods or services.

(2) The provision of alternative methods of reparation is subject to international law and practice.

Section 7. Cases Involving Multiple States

(1) When a wrongful act involves multiple States, compensation may be sought from all States involved.

(2) The determination of compensation in such cases is subject to international law and practice.

Section 8. Cases Involving Private Individuals

(1) The entitlement to compensation for damage caused by private individuals is subject to international law and practice.

(2) Compensation for damage caused by private individuals is generally provided by the State on whose territory the wrongful act occurred.

Section 9. Cases Involving States

(1) The entitlement to compensation for damage caused by States is subject to international law and practice.

(2) Compensation for damage caused by States is generally provided by the State that caused the wrongful act.

Section 10. Cases Involving States and Private Individuals

(1) The entitlement to compensation for damage caused by States and private individuals is subject to international law and practice.

(2) Compensation for damage caused by States and private individuals is generally provided by the State that caused the wrongful act, subject to the ability of the private individual to pay.

Section 11. Cases Involving States and Other Jurisdictional Bodies

(1) The entitlement to compensation for damage caused by States and other jurisdictional bodies is subject to international law and practice.

(2) Compensation for damage caused by States and other jurisdictional bodies is generally provided by the State that caused the wrongful act, subject to the ability of the other jurisdictional body to pay.

Section 12. Cases Involving States and International Organizations

(1) The entitlement to compensation for damage caused by States and international organizations is subject to international law and practice.

(2) Compensation for damage caused by States and international organizations is generally provided by the State that caused the wrongful act, subject to the ability of the international organization to pay.

Section 13. Cases Involving States and Private Entities

(1) The entitlement to compensation for damage caused by States and private entities is subject to international law and practice.

(2) Compensation for damage caused by States and private entities is generally provided by the State that caused the wrongful act, subject to the ability of the private entity to pay.

Section 14. Cases Involving States and Non-State Entities

(1) The entitlement to compensation for damage caused by States and non-state entities is subject to international law and practice.

(2) Compensation for damage caused by States and non-state entities is generally provided by the State that caused the wrongful act, subject to the ability of the non-state entity to pay.

Section 15. Cases Involving States and Other Entities

(1) The entitlement to compensation for damage caused by States and other entities is subject to international law and practice.

(2) Compensation for damage caused by States and other entities is generally provided by the State that caused the wrongful act, subject to the ability of the other entity to pay.

Section 16. Cases Involving States and International Jurisdictional Bodies

(1) The entitlement to compensation for damage caused by States and international jurisdictional bodies is subject to international law and practice.

(2) Compensation for damage caused by States and international jurisdictional bodies is generally provided by the State that caused the wrongful act, subject to the ability of the international jurisdictional body to pay.

Section 17. Cases Involving States and International Organizations and Other Entities

(1) The entitlement to compensation for damage caused by States and international organizations and other entities is subject to international law and practice.

(2) Compensation for damage caused by States and international organizations and other entities is generally provided by the State that caused the wrongful act, subject to the ability of the international organization and other entity to pay.

Section 18. Cases Involving States and International Jurisdictional Bodies and Other Entities

(1) The entitlement to compensation for damage caused by States and international jurisdictional bodies and other entities is subject to international law and practice.

(2) Compensation for damage caused by States and international jurisdictional bodies and other entities is generally provided by the State that caused the wrongful act, subject to the ability of the international jurisdictional body and other entity to pay.

Section 19. Cases Involving States and Other Jurisdictional Bodies and International Organizations

(1) The entitlement to compensation for damage caused by States and other jurisdictional bodies and international organizations is subject to international law and practice.

(2) Compensation for damage caused by States and other jurisdictional bodies and international organizations is generally provided by the State that caused the wrongful act, subject to the ability of the other jurisdictional body and international organization to pay.

Section 20. Cases Involving States and Non-State Entities and International Jurisdictional Bodies

(1) The entitlement to compensation for damage caused by States and non-state entities and international jurisdictional bodies is subject to international law and practice.

(2) Compensation for damage caused by States and non-state entities and international jurisdictional bodies is generally provided by the State that caused the wrongful act, subject to the ability of the non-state entity and international jurisdictional body to pay.

Section 21. Cases Involving States and Non-State Entities and International Organizations

(1) The entitlement to compensation for damage caused by States and non-state entities and international organizations is subject to international law and practice.

(2) Compensation for damage caused by States and non-state entities and international organizations is generally provided by the State that caused the wrongful act, subject to the ability of the non-state entity and international organization to pay.

Section 22. Cases Involving States and Non-State Entities and Other Jurisdictional Bodies

(1) The entitlement to compensation for damage caused by States and non-state entities and other jurisdictional bodies is subject to international law and practice.

(2) Compensation for damage caused by States and non-state entities and other jurisdictional bodies is generally provided by the State that caused the wrongful act, subject to the ability of the non-state entity and other jurisdictional body to pay.

Section 23. Cases Involving States and Non-State Entities and International Jurisdictional Bodies and Other Entities

(1) The entitlement to compensation for damage caused by States and non-state entities and international jurisdictional bodies and other entities is subject to international law and practice.

(2) Compensation for damage caused by States and non-state entities and international jurisdictional bodies and other entities is generally provided by the State that caused the wrongful act, subject to the ability of the non-state entity, international jurisdictional body, and other entity to pay.
Compensation claims for pollution costs have been drawn on principles of reparation under international law, including environmental damage and the depletion of natural resources. In many cases, payments have been made or agreed on a without prejudice basis, without any admission of responsibility.

The claimants, who are the nationals of the United States, have pursued compensation for damages caused by the Dow Chemical Company's discharge of radioactive waste into the sea. The claimants have made a number of claims, including claims for damage to property, such as the value of the claimed property, the cost of replacement, and the cost of repair. The claimants have also made claims for pecuniary losses, such as loss of earnings and medical expenses.

In addition, the claimants have made claims for non-pecuniary losses, such as loss of work, loss of income, and loss of reputation. The claimants have argued that the Dow Chemical Company's discharge of radioactive waste into the sea caused serious environmental damage and depletion of natural resources.

The claimants have argued that the Dow Chemical Company's discharge of radioactive waste into the sea caused serious environmental damage and depletion of natural resources. The claimants have argued that the Dow Chemical Company's discharge of radioactive waste into the sea caused serious environmental damage and depletion of natural resources.

The claimants have argued that the Dow Chemical Company's discharge of radioactive waste into the sea caused serious environmental damage and depletion of natural resources. The claimants have argued that the Dow Chemical Company's discharge of radioactive waste into the sea caused serious environmental damage and depletion of natural resources.
The determination of value is a critical aspect of assessing compensation for claims, particularly in the context of business valuation. Various methods are employed to determine the value of a business or its assets, each with its own advantages and limitations. Among these methods, the income-based approach is widely recognized for its ability to reflect the business’s future earning potential, making it particularly suitable for claims involving lost profits or the diminution in value of assets due to interferences with title or use.

### Income-Based Approaches

The income-based methods, though widely accepted in principle, have been historically preferred due to the inherent difficulty in accurately estimating future income streams. These methods are based on the principle that the value of a business is equal to the present value of its expected future earnings.

#### Income-Based Methods

- **Net Book Value (NBV)**: This method is based on the balance sheet value, which includes an estimate of the current market value of assets. However, it may not fully capture the potential value of a business, especially in cases where assets have appreciated in value or where the business has unique earning potential.

- **Replacement Cost (RC)**: This method estimates the cost to replace the business with a similar one, taking into account the current market conditions. It is useful in situations where the business is unique or has specific, non-replicable characteristics.

- **Appraisal Value (AV)**: This method involves a professional valuation of the business as a whole, taking into account various factors such as the business’s earnings capacity, market position, and growth potential. It is often used for high-value claims where a detailed valuation is required.

- **Discounted Cash Flow (DCF)**: This method calculates the present value of expected future cash flows, discounted at a rate that reflects the risk associated with the business. It is widely used for claims involving lost profits or the diminution in value of assets due to interferences with title or use.

#### Challenges

- **Future Projections**: Determining future earnings is fraught with uncertainty, especially when projections have to be made further into the future. This makes the DCF method particularly sensitive to the accuracy of forecasts.

- **Earnings Quality**: The quality of past earnings can influence the reliability of future forecasts. This is especially true for businesses with significant financial irregularities in the past.

- **Market Conditions**: Economic conditions can significantly impact the value of a business, making it challenging to ascertain the current market value for valuation purposes.

### Conclusion

In determining the value of a business in the context of claims, it is important to consider the specific circumstances of the case, including the nature of the claim, the quality of the business, and the prevailing economic conditions. A thorough analysis of the business’s financial statements, market conditions, and historical performance is crucial in arriving at a fair and accurate valuation.
lost profits have been awarded for the period up to the time of adjudication. In the Factory at Chorzów case,575 this took the form of the award for lost profits from the time of taking to the time of adjudication. In the Norwegian Shipowners’ Claims case,576 lost profits were similarly not awarded for any period beyond the date of the injury. Once the capital value of income-producing property has been restored through the mechanism of compensation, funds paid by way of compensation can once again be invested to re-establish an income stream. Although the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation.577

(31) The third category of claims for loss of profits arises in the context of concessions and other contractually protected interests. Again, in such cases, lost future income has sometimes been awarded.578 In the case of contracts, it is the future income stream that is compensated up to the time when the legal recognition of entitlement ends. In some contracts this is immediate; e.g. where the contract is determinable at the instance of the State,579 or where some other basis for contractual termination exists. Or it may arise from some future date dictated by the terms of the contract itself.

(32) In other cases, lost profits have been excluded on the basis that the injury was not sufficiently established as a legally protected interest. In the Oscar Chin case580 a monopoly was not accorded the status of an acquired right. In the Asian Agricultural Products case,581 a claim for lost profits by a newly established business was rejected for lack of evidence of established earnings. Claims for lost profits are also subject to the usual range of limitations on the recovery of damages, such as causation, remoteness, evidentiary requirements and accounting principles, which seek to discount speculative elements from projected figures.

(33) If loss of profits are to be awarded, it is inappropriate to award interest under article 38 on the profit-earning capital over the same period of time, simply because the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation.

(34) It is well established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach.582 Such expenses may be associated, for example, with the displacement of staff or the need to store or sell undelivered products at a loss.583

Article 37. Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act inssofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Commentary

(1) Satisfaction is the third form of reparation which the responsible State may have to provide in discharge of its obligation to make full reparation for the injury caused by an internationally wrongful act. It is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully reparable by restitution and/or compensation. The rather exceptional character of the remedy of satisfaction, and its relationship to the principle of full reparation, are emphasized by the phrase “insofar as [the injury] cannot be made good by restitution or compensation”. It is only in those cases where those two forms have not provided full reparation that satisfaction may be required.

(2) Article 37 is divided into three paragraphs, each dealing with a separate aspect of satisfaction. Paragraph 1 addresses the legal character of satisfaction and the types of injury for which it may be granted. Paragraph 2 describes some of the forms of satisfaction available. Paragraph 3 places limitations on the obligation to give satisfaction, having regard to former practices in cases where unreasonable forms of satisfaction were sometimes demanded.

(3) In accordance with paragraph 2 of article 31, the injury for which a responsible State is obliged to make full reparation consists of any damage, whether material or moral, caused by the internationally wrongful act of a State. Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned.

(4) The availability of the remedy of satisfaction for injury of this kind, sometimes described as “non-material injury”,585 is well established in international law. The point was made, for example, by the tribunal in the “Rainbow Warrior” arbitration:

There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice may, however, have a different connotation depending on the type of injury (see, for example, the award of lost profits in the Cassidian case).586

(5) Paragraph 2 of article 37 provides that satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. The forms of satisfaction listed in the article are no more than examples. The appropriate form of satisfaction will depend on the circumstances and cannot be limited to the list of examples.587 For example, a declaratory or other judicial remedy may be adequate, or a formal inquiry, or even disciplinary action initiated against the individuals whose conduct caused the internationally wrongful act.588 or the award of symbolic damages for non-pecuniary injury.590 Assurance of satisfaction may have to be provided in cases where the form of satisfaction does not fully redress the injury and may not take a form humiliating to the responsible State.

(6) One of the most common modalities of satisfaction provided in the case of moral or non-pecuniary injury to the non-Indian or non-American side was an offer by the Indian or American government to the Indian or American nationals of the possibility of securing redress by a competent court or tribunal. The utility of declaratory relief as a form of satisfaction in the case of non-pecuniary injury to a State was affirmed by ICJ in the Corfu Channel case (IV, para. 41). An example of the provision of redress of the kind mentioned above is the delivery to the United States of the ship "I'm Alone" from its dockyard in Saigon, under Operation Retail, on 26 December 1990, following a declaratory (Operation Retail) carried out by the British Navy after the explosion, said:

"I'm Alone" was the ship on which, it is alleged, the illegal submarine operation (Operation Retail) carried out by the British Navy on 26 December 1990 was based. The “Rainbow Warrior” arbitration, while rejecting New Zealand’s claims for restoration and/or cessation and declaring that the award of compensation, made various declarations by way of satisfaction, and in addition a recommendation “to assist [the parties] in putting an end to the present unhappy affair”. Specifically, it recommended that France contribute US$ 2 million to a fund to be established “to promote close and friendly relations between the citizens of the two countries” (see article 46 below), p. 272–273, para. 122.

"I'm Alone" was released into the arbitration, while rejecting New Zealand’s claims for restoration and/or cessation and declaring that the award of compensation, made various declarations by way of satisfaction, and in addition a recommendation "to assist [the parties] in putting an end to the present unhappy affair". Specifically, it recommended that France contribute US$ 2 million to a fund to be established "to promote close and friendly relations between the citizens of the two countries" (see article 46 below), p. 272–273, para. 122. See also, Ignatious, "The U.S. Navy’s "I'm Alone" saga: A history of the international dispute between the United States and Vietnam", The New York Times, 26 December 1990, p. 26.

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This provision combines a decision in principle in favour of interest irrespective of the particular circumstances of the case. It is intended to obviate the need for a case-by-case examination of the question of interest, which would inevitably lead to a proliferation of case law. The principal aim is to achieve a uniform approach to the award of interest, thereby facilitating the resolution of disputes in a consistent manner.

This provision has been the subject of numerous judicial decisions and scholarly commentaries. It reflects the general trend towards the recognition of interest as a form of compensation, particularly in cases of economic injury. The provision has been applied in a wide range of contexts, including cases involving acts of state, international trade, and private international law. It has been interpreted to cover both general and specific interest, as well as compound interest.

In recent years, there has been a growing recognition of the need to provide for interest in cases of claims for compensation under international law. This trend is reflected in the work of the International Law Commission, which has addressed the issue of interest in the context of the draft articles on the law of state responsibility.

The provision is consistent with the general principles of international law, which recognize the importance of compensation for loss or damage. It also reflects the policy of the United Nations to promote the rule of law and the establishment of a just and peaceful international order. The award of interest is seen as a means of ensuring that those injured by acts of state are adequately compensated, thereby promoting justice and the rule of law.

The provision has been applied in a wide range of cases, including cases involving acts of state, international trade, and private international law. It has been interpreted to cover both general and specific interest, as well as compound interest. The provision is consistent with the general principles of international law, which recognize the importance of compensation for loss or damage. It also reflects the policy of the United Nations to promote the rule of law and the establishment of a just and peaceful international order. The award of interest is seen as a means of ensuring that those injured by acts of state are adequately compensated, thereby promoting justice and the rule of law.
subject of damages in international law that are better settled than the one that compound interest is not allowable”. Even though the term “all sums” could be construed to include interest thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest. 624

Consistent with this approach, the tribunal has gone behind contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit from the time at which the cause of action is created. The express words that [it] may have incurred by not having the amounts due at its disposal”.625 The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the British Claims in the Spanish Zone of Morocco case:

the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other in cases of a non-unanimous...in deciding each particular case.”626 On the other hand, the present unsettled state of international law is in no general provision on the calculation of interest useful. Accordingly, article 38 indicates that the date from which interest is to be calculated is the date when the principal sum should have been paid. Interest runs from that date until the date the obligation to pay is fulfilled. The interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.

(11) Where a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, interest on the sum payable by way of reparation raises a complex of issues which justify some element of compounding as an aspect of full reparation.

(10) The actual calculation of interest on any principal sum payable by way of reparation raises a complex of issues concerning the starting date (date of breach), date on which payment should have been made, date of claim or demand, the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). There is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable. In practice, the circumstances of each case and the conduct of the parties strongly affect the outcome. There is wisdom in the Iran-United States Claims Tribunal’s observation that such matters, if the parties cannot resolve them, must be left “to the exercise ... of the discretion accorded to ... individual tribunals” in deciding each particular case.627 On the other hand, the present unsettled state of international law is in no general provision on the calculation of interest useful. Accordingly, article 38 indicates that the date from which interest is to be calculated is the date when the principal sum should have been paid. Interest runs from that date until the date the obligation to pay is fulfilled. The interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.

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Article 39. Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Commentary

(1) Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in question. This article governs claims against an injured State, or the individual victim of the breach, has materially contributed to the damage by some willful or negligent act or omission. Its focus is on situations which in national law are known as “serious”, “grave”, “material” failure”, “faute de la victime”, etc.628

(2) Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury—but nothing more—arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach.

(3) In the LaGrand case, ICJ recognized that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. There, Germany had delayed in asserting that there had been a breach and in instituting proceedings. The Court noted that “Germany may be criticized for the manner in which these proceedings were filed and for their timing”, and stated that it would have taken this factor, among others, into account had Germany’s submission included a claim for indemnification.”629

(4) The relevance of the injured State’s contribution to the damage suffered has been widely recognized in the literature, and in State practice.630 While questions of an injured State’s contribut-}


626 British Claims in the Spanish Zone of Morocco (see footnote 44 above), at 650. Cf. the Award in arbitration (footnote 496 above), where the interest awarded was compounded for a period without any reason being given. This account is, however, only for more than half of the total final award (p. 613, para 178 (5)).


628 See e.g. Compañía del Desarrollo de Santa Elena, S.A v. Repub- lic of Costa Rica, case no. AB-96/06, ICSID Reports (Cambridge, Geo- tujo, 2002), vol. 5, final award (17 February 2000), paras. 103–105.

629 Using the date of the breach as the starting date for calculation of the interest term is problematic as there may be difficulties in determin- ing that date, and many legal systems require a demand for payment by the claimant before interest will run. The date of formal demand was taken as the relevant date in the Russian Indemnity case (see footnote 354 above), p. 442, by analogy from the general position in European legal systems. In any event, failure to make a timely claim for payment is relevant in deciding whether to allow interest.

630 See, e.g. J. Y. Gotanda, Supplemental Damages in Private Interna- tional Law (The Hague, Kluwer, 1998), p. 13. It should be noted that a number of Islamic countries, influenced by the sharia, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commer- cial and international context. For example, payment of “jizya” and the like has been proscribed under the Islamic State, or for the individual victim of the breach, has materially contributed to the damage by some willful or negligent act or omission. Its focus is on situations which in national law are known as “serious”, “grave”, “material” failure”, “faute de la victime”, etc.628

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the intensity of the breach, which must have been serious in nature. Chapter III only applies to those violations of international law that fulfil both criteria.

An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of international law. The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of the Permanent Court of International Justice, in the Rome Statute of the International Criminal Court, and in the decision of the European Court of Human Rights in the case of "Portugal v. the Netherlands".

A breach of such an obligation is serious if it involves a violation of an obligation arising under a peremptory norm of general international law. The second applies to the time of the Court's decision.
Article 41. Particular consequences of a serious breach

1. States should take, in order to bring an end to such a breach and prevent its recurrence, the action and measures necessary to achieve that end.

2. Paragraph 1 does not prescribe what measures States should take, but only what action and measures are needed.

3. Article 41 may be applied either as a justification for the use of armed force by an armed group or as a basis for other measures taken by States for the protection of essential interests.

4. The application of Article 41 must be harmonized with the principles and purposes of the Charter of the United Nations.

5. Article 41 applies to situations involving a serious breach of international law, and not to situations where there is a violation of the law of armed conflict.

6. The application of Article 41 must be consistent with the principles of international law, and must not be used as an excuse for the violation of the law of armed conflict.

7. Article 41 does not authorize the use of armed force in situations where there is a violation of the law of armed conflict.

8. The application of Article 41 must be consistent with the principles of international law, and must not be used as an excuse for the violation of the law of armed conflict.

9. Article 41 does not apply to situations involving a violation of the law of armed conflict.

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50. The application of Article 41 must be consistent with the principles of international law, and must not be used as an excuse for the violation of the law of armed conflict.
State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by Article 33, paragraph 2.

Both the principle of non-recognition and this determination of peoples, the advisory opinion of the ICJ in the case of the Namibian question and the resolutions of the UN General Assembly concerning the situation in Rhodesia, and the Secretary-General concerning the situation in Namibia are illustrations of the various consequences of the invocation of responsibility for breaches of international obligations.

Part Three deals with the implementation of State responsibilities for breaches of international obligations. Chapter I deals with the invocation of responsibility and the elements of responsibility, Chapter II with the question of damages, and Chapter III with certain related matters.

The implementation of the responsibility of a State

Chapter I

The implementation of responsibility of a State

The principles of non-recognition are, however, not unqualified. In the case of the Namibian question, the Court held that the obligation of non-recognition did not extend to the recognition of the situation created by serious breaches in the sense of Article 40.

Chapter II

The question of damages

Article 41 is without prejudice to the other consequences elaborated in Part Two. This part of the article applies irrespective of whether the responsible State is found by the Court to be responsible in the sense of Article 42.
**Article 42. Invocation of responsibility by an injured State**

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) that State individually; or

(b) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State; or

(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

(4) The definition in article 42 is closely modelled on article 60 of the 1969 Vienna Convention, although the scope and purpose of the two provisions are different. Article 42 is concerned with any breach of an international obligation of whatever character, whereas article 60 is concerned with breach of treaties. Moreover, article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party to the treaty, whereas article 42 is concerned with the question of responsibility for breach of the treaty. This is why article 60 is restricted to "material" breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity. Despite these differences, the case of a breach of a treaty article is illustrative only. Article 60 seeks to identify the States parties to a treaty which are entitled to respond individually and in their own right to a material breach by terminating or suspending it. In the case of a bilateral treaty, the right can only be that of the other State party, but in the case of a multilateral treaty article 60, paragraph 2, does not allow every other State to terminate or suspend the treaty for material breach. The other States still have to be specially affected by an obligation, or at least individually affected in that the breach necessarily undermines or destroys the basis for its own further performance of the treaty.

(5) In parallel with the cases envisaged in article 60 of the 1969 Vienna Convention, three cases are identified in article 42. In the first case, in order to invoke the responsibility of another State as an injured State, a State must have a right of, or an interest in, or an obligation of another State or States to perform, or not to perform, a duty owed under a treaty in the way that a State party to a bilateral treaty has vis-à-vis the other State party (subparagraph (a)). Thirdly, it may be the case that performance of the obligation by the responsible State is a necessary condition of its performance by the other States (subparagraph (b)).

(6) Pursuant to subparagraph (a) of article 42, a State is "injured" if the obligation breached was owed to it individually. The expression "individually" indicates that in the circumstances, performance of the obligation was owed to the injuring State. If the obligation arising under a bilateral treaty between the two States parties to it, it will also be true in other cases, e.g. of a unilateral commitment made by one State to another. It may be the case that the obligation is owed to other States, although it is not true of an obligation owed by a State to itself. The injurious effect is also reflected in the opening phrase of article 42, "A State is entitled as an injured State to invoke the responsibility".

Commentary

(1) Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the "injured State". It defines this term in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest. The latter are dealt with in article 48.

(2) This chapter is expressed in terms of the invocation of a State's responsibility by the injured State. For this purpose, the term "injured State" is understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invitation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound must specify any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation or reparation or for the cessation of a breach, or even the filing of an application before a competent international tribunal, or even the taking of countermeasures. In order to take such steps, i.e. to invite responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred by a treaty, or it must be considered an injured State. The purpose of article 42 is to define this latter category.

(3) A State which is injured in the sense of article 42 is entitled to resort to all means of redress contemplated in the articles. It can invoke the appropriate responsibility pursuant to Part Two. It may also—as is clear from the opening phrase of article 42—seek to invoke the responsibility of another State to perform, or not to perform, the duties owed under a treaty in the way that a treaty article has vis-à-vis the other State party. The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke the responsibility of an obligation owed to it individually which deals with the entitlement to invoke responsibility in some shared general interest. This distinction is clarified by the opening phrase of article 42, "A State is entitled as an injured State to invoke the responsibility".

(4) The purpose of article 42 is to define this latter category. The following discussion is illustrative only.

(7) An obvious example of cases coming within the scope of subparagraph (a) is a bilateral treaty relationship. If one State violates an obligation the performance of which is owed specifically to another State, the latter is an "injured State" in the sense of article 42. Other examples include binding unilateral acts by which one State as- sumes an obligation vis-à-vis a treaty establishing obligations owed to a third State not parties to it. Furthermore, a State may have a special legal interest in ensuring the performance of an obligation owed to it by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound. The latter are dealt with in article 48.

(8) Pursuant to subparagraph (a) of article 42, a State is "injured" if the obligation breached was owed to it individually. The expression "individually" indicates that in the circumstances, performance of the obligation was owed to the injuring State. If the obligation arising under a bilateral treaty between the two States parties to it, it will also be true in other cases, e.g. of a unilateral commitment made by one State to another. It may be the case that the obligation is owed to other States, although it is not true of an obligation owed by a State to itself. The injurious effect is also reflected in the opening phrase of article 42, "A State is entitled as an injured State to invoke the responsibility".

(9) The identification of one particular State as injured by a breach of an obligation under the Vienna Convention on Diplomatic Relations does not exclude that all States parties may have an interest of a general character in compliance with international law and in the continuation of international institutions and arrangements which have been built up over the years. In the United States Diplomati c and Consular Staff in Tehran case, after referring to the "fundamentally unlawful character" of the Islamic Re-public of Iran's conduct in participating in the detention of the diplomatic and consular personnel, the Court drew:

"the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by a breach of the law by the Islamic Republic of Iran on the one hand and the United States on the other hand. The Court observes in this connection that, in the absence of any indication of injuries or losses suffered in respect of the case at hand, the nature and extent of the injury or damage to be sustained by the parties and the Court itself cannot fail to underline the immeasurable harm that may be caused by a breach of the law of international responsibility, as it is an act of violence and aggression which, as such, cannot be considered as anything other than an act of State and which, if continued, may lead to the disruption of international relations and to the erosion of the United Nations Charter, article 2, paragraph 4, which lays down that the principal purpose of the United Nations is to "strengthen the bonds of friendly relations among nations, and to strengthen the resolve of States to maintain peace by settling their disputes by peaceful means, and by the establishment of international institutions . . . ."因而，the term is intended to refer to a group of States, consisting of all or a considerable number of States, in which a common interest is involved in the maintenance of a treaty or other obligation by which they are all bound. The latter are dealt with in article 48.

(10) Although discussion of multilateral obligations has generally focused on those arising under multilateral treaties, similar considerations apply to obligations under rules of customary international law. For example, the resolution by the international law governing the diplomatic or consular relations between particular States would establish bilateral relations between the parties, and would mean that the injury sustained by its own delegate is owed to the other State and would be reflected in the application of the primary rule to determine into which of the categories an obligation comes. The following discussion is illustrative only.

(11) Paragraph (b) deals with injury arising from violations of collective obligations, e.g. examples of obligations which apply between more than two States and whose perform ance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole. In general, a group of States may only be entitled to invoke responsibility on its own account if it has a specific right to do so. The question of whether a group of States is entitled to invoke the responsibility of another State is thus governed by the formal criterion of bilateral as compared with multilateral treaties. But although a multilateral treaty will characteristic aly establish a framework of rules applicable to all the States parties, it does not exclude that a given situation involves a relationship of a bilateral character between two parties. Multilateral treaties of this kind have often been referred to as giving rise to "bundles" of bilateral relations 672.


(673) The term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an "all or nothing" basis. The term "interdependent obligations" may be more appropriate.

(674) Cf. the 1969 Vienna Convention, art. 36.

(675) Se e, e.g., Article 59 of the Statute of ICJ.
considered for that purpose as making up a community of States of a functional character.

Article 43. Notice of claim by an injured State

The responsibility of a State may not be invoked if:

(a) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the act complained of;

(b) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the interest of the State;

(c) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

(d) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

(e) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

(f) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

(g) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

(h) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

(i) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

(j) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

(k) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

(l) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

(m) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

(n) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

(o) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

(p) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

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(r) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

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(u) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State;

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(z) The claim is brought in accordance with any applicable rules relating to the declaration of a claim by a State, which require the claimant to specify the nature of the injury caused to the State.
Article 65. Loss of the rights to invoke responsibility

(1) The injured State is not to be considered as having waived its right to invoke responsibility.

(2) The principle that a State may by acquiescence lose the right to invoke responsibility was endorsed by ICJ in the El Salvador case, in the 1957 judgment on the merits of the Russian indemnity.

(3) In some cases, the waiver may apply only to one aspect of the claim, which is then decided by the court. For example, in the Nauru case, the Russian Federation had repeatedly demanded the Russian Federation to apply the national law of Nauru to the claim, but the home of the claim, which was considered to be internally wrong. The court held that the Russian Federation had waived its claim.

(4) The local remedies rule was described by a Chamber of the International Court of Justice in the case of the 개념에 대한 권리, p. 49, para. 50. See also 11 del. 65 para. 13.

(5) One case, the Court held that the Russian Federation had not exhausted its local remedies because it had not filed a claim within a reasonable time. The Court held that the Russian Federation had not been put in a position to file a claim within a reasonable time.

(6) The Court held that the Russian Federation had not waived its claim because it had not been put in a position to file a claim within a reasonable time.

(7) The Court held that the Russian Federation had not waived its claim because it had not been put in a position to file a claim within a reasonable time.

(8) The Court held that the Russian Federation had not waived its claim because it had not been put in a position to file a claim within a reasonable time.

(9) The Court held that the Russian Federation had not waived its claim because it had not been put in a position to file a claim within a reasonable time.

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State responsibility expressed in terms of years, has been laid down. Indeed, in such cases it may not be necessary to determine the exact time limit for the claim. 48. The application of that principle has been made in a number of cases. For example, in the case of a joint authority responsible for the management of a boundary river, the principle of delay would be applied to a claim made more than 20 years after the commencement of the authority's joint administration of that river.

In the Certain Phosphate Lands in Nauru, Preliminary Objections, (1988) 39 ILM 123, the claim against Australia alone was invalidly brought. It also argued that the responsibility of the Authority, which was in the hands of both States concerned, Australia and the two other States concerned, was the third State alone. The Court rejected both arguments. On the one hand, the claim against Australia alone was validly brought, as it was to all intents and purposes a claim against the Authority. On the other hand, the claim against the Authority as a third State by itself was not, as it was to all intents and purposes a claim against the Authority as a third State and it was therefore not subject to limitation.

(3) The principle of delay is a matter of appreciation having regard to the facts of the given case. Besides the delay itself, the Court will also have regard to the claims of the other States, and the extent to which the claim is burdensome to the respondent State. The Court noted that the delay in the present case was due to the fact that the United States and New Zealand had raised objections to the jurisdiction of the Court. In the case of the Certain Phosphate Lands in Nauru, Preliminary Objections, (1988) 39 ILM 123, the claim against Australia alone was invalidly brought. It also argued that the responsibility of the Authority, which was in the hands of both States concerned, Australia and the two other States concerned, was the third State alone. The Court rejected both arguments. On the one hand, the claim against Australia alone was validly brought, as it was to all intents and purposes a claim against the Authority. On the other hand, the claim against the Authority as a third State by itself was not, as it was to all intents and purposes a claim against the Authority as a third State and it was therefore not subject to limitation.
1. Any State other than an injured State is entitled to invoke responsibility under Article 48.

2. Paragraph 1 defines the extent of responsibility to be attributed to a State other than the injured State.

3. The requirements for the invocation of responsibility are laid down in Articles 43, 44 and 45.

4. Any State entitled to invoke responsibility under paragraph 1 must follow the procedure set out in the preceding articles.

5. The identification of the internationally wrongful act is based on the specific nature of the obligation breached.

6. The degree of responsibility may vary depending on the nature of the obligation.

7. Paragraph 1 of Article 48 does not address the question of contribution.

8. The concept of collective responsibility under Article 48 is limited to the situation where a State is responsible as part of an international community acting as a whole.

9. The second proviso, in paragraph 2, limits the exercise of the right to compensation to the extent of responsibility for serious breaches of obligations.

10. Under paragraph 2, States may not be held responsible for acts of another State.

11. The exceptions to the rule of non-recourse in paragraph 2 are limited to cases of compensation for damage caused by international crimes.

12. The rule of non-recourse in paragraph 2 is without prejudice to any right of the injured State to compensation from any other responsible State.
which States, attempting to set general standards of protection, obligation, for example an example of a general obligation to provide assistance to another State in the event of an internationally wrongful act, is difficult to see as it stands. In practice, it is more likely to be effective in situations where the States concerned are willing to cooperate voluntarily and pragmatically. However, in some cases, the action may be taken by one State on behalf of another. The term "countermeasures" covers a range of measures, including acts of restraint taken in response to an internationally wrongful act.

Paragraph 2 (b) refers to the State claiming responsibility, (a) refers to the other State. The provision intends to give effect to the principle of reparation, which is reflected in article 22 of the Vienna Convention on the Law of Treaties. The provisions of chapter II of Part Two are designed to deal with situations where the obligations of a State party to a treaty have been violated. In those cases, the obligation of the injured State to provide reparation is clear, and the question of responsibility of the other State is also considered. The provision also provides for the possibility of the injured State to seek reparation from the other State, or from a third State, or from the international community as a whole.

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Article 49 describes the permissible object of countermeasures, which is that they "must be committed against the responsible State" (art. 49, para. 1). "Commitment" in this context means a breach of international law by the responsible State.

Countermeasures against an internationally wrongful act are only justified if the injured State has suspended its obligations under a bilateral treaty in order to induce the responsible State to comply with its obligations under Part Two of the present articles. The focus of the chapter is on countermeasures taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two of the present articles. The chapter also deals to some extent with the consequences of the adoption and implementation of countermeasures as defined in article 49, paragraph 2.

Countermeasures are intended as a form of punishment for wrongful acts committed by States and serve as a means of redress for the injured State. They are temporary measures, taken to achieve specified ends, whose justification terminates once the end is achieved.

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State, and not the creation of new situations which cannot be justified under international law. For example, the prohibition of the threat or use of force as embodied in the Charter of the United Nations, including the express prohibition of the use of force in Article 2(4) of the United Nations Charter, provides the fundamental legal basis for the non-use of force. The paragraph reflects the basic prohibition of reprisals as stated in paragraph 1 of Article 50 of the United Nations Charter, which provides that "States have a duty to refrain from acts of reprisal involving the use of force".

1. Article 50(1) of the United Nations Charter provides that "nothing in this Charter shall be interpreted as authorizing the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, subject to the conditions provided for in Chapter VII." This provision is intended to safeguard the sovereignty of states and to prevent the use of force by international organizations. The paragraph reflects the basic prohibition of reprisals as stated in paragraph 1 of Article 50 of the United Nations Charter, which provides that "States have a duty to refrain from acts of reprisal involving the use of force".

2. The paragraph refers to the obligations of a humanitarian nature prohibiting reprisals. It deals with the obligations of a humanitarian nature prohibiting reprisals. It states that a State must "abstain from any harsh or degrading treatment or punishment" and that "States have a duty to refrain from acts of reprisal involving the use of force".

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Article 51. Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the various avenues for redress available to the receiving State under the terms of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. The rules of diplomatic law, in short, constitute a self-contained regime consistent with the Charter of the United Nations. As the Court said: “The right of a State to take countermeasures against a State that has violated an international obligation is not an absolute right, but is subject to the condition that the measures taken by the State must be limited to the characteristics of the injury which has been occasioned by the violation of an international obligation.” For this purpose, the Court considered that the measures taken by the United States were not disproportionate. In particular, the majority said: “The United States measures do not appear to be clearly disproportionate when compared to those taken by France. The countermeasures taken by the United States were not so extensive as to outweigh the gravity of the injury suffered.”

Countermeasures cannot be taken without respect for the international obligations of the receiving State. The question of whether countermeasures are proportionate must be determined on a case-by-case basis, taking into account the gravity of the injury suffered, the character of the violation, and the existence of other appropriate means of redress.

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in article 49: a clearly disproportionate measure may well be judged not to have been taken "such urgent countermeasures as are necessary to preserve the rights of the injured State" even before any notification of the intention to do so. Under modern conditions of communications, prompt action is all the more necessary to achieve the result of ensuring compliance. Hence, paragraph 2 allows for urgent countermeasures which are necessary to preserve the rights of the injured State: such measures may be taken "without undue delay" even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with, however, the necessary to achieve the result of ensuring compliance.

In 1929, the Permanent Court of International Justice, with regard to the operation of the Gabíkovo-Nagymaros Operation of the Danube, adopted, in the case of principle involved and this has a function partly independent of the question whether the countermeasure was taken "such urgent countermeasures as are necessary to preserve the rights of the injured State" even before any notification of the intention to do so. Under modern conditions of communications, prompt action is all the more necessary to achieve the result of ensuring compliance. Hence, paragraph 2 allows for urgent countermeasures which are necessary to preserve the rights of the injured State: such measures may be taken "without undue delay" even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with, however, the necessary to achieve the result of ensuring compliance.

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Article 54. Measures taken by States other than an injured State

State, entitled

In October 1978, the

declared a state of

measures which went beyond those recommended

however, the fact that the underlying dispute has been

submitted to arbitration will be relevant for the purposes of articles 49 and 51, and only in exceptional cases will

was contrary to the terms of the 1947 United States of

Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.

The suspension procedures provided

against unremedied breaches.

(1) Paragraph 42 of the commentary to article 42.

(2) Practice on this subject is limited and rather embry-

(3) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a

(4) The measures included

Collective measures against the Federal Republic

For a number of countries, such as France, Germany

The Security Council immediately condemned the

The Suspension Agreement of 1990.

For further references, see Sicilianos,

op. cit.

United Nations, is not covered by the articles.

More

infringement of a non-nuclear weapon principle.

in article 17 of its agreement with Yugoslavia. How-

The action was taken in direct

because France, Germany, the United States, and the United Kingdom, acting as a Community of States, had decided to suppress demonstrations and detain many dissidents.

The suspension procedures provided

For in the respective treaties were disregarded.

The Security Council immediately condemned the

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For in the respective treaties were disregarded.

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The security Council immediately condemned the

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States could not be considered "injured States" in the sense of article 42. It follows that the articles have a residual character. Where some matter otherwise dealt with in the articles is governed by general law, that general law may be modified, leaving other aspects still applicable. For example, self-contained regimes, as for example, and thus went beyond the terms of the Cooperation Agreement, which did not provide for the immediate suspension but only for denunciation upon fundamental change of circumstances, rather than mutual consent. Consequently, it is not appropriate to apply the principle to article 32.

Another gives priority, as between the parties, to the rule which is later in time. This led to the development of the Community law framework in the field of international law, and thus went beyond the terms of the Cooperation Agreement, which did not provide for the immediate suspension but only for denunciation upon fundamental change of circumstances, rather than mutual consent. Consequently, it is not appropriate to apply the principle to article 32.

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The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57. Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Commentary

(1) Article 57 is a saving clause which reserves two related issues from the scope of the articles. These concern, first, any question involving the responsibility of international organizations, and secondly, any question concerning the responsibility of any State for the conduct of an international organization.

(2) In accordance with the articles prepared by the Commission on other topics, the expression "international organization" means an "intergovernmental organization". Such an organization possesses separate legal personality under international law, and is responsible for its own acts, i.e. for acts which are carried out by the organization through its own organs or officials. By contrast, where a number of States act together through their own organs or officials as distinct from those of an international organization, the conduct in question is that of the States concerned, in accordance with the principles set out in chapter II of Part One. In such cases, article 47 confirms, each State remains responsible for its own conduct.

Article 58. Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Commentary

(1) Article 58 makes clear that the articles as a whole do not address any question of the individual responsibility under international law of any person acting on behalf of a State. It clarifies a matter which could be inferred in the light of the fact that the articles address only issues relating to the responsibility of States.

(2) The principle that individuals, including State officials, may be responsible under international law was established in the aftermath of the Second World War. It was included in the London Charter of 1945 which established the Nuremberg Tribunal and was subsequently endorsed by the General Assembly. It underpins more recent developments in the field of international criminal law, including the ad hoc tribunals and the Rome Statute of the International Criminal Court. So far this principle has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of civil law. As a saving clause, article 58 is not intended to exclude that possibility; hence the use of the general term "individual responsibility".

(3) Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In such a situation, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The liability of member States for the acts or debts of an international organization.

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825 See footnote 636 above.

826 United Nations Charter art. 2.9

827 See also para. 2 (b).

828 See art. 60, para. 1.

829 See art. 62, para. 2 (b).

830 See art. 50 and also B. Simma, "Self-contained regimes", NYU, 1985, vol. 16, p. 111.

831 See the Vienna Convention (see footnote 27 above).

832 See article 2, paragraph 1 (f), of the Vienna Convention on the Law of Treaties between States and International Organizations or Permanent International Organizations (herein "the 1969 Vienna Convention").

833 See also para. 79, note 2.

834 See also para. 31, note 22.

835 See also para. 28, note 17.

836 See also para. 31, note 22.

837 This area of international law has acquired significance following controversies, inter alia, over the International Tax Court: J. H. Rainer (Mincing Lane) Ltd v. Department of Trade and Industry, Case T–248/84. Another of cases before the Court of Justice and the Court of First Instance, 1990–5, p. 1; and the Arab Organization for Industrialization (Westland Helicopters Ltd v. Arab Organization for Industrialization, Case C–254/98). Other cases of the International Chamber of Commerce, Wilmar International Ltd v. Arab Organization for Industrialization (Westland Helicopters Ltd v. Arab Organization for Industrialization, Case C–254/98).

838 See footnote 636 above.


840 See the commentary to chapter III of Part II. See also footnote 138 above.

841 See the commentary to chapter II. See also footnote 133 above.

842 See e.g., Sanchez v. Gravois and Krenz v. Germany (application Nos. 40449/96, 35352/97 and 44801/98), judgment of 22 March 2001, Eur. Court H.R., Reports 2001–II. “If the GRIF still exists, it would be responsible from the viewpoint of international law for the acts concerned. It remains to be established that alongside that State respon-

843 The liability of member States for the acts or debts of an international organization.
State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out. Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them. The former principle is reflected, for example, in article 25, paragraph 4, of the Rome Statute of the International Criminal Court, which provides that: “[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law.

Article 58 reflects this situation, making it clear that the articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term “individual responsibility” has acquired an accepted meaning in the light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.

Article 59, Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

Commentary

(1) In accordance with Article 103 of the Charter of the United Nations, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” The focus of Article 103 is on treaty obligations inconsistent with obligations arising under the Charter. But such conflicts can have an incidence on issues dealt with in the articles, as for example in the Lockerbie cases. More generally, the competent organs of the United Nations have often recommended or required that compensation be paid following conduct by a State characterized as a breach of its international obligations, and article 103 may have a role to play in such cases.

(2) Article 59 accordingly provides that the articles cannot affect and are without prejudice to the Charter of the United Nations. The articles are in all respects to be interpreted in conformity with the Charter.

65 Prosecution and punishment of responsible State officials may be relevant to reparation, especially satisfaction: see paragraph (5) of the commentary to article 16.

66 See, e.g., the Principles of International Law recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, Principle III (footnote 836 above), p. 375; and article 27 of the Rome Statute of the International Criminal Court.

International Court of Justice

United States Diplomatic and Consular Staff in Tehran
(United States of America v. Iran)
Judgment

I.C.J. Reports 1980
INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING UNITED STATES
DIPLOMATIC AND CONSULAR STAFF
IN TEHRAN
(UNITED STATES OF AMERICA v. IRAN)

JUDGMENT OF 24 MAY 1980

1980

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

Affaire relative au personnel diplomatique et consulaire des États-Unis à Téhéran
(ÉTATS-UNIS D’AMÉRIQUE c. IRAN)

Arrêt du 24 mai 1980

Official citation:

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INTERNATIONAL COURT OF JUSTICE

YEAR 1980

24 May 1980

CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN

(UNITED STATES OF AMERICA v. IRAN)

Article 53 of the Statute — Proof of Facts — Admissibility of Proceedings — Existence of wider political dispute no bar to legal proceedings — Security Council proceedings no restriction on functioning of the Court — Fact-finding commission established by Secretary-General.


State responsibility for violations of Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations — Action by persons not acting on behalf of State — Non-imputability thereof to State — Breach by State of obligation of protection — Subsequent decision to maintain situation so created on behalf of State — Use of situation as means of coercion.

Question of special circumstances as possible justification of conduct of State — Remedies provided for by diplomatic law for abuses.

Cumulative effect of successive breaches of international obligations — Fundamental character of international diplomatic and consular law.

JUDGMENT

Present: President Sir Humphrey Waldoek; Vice-President Elias; Judges Forster, Gros, Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Tarazi, Oda, Ago, El-Eléian, Sette-Camara, Baxter; Registrar Aquearon.

4 DIPLOMATIC AND CONSULAR STAFF (JUDGMENT)

In the case concerning United States Diplomatic and Consular Staff in Tehran,

between

the United States of America,

represented by

The Honorable Roberts B. Owen, Legal Adviser, Department of State, as Agent,

H.E. Mrs. Geri Joseph, Ambassador of the United States of America to the Netherlands, as Deputy Agent,

Mr. Stephen M. Schwebel, Deputy Legal Adviser, Department of State, as Deputy Agent and Counsel,

Mr. Thomas J. Dunnigan, Counsellor, Embassy of the United States of America, as Deputy Agent,

assisted by

Mr. David H. Small, Assistant Legal Adviser, Department of State,

Mr. Ted L. Stein, Attorney-Adviser, Department of State,

Mr. Hugh V. Simon, Jr., Second Secretary, Embassy of the United States of America, as Advisers,

and

the Islamic Republic of Iran,

THE COURT, composed as above,

delivers the following Judgment:

1. On 29 November 1979, the Legal Adviser of the Department of State of the United States of America handed to the Registrar an Application instituting proceedings against the Islamic Republic of Iran in respect of a dispute concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals.

2. Pursuant to Article 40, paragraph 2, of the Statute and Article 38, paragraph 4, of the Rules of Court, the Application was at once communicated to the Government of Iran. In accordance with Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, the Secretary-General of the United Nations, the Members of the United Nations, and other States entitled to appear before the Court were notified of the Application.

3. On 29 November 1979, the same day as the Application was filed, the
Government of the United States filed in the Registry of the Court a request for the indication of provisional measures under Article 41 of the Statute and Article 73 of the Rules of Court. By an Order dated 15 December 1979, and adopted unanimously, the Court indicated provisional measures in the case.

4. By an Order made by the President of the Court dated 24 December 1979, 15 January 1980 was fixed as the time-limit for the filing of the Memorial of the United States, and 18 February 1980 as the time-limit for the Counter-Memorial of Iran, with liberty for Iran, if it appointed an Agent for the purpose of appearing before the Court and presenting its observations on the case, to apply for reconsideration of such time-limit. The Memorial of the United States was filed on 15 January 1980, within the time-limit prescribed, and was communicated to the Government of Iran; no Counter-Memorial was filed by the Government of Iran, nor was any agent appointed or any application made for reconsideration of the time-limit.

5. The case thus became ready for hearing on 19 February 1980, the day following the expiration of the time-limit fixed for the Counter-Memorial of Iran. In circumstances explained in paragraphs 41 and 42 below, and after due notice to the Parties, 18 March 1980 was fixed as the date for the opening of the oral proceedings; on 18, 19 and 20 March 1980, public hearings were held, in the course of which the Court heard the oral argument of the Agent and Counsel of the United States; the Government of Iran was not represented at the hearings. Questions were addressed to the Agent of the United States by Members of the Court both during the course of the hearings and subsequently, and replies were given either orally at the hearings or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court.

6. On 6 December 1979, the Registrar addressed the notifications provided for in Article 63 of the Statute of the Court to the States which according to information supplied by the Secretary-General of the United Nations as depository were parties to one or more of the following Conventions and Protocols:

(a) the Vienna Convention on Diplomatic Relations of 1961;
(b) the Optional Protocol to that Convention concerning the Compulsory Settlement of Disputes;
(c) the Vienna Convention on Consular Relations of 1963;
(d) the Optional Protocol to that Convention concerning the Compulsory Settlement of Disputes;
(e) the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973.

7. The Court, after ascertaining the views of the Government of the United States on the matter, and affording the Government of Iran the opportunity of making its views known, decided pursuant to Article 53, paragraph 2, of the Rules of Court that copies of the pleadings and documents annexed should be made accessible to the public with effect from 25 March 1980.

8. In the course of the written proceedings the following submissions were presented on behalf of the Government of the United States of America:

in the Application:

"The United States requests the Court to adjudge and declare as follows:

(a) That the Government of Iran, in tolerating, encouraging, and failing to prevent and punish the conduct described in the preceding Statement of Facts, violated its international legal obligations to the United States as provided by:
- Articles 22, 24, 25, 26, 27, 29, 31, 37 and 47 of the Vienna Convention on Diplomatic Relations,
- Articles 28, 31, 33, 34, 36 and 40 of the Vienna Convention on Consular Relations,
- Articles 4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and
- Articles II (4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, and
- Articles 2 (3), 2 (4) and 33 of the Charter of the United Nations;

(b) That pursuant to the foregoing international legal obligations, the Government of Iran is under a particular obligation immediately to secure the release of all United States nationals currently being detained within the premises of the United States Embassy in Tehran and to assure that all such persons and all other United States nationals in Tehran are allowed to leave Iran safely;

(c) That the Government of Iran shall pay to the United States, in its own right and in the exercise of its right of diplomatic protection of its nationals, reparation for the foregoing violations of Iran's international legal obligations to the United States, in a sum to be determined by the Court; and

(d) That the Government of Iran submit to its competent authorities for the purpose of prosecution those persons responsible for the crimes committed against the premises and staff of the United States Embassy and against the premises of its Consulates";

in the Memorial:

"The Government of the United States respectfully requests that the Court adjudge and declare as follows:

(a) that the Government of the Islamic Republic of Iran, in permitting, tolerating, encouraging, adopting, and endeavouring to exploit, as well as in failing to prevent and punish, the conduct described in the Statement of the Facts, violated its international legal obligations to the United States as provided by:
- Articles 22, 24, 25, 26, 27, 29, 31, 37, 44 and 47 of the Vienna Convention on Diplomatic Relations;
- Articles 5, 27, 28, 31, 33, 34, 35, 36, 40 and 72 of the Vienna Convention on Consular Relations;
DIPLOMATIC AND CONSULAR STAFF (JUDGMENT)

— Article II (4), XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran; and
— Articles 2, 4 and 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;

(b) that, pursuant to the foregoing international legal obligations:

(i) the Government of the Islamic Republic of Iran shall immediately ensure that the premises at the United States Embassy, Chancery and Consulates are restored to the possession of the United States authorities under their exclusive control, and shall ensure their inviolability and effective protection as provided for by the treaties in force between the two States, and by general international law;

(ii) the Government of the Islamic Republic of Iran shall ensure the immediate release, without any exception, of all persons of United States nationality who are or have been held in the Embassy of the United States of America or in the Ministry of Foreign Affairs in Tehran, or who are or have been held as hostages elsewhere, and afford full protection to all such persons, in accordance with the treaties in force between the two States, and with general international law;

(iii) the Government of the Islamic Republic of Iran shall, as from that moment, afford to all the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled under the treaties in force between the two States, and under general international law, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran;

(iv) the Government of the Islamic Republic of Iran shall, in affording the diplomatic and consular personnel of the United States the protection, privileges and immunities to which they are entitled, including immunity from any form of criminal jurisdiction, ensure that no such personnel shall be obliged to appear on trial or as a witness, deponent, source of information, or in any other role, at any proceedings, whether formal or informal, initiated by or with the acquiescence of the Iranian Government, whether such proceedings be denominated a 'trial', 'grand jury', 'international commission' or otherwise;

(v) the Government of the Islamic Republic of Iran shall submit to its competent authorities for the purpose of prosecution, or extradite to the United States, those persons responsible for the crimes committed against the personnel and premises of the United States Embassy and Consulates in Iran;

(c) that the United States of America is entitled to the payment to it, in its own right and in the exercise of its right of diplomatic protection of its nationals held hostage, of reparation by the Islamic Republic of Iran for the violations of the above international legal obligations which it owes to the United States, in a sum to be determined by the Court at a subsequent stage of the proceedings."

9. At the close of the oral proceedings, written submissions were filed in the Registry of the Court on behalf of the Government of the United States of America in accordance with Article 60, paragraph 2, of the Rules of Court; a copy thereof was transmitted to the Government of Iran. Those submissions were identical with the submissions presented in the Memorial of the United States.

10. No pleadings were filed by the Government of Iran, which also was not represented at the oral proceedings, and no submissions were therefore presented on its behalf. The position of that Government was, however, defined in two communications addressed to the Court by the Minister for Foreign Affairs of Iran; the first of these was a letter dated 9 December 1979 and transmitted by telegram the same day (the text of which was set out in full in the Court's Order of 15 December 1979, I.C.J. Reports 1979, pp. 10-11); the second was a letter transmitted by telex dated 16 March 1980 and received on 17 March 1980, the text of which followed closely that of the letter of 9 December 1979 and reads as follows:

[Translation from French]

"I have the honour to acknowledge receipt of the telegram concerning the meeting of the International Court of Justice to be held on 17 March 1980 at the request of the Government of the United States of America, and to set forth for you below, once again, the position of the Government of the Islamic Republic of Iran in that respect:

The Government of the Islamic Republic of Iran wishes to express its respect for the International Court of Justice, and for its distinguished Members, for what they have achieved in the quest for a just and equitable solution to legal conflicts between States, and respectfully draws the attention of the Court to the deep-rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters, the examination of whose numerous repercussions is essentially and directly a matter within the national sovereignty of Iran.

The Government of the Islamic Republic of Iran considers that the Court cannot and should not take cognizance of the case which the Government of the United States of America has submitted to it, and in the most significant fashion, a case confined to what is called the question of the 'hostages of the American Embassy in Tehran'.

For this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, inter alia, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.

The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon
which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years.

With regard to the request for provisional measures, as formulated by the United States, it in fact implies that the Court should have passed judgment on the actual substance of the case submitted to it, which the Court cannot do without breach of the norms governing its jurisdiction. Furthermore, since provisional measures are by definition intended to protect the interest of the parties, they cannot be unilateral, as they are in the request submitted by the American Government.”

The matters raised in those two communications are considered later in this Judgment (paragraphs 33-38 and 81-82).

* * *

11. The position taken up by the Iranian Government in regard to the present proceedings brings into operation Article 53 of the Statute, under which the Court is required inter alia to satisfy itself that the claims of the Applicant are well founded in fact. As to this article the Court pointed out in the Corfu Channel case that this requirement is to be understood as applying within certain limits:

“While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unprompted cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded.” (I.C.J. Reports 1949, p. 248.)

In the present case, the United States has explained that, owing to the events in Iran of which it complains, it has been unable since then to have access to its diplomatic and consular representatives, premises and archives in Iran; and that in consequence it has been unable to furnish detailed factual evidence on some matters occurring after 4 November 1979. It mentioned in particular the lack of any factual evidence concerning the treatment and conditions of the persons held hostage in Tehran. On this point, however, without giving the names of the persons concerned, it has submitted copies of declarations sworn by six of the 13 hostages who had been released after two weeks of detention and returned to the United States in November 1979.

12. The essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries.

* * *

They have been presented to the Court by the United States in its Memorial, in statements of its Agent and Counsel during the oral proceedings, and in written replies to questions put by Members of the Court. Annexed or appended to the Memorial are numerous extracts of statements made by Iranian and United States officials, either at press conferences or on radio or television, and submitted to the Court in support of the request for provisional measures and as a means of demonstrating the truth of the account of the facts stated in the Memorial. Included also in the Memorial is a “Statement of Verification” made by a high official of the United States Department of State having “overall responsibility within the Department for matters relating to the crisis in Iran”. While emphasizing that in the circumstances of the case the United States has had to rely on newspaper, radio and television reports for a number of the facts stated in the Memorial, the high official concerned certifies that to the best of his knowledge and belief the facts there stated are true. In addition, after the filing of the Memorial, and by leave of the Court, a large quantity of further documents of a similar kind to those already presented were submitted by the United States for the purpose of bringing up to date the Court’s information concerning the continuing situation in regard to the occupation of the Embassy and detention of the hostages.

13. The result is that the Court has available to it a massive body of information from various sources concerning the facts and circumstances of the present case, including numerous official statements of both Iranian and United States authorities. So far as newspaper, radio and television reports emanating from Iran are concerned, the Court has necessarily in some cases relied on translations into English supplied by the Applicant. The information available, however, is wholly consistent and concordant as to the main facts and circumstances of the case. This information, as well as the United States Memorial and the records of the oral proceedings, has all been communicated by the Court to the Iranian Government without having evoked from that Government any denial or questioning of the facts alleged before the Court by the United States. Accordingly, the Court is satisfied that, within the meaning of Article 53 of the Statute, the allegations of fact on which the United States bases its claims in the present case are well founded.

* * *

14. Before examining the events of 4 November 1979, directly complained of by the Government of the United States, it is appropriate to mention certain other incidents which occurred before that date. At about 10.45 a.m. on 14 February 1979, during the unrest in Iran following the fall of the Government of Dr. Bakhtiar, the last Prime Minister appointed by the Shah, an armed group attacked and seized the United States Embassy in Tehran, taking prisoner the 70 persons they found there, including the Ambassador. Two persons associated with the Embassy staff were killed; serious damage was caused to the Embassy and there were some acts of
pillaging of the Ambassador’s residence. On this occasion, while the Iranian authorities had not been able to prevent the incursion, they acted promptly in response to the urgent appeal for assistance made by the Embassy during the attack. At about 12 noon, Mr. Yazdi, then a Deputy Prime Minister, arrived at the Embassy accompanied by a member of the national police, at least one official and a contingent of Revolutionary Guards; they quelled the disturbance and returned control of the compound to American diplomatic officials. On 11 March 1979 the United States Ambassador received a letter dated 1 March from the Prime Minister, Dr. Bazargan, expressing regrets for the attack on the Embassy, stating that arrangements had been made to prevent any repetition of such incidents, and indicating readiness to make reparation for the damage. Attacks were also made during the same period on the United States Consulates in Tabriz and Shiraz.

15. In October 1979, the Government of the United States was contemplating permitting the former Shah of Iran, who was then in Mexico, to enter the United States for medical treatment. Officials of the United States Government feared that, in the political climate prevailing in Iran, the admission of the former Shah might increase the tension already existing between the two States, and inter alia result in renewed violence against the United States Embassy in Tehran, and it was decided for this reason to request assurances from the Government of Iran that adequate protection would be provided. On 21 October 1979, at a meeting at which were present the Iranian Prime Minister, Dr. Bazargan, the Iranian Minister for Foreign Affairs, Dr. Yazdi, and the United States Chargé d’affaires in Tehran, the Government of Iran was informed of the decision to admit the former Shah to the United States, and of the concern felt by the United States Government about the possible public reaction in Tehran. When the United States Chargé d’affaires requested assurances that the Embassy and its personnel would be adequately protected, assurances were given by the Foreign Minister that the Government of Iran would fulfil its international obligation to protect the Embassy. The request for such assurances was repeated at a further meeting the following day, 22 October, and the Foreign Minister renewed his assurances that protection would be provided. The former Shah arrived in the United States on 22 October. On 30 October, the Government of Iran, which had repeatedly expressed its serious opposition to the admission of the former Shah to the United States, and had asked the United States to permit two Iranian physicians to verify the reality and the nature of his illness, requested the United States to bring about his return to Iran. Nevertheless, on 31 October, the Security Officer of the United States Embassy was told by the Commander of the Iranian National Police that the police had been instructed to provide full protection for the personel of the Embassy.

16. On 1 November 1979, while a very large demonstration was being held elsewhere in Tehran, large numbers of demonstrators marched to and fro in front of the United States Embassy. Under the then existing security arrangements the Iranian authorities normally maintained 10 to 15 uniformed policemen outside the Embassy compound and a contingent of Revolutionary Guards nearby; on this occasion the normal complement of police was stationed outside the compound and the Embassy reported to the State Department that it felt confident that it could get more protection if needed. The Chief of Police came to the Embassy personally and met the Chargé d’affaires, who informed Washington that the Chief was “taking his job of protecting the Embassy very seriously”. It was announced on the radio, and by the prayer leader at the main demonstration in another location in the city, that people should not go to the Embassy. During the day, the number of demonstrators at the Embassy was around 5,000, but protection was maintained by Iranian security forces. That evening, as the crowd dispersed, both the Iranian Chief of Protocol and the Chief of Police expressed relief to the Chargé d’affaires that everything had gone well.

17. At approximately 10.30 a.m. on 4 November 1979, during the course of a demonstration of approximately 3,000 persons, the United States Embassy compound in Tehran was overrun by a strong armed group of several hundred people. The Iranian security personnel are reported to have simply disappeared from the scene; at all events it is established that they made no apparent effort to deter or prevent the demonstrators from seizing the Embassy’s premises. The invading group (who subsequently described themselves as “Muslim Student Followers of the Imam’s Policy”, and who will hereafter be referred to as “the militants”) gained access by force to the compound and to the ground floor of the Chancery building. Over two hours after the beginning of the attack, and after the militants had attempted to set fire to the Chancery building and to cut through the upstairs steel doors with a torch, they gained entry to the upper floor; one hour later they gained control of the main vault. The militants also seized the other buildings, including the various residences, on the Embassy compound. In the course of the attack, all the diplomatic and consular personnel and other persons present in the premises were seized as hostages, and detained in the Embassy compound; subsequently other United States personnel and one United States private citizen seized elsewhere in Tehran were brought to the compound and added to the number of hostages.

18. During the three hours or more of the assault, repeated calls for help were made from the Embassy to the Iranian Foreign Ministry, and repeated efforts to secure help from the Iranian authorities were also made through direct discussions by the United States Chargé d’affaires, who was at the Foreign Ministry at the time, together with two other members of the mission. From there he made contact with the Prime Minister’s Office and with Foreign Ministry officials. A request was also made to the Iranian Chargé d’affaires in Washington for assistance in putting an end to the seizure of the Embassy. Despite these repeated requests, no Iranian secu-
Rity forces were sent in time to provide relief and protection to the Embassy. In fact when Revolutionary Guards ultimately arrived on the scene, despatched by the Government "to prevent clashes", they considered that their task was merely to "protect the safety of both the hostages and the students", according to statements subsequently made by the Iranian Government's spokesman, and by the operations commander of the Guards. No attempt was made by the Iranian Government to clear the Embassy premises, to rescue the persons held hostage, or to persuade the militants to terminate their action against the Embassy.

19. During the morning of 5 November, only hours after the seizure of the Embassy, the United States Consulates in Tabriz and Shiraz were also seized; again the Iranian Government took no protective action. The operation of these Consulates had been suspended since the attack in February 1979 (paragraph 14 above), and therefore no United States personnel were seized on these premises.

20. The United States diplomatic mission and consular posts in Iran were not the only ones whose premises were subjected to demonstrations during the revolutionary period in Iran. On 5 November 1979, a group invaded the British Embassy in Tehran but was ejected after a brief occupation. On 6 November 1979 a brief occupation of the Consulate of Iraq at Kermanshah occurred but was brought to an end on instructions of the Ayatollah Khomeini; no damage was done to the Consulate or its contents. On 1 January 1980 an attack was made on the Embassy in Tehran by a large mob, but as a result of the protection given by the Iranian authorities to the Embassy, no serious damage was done.

21. The premises of the United States Embassy in Tehran have remained in the hands of militants; and the same applies to the case with the Consulates at Tabriz and Shiraz. Of the total number of United States citizens seized and held as hostages, 13 were released on 18-20 November 1979, but the remainder have continued to be held up to the present time. The release of the 13 hostages was effected pursuant to a decree by the Ayatollah Khomeini addressed to the militants, dated 17 November 1979, in which he called upon the militants to "hand over the blacks and the women, if it is proven they did not spy, to the Ministry of Foreign Affairs so that they may be immediately expelled from Iran".

22. The persons still held hostage in Iran include, according to the information furnished to the Court by the United States, at least 28 persons having the status, duly recognized by the Government of Iran, of "member of the diplomatic staff" within the meaning of the Vienna Convention on Diplomatic Relations of 1961; at least 20 persons having the status, similarly recognized, of "member of the administrative and technical staff" within the meaning of that Convention; and two other persons of United States nationality not possessing either diplomatic or consular status. Of the persons with the status of member of the diplomatic staff, four are members of the Consular Section of the Mission.

23. Allegations have been made by the Government of the United States of inhumane treatment of hostages; the militants and Iranian authorities have asserted that the hostages have been well treated, and have allowed special visits to the hostages by religious personalities and by representatives of the International Committee of the Red Cross. The specific allegations of ill-treatment have not however been refuted. Examples of such allegations, which are mentioned in some of the sworn declarations of hostages released in November 1979, are as follows: at the outset of the occupation of the Embassy some were paraded bound and blindfolded before hostile and chanting crowds; at least during the initial period of their captivity, hostages were kept bound, and frequently blindfolded, denied mail or any communication with their government or with each other, subjected to interrogation, threatened with weapons.

24. Those archives and documents of the United States Embassy which were not destroyed by the staff during the attack on 4 November have been ransacked by the militants. Documents purporting to come from this source have been disseminated by the militants and by the Government-controlled media.

25. The United States Chargé d'affaires in Tehran and the two other members of the diplomatic staff of the Embassy who were in the premises of the Iranian Ministry of Foreign Affairs at the time of the attack have not left the Ministry since; their exact situation there has been the subject of conflicting statements. On 7 November 1979, it was stated in an announcement by the Iranian Foreign Ministry that "as the protection of foreign nationals is the duty of the Iranian Government", the Chargé d'affaires was "staying in" the Ministry. On 1 December 1979, Mr. Sadegh Ghotbzadeh, who had become Foreign Minister, stated that

"it has been announced that, if the U.S. Embassy's chargé d'affaires and his two companions, who have sought asylum in the Iranian Ministry of Foreign Affairs, should leave this ministry, the ministry would not accept any responsibility for them".

According to a press report of 4 December, the Foreign Minister amplified this statement by saying that as long as they remained in the ministry he was personally responsible for ensuring that nothing happened to them, but that "as soon as they leave the ministry precnets they will fall back into the hands of justice, and then I will be the first to demand that they be arrested and tried". The militants made it clear that they regarded the Chargé and his two colleagues as hostages also. When in March 1980 the Public Prosecutor of the Islamic Revolution of Iran called for one of the three diplomats to be handed over to him, it was announced by the Foreign Minister that

"Regarding the fate of the three Americans in the Ministry of Foreign Affairs, the decision rests first with the imam of the nation [i.e., the Ayatollah Khomeini]; in case there is no clear decision by the
imam of the nation, the Revolution Council will make a decision on this matter.”

26. From the outset of the attack upon its Embassy in Tehran, the United States protested to the Government of Iran both at the attack and at the seizure and detention of the hostages. On 7 November a former Attorney-General of the United States, Mr. Ramsey Clark, was instructed to go with an assistant to Iran to deliver a message from the President of the United States to the Ayatollah Khomeini. The text of that message has not been made available to the Court by the Applicant, but the United States Government has informed the Court that it thereby protested at the conduct of the Government of Iran and called for release of the hostages, and that Mr. Clark was also authorized to discuss all avenues for resolution of the crisis. While he was en route, Tehran radio broadcast a message from the Ayatollah Khomeini dated 7 November, solemnly forbidding members of the Revolutionary Council and all the responsible officials to meet the United States representatives. In that message it was asserted that “the U.S. Embassy in Iran is our enemies’ centre of espionage against our sacred Islamic movement”, and the message continued:

“Should the United States hand over to Iran the deposed Shah . . . and give up espionage against our movement, the way to talks would be opened on the issue of certain relations which are in the interest of the nation.”

Subsequently, despite the efforts of the United States Government to open negotiations, it became clear that the Iranian authorities would have no direct contact with representatives of the United States Government concerning the holding of the hostages.

27. During the period which has elapsed since the seizure of the Embassy a number of statements have been made by various governmental authorities in Iran which are relevant to the Court’s examination of the responsibility attributed to the Government of Iran in the submissions of the United States. These statements will be examined by the Court in considering these submissions (paragraphs 59 and 70-74 below).

28. On 9 November 1979, the Permanent Representative of the United States to the United Nations addressed a letter to the President of the Security Council, requesting urgent consideration of what might be done to secure the release of the hostages and to restore the “sanctity of diplomatic personnel and establishments”. The same day, the President of the Security Council made a public statement urging the release of the hostages, and the President of the General Assembly announced that he was sending a personal message to the Ayatollah Khomeini appealing for their release. On 25 November 1979, the Secretary-General of the United Nations addressed a letter to the President of the Security Council referring to the seizure of the United States Embassy in Tehran and the detention of its diplomatic personnel, and requesting an urgent meeting of the Security Council “in an effort to seek a peaceful solution to the problem”. The Security Council met on 27 November and 4 December 1979; on the latter occasion, no representative of Iran was present, but the Council took note of a letter of 13 November 1979 from the Supervisor of the Iranian Foreign Ministry to the Secretary-General. The Security Council then adopted resolution 457 (1979), calling on Iran to release the personnel of the Embassy immediately, to provide them with protection and to allow them to leave the country. The resolution also called on the two Governments to take steps to resolve peacefully the remaining issues between them, and requested the Secretary-General to lend his good offices for the immediate implementation of the resolution, and to take all appropriate measures to that end. It further stated that the Council would “remain actively seized of the matter” and requested the Secretary-General to report to it urgently on any developments with regard to his efforts.

29. On 31 December 1979, the Security Council met again and adopted resolution 461 (1979), in which it reiterated both its calls to the Iranian Government and its request to the Secretary-General to lend his good offices for achieving the object of the Council’s resolution. The Secretary-General visited Tehran on 1-3 January 1980, and reported to the Security Council on 6 January. On 20 February 1980, the Secretary-General announced the setting up of a commission to undertake a “fact-finding mission” to Iran. The Court will revert to the terms of reference of this commission and the progress of its work in connection with a question of admissibility of the proceedings (paragraphs 39-40 below).

* * *

30. Prior to the institution of the present proceedings, in addition to the approach made by the Government of the United States to the United Nations Security Council, that Government also took certain unilateral action in response to the actions for which it holds the Government of Iran responsible. On 10 November 1979, steps were taken to identify all Iranian students in the United States who were not in compliance with the terms of their entry visas, and to commence deportation proceedings against those who were in violation of applicable immigration laws and regulations. On 12 November 1979, the President of the United States ordered the discontinuation of all oil purchases from Iran for delivery to the United States. Believing that the Government of Iran was about to withdraw all Iranian funds from United States banks and to refuse to accept payment in dollars for oil, and to repudiate obligations owed to the United States and to United States nationals, the President on 14 November 1979 acted to block the very large official Iranian assets in the United States or in United
States control, including deposits both in banks in the United States and in foreign branches and subsidiaries of United States banks. On 12 December 1979, after the institution of the present proceedings, the United States informed the Iranian Chargé d’affaires in Washington that the number of personnel assigned to the Iranian Embassy and consular posts in the United States was to be restricted.

31. Subsequently to the indication by the Court of provisional measures, and during the present proceedings, the United States Government took no action. A draft resolution was introduced into the United Nations Security Council calling for economic sanctions against Iran. When it was put to the vote on 13 January 1980, the result was 10 votes in favour, 2 against, and 2 abstentions (one member not having participated in the voting); as a permanent member of the Council cast a negative vote, the draft resolution was not adopted. On 7 April 1980 the United States Government broke off diplomatic relations with the Government of Iran. At the same time, the United States Government prohibited exports from the United States to Iran — one of the sanctions previously proposed by it to the Security Council. Steps were taken to prepare an inventory of the assets of the Government of Iran frozen on 14 November 1979, and to make a census of outstanding claims of American nationals against the Government of Iran, with a view to “designing a program against Iran for the hostages, the hostage families and other U.S. claimants” involving the preparation of legislation “to facilitate processing and paying of these claims” and all visas issued to Iranian citizens for future entry into the United States were cancelled. On 17 April 1980, the United States Government announced further economic measures directed against Iran, prohibited travel there by United States citizens, and made further plans for reparations to be paid to the hostages and their families out of frozen Iranian assets.

32. During the night of 24-25 April 1980 the President of the United States set in motion, and subsequently terminated for technical reasons, an operation within Iranian territory designed to effect the rescue of the hostages by United States military units. In an announcement made on 25 April, President Carter explained that the operation had been planned over a long period as a humanitarian mission to rescue the hostages, and had finally been set in motion by him in the belief that the situation in Iran posed mounting dangers to the safety of the hostages and that their early release was highly unlikely. He stated that the operation had been under way in Iran when equipment failure compelled its termination; and that in the course of the withdrawal of the rescue forces two United States aircraft had collided in a remote desert location in Iran. He further stated that preparations for the rescue operations had been ordered for humanitarian reasons, to protect the national interests of the United States, and to alleviate international tensions. At the same time, he emphasized that the operation had not been motivated by hostility towards Iran or the Iranian people. The texts of President Carter’s announcement and of certain other

official documents relating to the operation have been transmitted to the Court by the United States Agent in response to a request made by the President of the Court on 25 April. Amongst these documents is the text of a report made by the United States to the Security Council on 25 April, “pursuant to Article 51 of the Charter of the United Nations”. In that report, the United States maintained that the mission had been carried out by it “in exercise of its inherent right of self-defence with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our Embassy”. The Court will refer further to this operation later in the present Judgment (paragraphs 93 and 94 below).

* * *

33. It is to be regretted that the Iranian Government has not appeared before the Court in order to put forward its arguments on the questions of law and of fact which arise in the present case; and that, in consequence, the Court has not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. Nevertheless, in accordance with its settled jurisprudence, the Court, in applying Article 53 of its Statute, must first take up, proprio motu, any preliminary question, whether of admissibility or of jurisdiction, that appears from the information before it to arise in the case and the decision of which might constitute a bar to any further examination of the merits of the Applicant’s case. The Court will, therefore, first address itself to the considerations put forward by the Iranian Government in its letters of 9 December 1979 and 16 March 1980, on the basis of which it maintains that the Court ought not to take cognizance of the present case.

34. The Iranian Government in its letter of 9 December 1979 drew attention to what it referred to as the “deep rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters”. The examination of the “numerous repercussions” of the revolution, it added, is “a matter essentially and directly within the national sovereignty of Iran”. However, as the Court pointed out in its Order of 15 December 1979, “a dispute which concerns diplomatic and consular premises and the detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations, is one which by its very nature falls within international jurisdiction” (I.C.J. Reports 1979, p. 16, para. 25).

In its later letter of 16 March 1980 the Government of Iran confined itself to repeating the observations on this point which it had made in its letter of 9 December 1979, without putting forward any additional arguments or explanations. In these circumstances, the Court finds it sufficient here to recall and confirm its previous statement on the matter in its Order of 15 December 1979.
35. In its letter of 9 December 1979 the Government of Iran maintained that the Court could not and should not take cognizance of the present case for another reason, namely that the case submitted to the Court by the United States, is "confined to what is called the question of the 'hostages of the American Embassy in Tehran'. It then went on to explain why it considered this to preclude the Court from taking cognizance of the case:

"For this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, inter alia, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms. The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years. This dossier includes, inter alia, all the crimes perpetrated in Iran by the American Government, in particular the coup d'état of 1953 stirred up and carried out by the CIA, the overthrow of the lawful national government of Dr. Mossadegh, the restoration of the Shah and of his régime which was under the control of American interests, and all the social, economic, cultural and political consequences of the direct interventions in our internal affairs, as well as grave, flagrant and continuous violations of all international norms, committed by the United States in Iran."

36. The Court, however, in its Order of 15 December 1979, made it clear that the seizure of the United States Embassy and Consulates and the detention of internationally protected persons as hostages cannot be considered as something "secondary" or "marginal", having regard to the importance of the legal principles involved. It also referred to a statement of the Secretary-General of the United Nations, and to Security Council resolution 457 (1979), as evidencing the importance attached by the international community as a whole to the observance of those principles in the present case as well as its concern at the dangerous level of tension between Iran and the United States. The Court, at the same time, pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important. It further underlined that, if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the United States' Application, it was open to that Government to present its own arguments regarding those activities to the Court either by way of defence in a Counter-Memorial or by way of a counter-claim.

37. The Iranian Government, notwithstanding the terms of the Court's Order, did not file any pleadings and did not appear before the Court. By its own choice, therefore, it has forgone the opportunities offered to it under the Statute and Rules of Court to submit evidence and arguments in support of its contention in regard to the "overall problem". Even in its later letter of 16 March 1980, the Government of Iran confined itself to repeating what it had said in its letter of 9 December 1979, without offering any explanations in regard to the points to which the Court had drawn attention in its Order of 15 December 1979. It has provided no explanation of the reasons why it considers that the violations of diplomatic and consular law alleged in the United States' Application cannot be examined by the Court separately from what it describes as the "overall problem" involving "more than 25 years of continual interference by the United States in the internal affairs of Iran". Nor has it made any attempt to explain, still less define, what connection, legal or factual, there may be between the "overall problem" of its general grievances against the United States and the particular events that gave rise to the United States' claims in the present case which, in its view, precludes the separate examination of those claims by the Court. This was the more necessary because legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.

38. It follows that the considerations and arguments put forward in the Iranian Government's letters of 9 December 1979 and 16 March 1980 do not, in the opinion of the Court, disclose any ground on which it should conclude that it cannot or ought not to take cognizance of the present case.

*   *

39. The Court, however, has also thought it right to examine, ex officio, whether its competence to decide the present case, or the admissibility of the present proceedings, might possibly have been affected by the setting up of the Commission announced by the Secretary-General of the United
Nations on 20 February 1980. As already indicated, the occupation of the
Embassy and detention of its diplomatic and consular staff as hostages was
referred to the United Nations Security Council by the United States on
9 November 1979 and by the Secretary-General on 25 November. Four
days later, while the matter was still before the Security Council, the
United States submitted the present Application to the Court together
with a request for the indication of provisional measures. On 4 December,
the Security Council adopted resolution 457 (1979) (the terms of which
have already been indicated in paragraph 28 above), whereby the Council
would “remain actively seized of the matter” and the Secretary-General
was requested to report to it urgently on developments regarding the
efforts he was to make pursuant to the resolution. In announcing the
setting up of the Commission on 20 February 1980, the Secretary-General
stated its terms of reference to be “to undertake a fact-finding mission to
Iran to hear Iran’s grievances and to allow for an early solution of the crisis
between Iran and the United States”; and he further stated that it was to
complete its work as soon as possible and submit its report to him. Subsequently,
in a message cabled to the President of the Court on 15 March
1980, the Secretary-General confirmed the mandate of the Commission to
be as stated in his announcement of 20 February, adding that the Gov-
ernments of Iran and the United States had “agreed to the establishment of
the Commission on that basis”. In this message, the Secretary-General also
informed the Court of the decision of the Commission to suspend its
activities in Tehran and to return to New York on 11 March 1980 “to
confer with the Secretary-General with a view to pursuing its tasks which it
regards as indivisible”. The message stated that while, in the circum-
cstances, the Commission was not in a position to submit its report, it was
prepared to return to Tehran, in accordance with its mandate and the
instructions of the Secretary-General, when the situation required. The
message further stated that the Secretary-General would continue his
efforts, as requested by the Security Council, to search for a peaceful
solution of the crisis, and would remain in contact with the parties and the
Commission regarding the resumption of its work.

40. Consequently, there can be no doubt at all that the Security Council
was “actively seized of the matter” and that the Secretary-General was
under an express mandate from the Council to use his good offices in the
matter when, on 15 December, the Court decided unanimously that it was
competent to entertain the United States’ request for an indication of
provisional measures, and proceeded to indicate such measures. As already
mentioned the Council met again on 31 December 1979 and adopted
resolution 461 (1979). In the preamble to this second resolution the Secu-
rity Council expressly took into account the Court’s Order of 15 December
1979 indicating provisional measures; and it does not seem to have
occurred to any member of the Council that there was or could be anything
irregular in the simultaneous exercise of their respective functions by the
Court and the Security Council. Nor is there in this any cause for surprise.

Whereas Article 12 of the Charter expressly forbids the General Assembly
to make any recommendation with regard to a dispute or situation while
the Security Council is exercising its functions in respect of that dispute or
situation, no such restriction is placed on the functioning of the Court by
any provision of either the Charter or the Statute of the Court. The reasons
are clear. It is for the Court, the principal judicial organ of the United
Nations, to resolve any legal questions that may be in issue between parties
to a dispute; and the resolution of such legal questions by the Court may
be important, and sometimes decisive, factor in promoting the peaceful
settlement of the dispute. This is indeed recognized by Article 36 of the
Charter, paragraph 3 of which specifically provides that:

“In making recommendations under this Article the Security Coun-
cil should also take into consideration that legal disputes should as a
general rule be referred by the parties to the International Court of
Justice in accordance with the provisions of the Statute of the
Court.”

41. In the present instance the proceedings before the Court continued
in accordance with the Statute and Rules of Court and, on 15 January
1980, the United States filed its Memorial. The time-limit fixed for delivery
of Iran’s Counter-Memorial then expired on 18 February 1980 without
Iran’s having filed a Counter-Memorial or having made a request for the
extension of the time-limit. Consequently, on the following day the case
became ready for hearing and, pursuant to Article 31 of the Rules, the
views of the Applicant State were requested regarding the date for the
opening of the oral proceedings. On 19 February 1980 the Court was
informed by the United States Agent that, owing to the delicate stage of
negotiations bearing upon the release of the hostages in the United States
Embassy, he would be grateful if the Court for the time being would defer
setting a date for the opening of the oral proceedings. On the very next
day, 20 February, the Secretary-General announced the establishment of the
above-mentioned Commission, which commenced its work in Tehran on
23 February. Asked on 27 February to clarify the position of the United
States in regard to the future procedure, the Agent stated that the Com-
mmission would not address itself to the claims submitted by the United
States to the Court. The United States, he said, continued to be anxious to
secure an early judgment on the merits, and he suggested 17 March as a
convenient date for the opening of the oral proceedings. At the same time,
however, he added that consideration of the well-being of the hostages
might lead the United States to suggest a later date. The Iranian Govern-
ment was then asked, in a telex message of 28 February, for any views it
might wish to express as to the date for the opening of the hearings,
mention being made of 17 March as one possible date. No reply had been
received from the Iranian Government when, on 10 March, the Commis-
sion, unable to complete its mission, decided to suspend its activities in
Tehran and to return to New York.

42. On 11 March, that is immediately upon the departure of the Com-
mission from Tehran, the United States notified the Court of its readiness to proceed with the hearings, suggesting that they should begin on 17 March. A further telex was accordingly sent to the Iranian Government on 12 March informing it of the United States' request and stating that the Court would meet on 17 March to determine the subsequent procedure. The Iranian Government's reply was contained in the letter of 16 March to which the Court has already referred (paragraph 10 above). In that letter, while making no mention of the proposed oral proceedings, the Iranian Government reiterated the reasons advanced in its previous letter of 9 December 1979 for considering that the Court ought not to take cognizance of the case. The letter contained no reference to the Commission, and still less any suggestion that the continuance of the proceedings before the Court might be affected by the existence of the Commission or the mandate given to the Secretary-General by the Security Council. Having regard to the circumstances which the Court has described, it can find no trace of any understanding on the part of either the United States or Iran that the establishment of the Commission might involve a postponement of all proceedings before the Court until the conclusion of the work of the Commission and of the Security Council's consideration of the matter.

43. The Commission, as previously observed, was established to undertake a "fact-finding mission to Iran to hear Iran's grievances and to allow for an early solution of the crisis between Iran and the United States" (emphasis added). It was not set up by the Secretary-General as a tribunal empowered to decide the matters of fact or of law in dispute between Iran and the United States; nor was its setting up accepted by them on any such basis. On the contrary, he created the Commission rather as an organ or instrument for mediation, conciliation or negotiation to provide a means of easing the situation of crisis existing between the two countries; and this, clearly, was the basis on which Iran and the United States agreed to its being set up. The establishment of the Commission by the Secretary-General with the agreement of the two States cannot, therefore, be considered in itself as in any way incompatible with the continuance of parallel proceedings before the Court. Negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement are enumerated together in Article 33 of the Charter as means for the peaceful settlement of disputes. As was pointed out in the Aegean Sea Continental Shelf case, the jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement by the Court have been pursued pari passu. In that case, in which also the dispute had been referred to the Security Council, the Court held expressly that "the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function" (I.C.J. Reports 1978, p. 12, para. 29).

44. It follows that neither the mandate given by the Security Council to the Secretary-General in resolutions 457 and 461 of 1979, nor the setting up of the Commission by the Secretary-General, can be considered as constituting any obstacle to the exercise of the Court's jurisdiction in the present case. It further follows that the Court must now proceed, in accordance with Article 53, paragraph 2, of the Statute, to determine whether it has jurisdiction to decide the present case and whether the United States' claims are well founded in fact and in law.

* * *

45. Article 53 of the Statute requires the Court, before deciding in favour of an Applicant's claim, to satisfy itself that it has jurisdiction, in accordance with Articles 36 and 37, empowering it to do so. In the present case the principal claims of the United States relate essentially to alleged violations by Iran of its obligations to the United States under the Vienna Conventions of 1961 on Diplomatic Relations and of 1963 on Consular Relations. With regard to these claims the United States has invoked as the basis for the Court's jurisdiction Article I of the Optional Protocols concerning the Compulsory Settlement of Disputes which accompany these Conventions. The United Nations publication Multilateral Treaties in respect of which the Secretary-General Performs Depository Functions lists both Iran and the United States as parties to the Vienna Conventions of 1961 and 1963, as also to their accompanying Protocols concerning the Compulsory Settlement of Disputes, and in each case without any reservation to the instrument in question. The Vienna Conventions, which codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and accepted throughout the world by nations of all creeds, cultures and political complexion. Moreover, the Iranian Government has not maintained in its communications to the Court that the two Vienna Conventions and Protocols are not in force as between Iran and the United States. Accordingly, as indicated in the Court's Order of 15 December 1979, the Optional Protocols manifestly provide a possible basis for the Court's jurisdiction, with respect to the United States' claims under the Vienna Conventions of 1961 and 1963. It only remains, therefore, to consider whether the present dispute in fact falls within the scope of their provisions.

46. The terms of Article I, which are the same in the two Protocols, provide:

"Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

The United States' claims here in question concern alleged violations by Iran of its obligations under several articles of the Vienna Conventions of 1961 and 1963 with respect to the privileges and immunities of the per-
sonnel, the inviolability of the premises and archives, and the provision of facilities for the performance of the functions of the United States Embassy and Consulates in Iran. In so far as its claims relate to two private individuals held hostage in the Embassy, the situation of these individuals falls under the provisions of the Vienna Convention of 1961 guaranteeing the inviolability of the premises of embassies, and of Article 5 of the 1963 Convention concerning the consular functions of assisting nationals and protecting and safeguarding their interests. By their very nature all these claims concern the interpretation or application of one or other of the two Vienna Conventions.

47. The occupation of the United States Embassy by militants on 4 November 1979 and the detention of its personnel as hostages was an event of a kind to provoke an immediate protest from any government, as it did from the United States Government, which despatched a special emissary to Iran to deliver a formal protest. Although the special emissary, denied all contact with Iranian officials, never entered Iran, the Iranian Government was left in no doubt as to the reaction of the United States to the taking over of its Embassy and detention of its diplomatic and consular staff as hostages. Indeed, the Court was informed that the United States was meanwhile making its views known to the Iranian Government through its Chargé d'affaires, who has been kept since 4 November 1979 in the Iranian Foreign Ministry itself, where he happened to be with two other members of his mission during the attack on the Embassy. In any event, by a letter of 9 November 1979, the United States brought the situation in regard to its Embassy before the Security Council. The Iranian Government did not take any part in the debates on the matter in the Council, and it was still refusing to enter into any discussions on the subject when, on 29 November 1979, the United States filed the present Application submitting its claims to the Court. It is clear that on that date there existed a dispute arising out of the interpretation or application of the Vienna Conventions and thus one falling within the scope of Article I of the Protocols.

48. Articles II and III of the Protocols, it is true, provide that within a period of two months after one party has notified its opinion to the other that a dispute exists, the parties may agree either: (a) "to resort not to the International Court of Justice but to an arbitral tribunal," or (b) "to adopt a conciliation procedure before resorting to the International Court of Justice". The terms of Articles II and III however, when read in conjunction with those of Article I and with the Preamble to the Protocols, make it crystal clear that they are not to be understood as laying down a precondition of the applicability of the precise and categorical provision contained in Article I establishing the compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the Vienna Convention in question. Articles II and III provide only that, as a substitute for recourse to the Court, the parties may agree upon resort either to arbitration or to conciliation. It follows, first, that Articles II and III have no application unless recourse to arbitration or conciliation has been proposed by one of the parties to the dispute and the other has expressed its readiness to consider the proposal. Secondly, it follows that only then may the provisions in those articles regarding a two months' period come into play, and function as a time-limit upon the conclusion of the agreement as to the organization of the alternative procedure.

49. In the present instance, neither of the parties to the dispute proposed recourse to either of the two alternatives, before the filing of the Application or at any time afterwards. On the contrary, the Iranian authorities refused to enter into any discussion of the matter with the United States, and this could only be understood by the United States as ruling out, in limine, any question of arriving at an agreement to resort to arbitration or conciliation under Article II or Article III of the Protocols, instead of recourse to the Court. Accordingly, when the United States filed its Application on 29 November 1979, it was unquestionably free to have recourse to Article I of the Protocols, and to invoke it as a basis for establishing the Court's jurisdiction with respect to its claims under the Vienna Conventions of 1961 and 1963.

50. However, the United States also presents claims in respect of alleged violations by Iran of Articles II, paragraph 4, XIII, XVIII and XIX of the Treaty of Amity, Economic Relations, and Consular Rights of 1955 between the United States and Iran, which entered into force on 16 June 1957. With regard to these claims the United States has invoked paragraph 2 of Article XXI of the Treaty as the basis for the Court's jurisdiction. The claims of the United States under this Treaty overlap in considerable measure with its claims under the two Vienna Conventions and more especially the Convention of 1963. In this respect, therefore, the dispute between the United States and Iran regarding those claims is at the same time a dispute arising out of the interpretation or application of the Vienna Conventions which falls within Article I of their Protocols. It was for this reason that in its Order of 15 December 1979 indicating provisional measures the Court did not find it necessary to enter into the question whether Article XXI, paragraph 2, of the 1955 Treaty might also have provided a basis for the exercise of its jurisdiction in the present case. But taking into account that Article II, paragraph 4, of the 1955 Treaty provides that "nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party . . .", the Court considers that at the present stage of the proceedings that Treaty has importance in regard to the claims of the United States in respect of the two private individuals said to be held
hostage in Iran. Accordingly, the Court will now consider whether a basis for the exercise of its jurisdiction with respect to the alleged violations of the 1955 Treaty may be found in Article XXI, paragraph 2, of the Treaty.

51. Paragraph 2 of that Article reads:

"Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

As previously pointed out, when the United States filed its Application on 29 November 1979, its attempts to negotiate with Iran in regard to the overrunning of its Embassy and detention of its nationals as hostages had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter. In consequence, there existed at that date not only a dispute but, beyond any doubt, a "dispute . . . not satisfactorily adjusted by diplomacy" within the meaning of Article XXI, paragraph 2, of the 1955 Treaty; and this dispute comprised, inter alia, the matters that are the subject of the United States' claims under that Treaty.

52. The provision made in the 1955 Treaty for disputes as to its interpretation or application to be referred to the Court is similar to the system adopted in the Optional Protocols to the Vienna Conventions which the Court has already explained. Article XXI, paragraph 2, of the Treaty establishes the jurisdiction of the Court as compulsory for such disputes, unless the parties agree to settlement by some other means. In the present instance, as in the case of the Optional Protocols, the immediate and total refusal of the Iranian authorities to enter into any negotiations with the United States excluded in limine any question of an agreement to have recourse to "some other pacific means" for the settlement of the dispute. Consequently, under the terms of Article XXI, paragraph 2, the United States was free on 29 November 1979 to invoke its provisions for the purpose of referring its claims against Iran under the 1955 Treaty to the Court. While that Article does not provide in express terms that either party may bring a case to the Court by unilateral application, it is evident, as the United States contended in its Memorial, that this is what the parties intended. Provisions drawn in similar terms are very common in bilateral treaties of amity or of establishment, and the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court, in the absence of agreement to employ some other pacific means of settlement.

53. The point has also been raised whether, having regard to certain counter-measures taken by the United States vis-à-vis Iran, it is open to the United States to rely on the Treaty of Amity, Economic Relations, and Consular Rights in the present proceedings. However, all the measures in question were taken by the United States after the seizure of its Embassy by an armed group and subsequent retention of its diplomatic and consular staff as hostages. They were measures taken in response to what the United States believed to be grave and manifest violations of international law by Iran, including violations of the 1955 Treaty itself. In any event, any alleged violation of the Treaty by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.

54. No suggestion has been made by Iran that the 1955 Treaty was not in force on 4 November 1979 when the United States Embassy was overrun and its nationals taken hostage, or on 29 November when the United States submitted the dispute to the Court. The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Article XXI, paragraph 2, of the 1955 Treaty was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by other peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Article XXI, paragraph 2, were now to be found not to be open to the parties precisely at the moment when such recourse was most needed. Furthermore, although the machinery for the effective operation of the 1955 Treaty has, no doubt, now been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions remain part of the corpus of law applicable between the United States and Iran.

* * *

55. The United States has further invoked Article 13 of the Convention of 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, as a basis for the exercise of the Court's jurisdiction with respect to its claims under that Convention. The Court does not, however, find it necessary in the present Judgment to enter into the question whether, in the particular circumstances of the case, Article 13 of that Convention provides a basis for the exercise of the Court's jurisdiction with respect to those claims.

* * *

56. The principal facts material for the Court's decision on the merits of the present case have been set out earlier in this Judgment. Those facts have
to be looked at by the Court from two points of view. First, it must
determine how far, legally, the acts in question may be regarded as im-
putable to the Iranian State. Secondly, it must consider their compatibility
or incompatibility with the obligations of Iran under treaties in force or
under any other rules of international law that may be applicable. The
events which are the subject of the United States’ claims fall into two
phases which it will be convenient to examine separately.

57. The first of these phases covers the armed attack on the United
States Embassy by militants on 4 November 1979, the overrunning of its
premises, the seizure of its inmates as hostages, the appropriation of its
property and archives and the conduct of the Iranian authorities in the face
of those occurrences. The attack and the subsequent overrunning, bit by
bit, of the whole Embassy premises, was an operation which continued
over a period of some three hours without any body of police, any military
unit or any Iranian official intervening to try to stop or impede it from
being carried through to its completion. The result of the attack was
considerable damage to the Embassy premises and property, the forcible
opening and seizure of its archives, the confiscation of the archives and
other documents found in the Embassy and, most grave of all, the seizure
by force of its diplomatic and consular personnel as hostages, together with
two United States nationals.

58. No suggestion has been made that the militants, when they executed
their attack on the Embassy, had any form of official status as recognized
“agents” or organs of the Iranian State. Their conduct in mounting the
attack, overrunning the Embassy and seizing its inmates as hostages cannot,
therefore, be regarded as imputable to that State on that basis. Their
conduct might be considered as itself directly imputable to the Iranian State
only if it were established that, in fact, on the occasion in question the
militants acted on behalf on the State, having been charged by some
competent organ of the Iranian State to carry out a specific operation. The
information before the Court does not, however, suffice to establish with
the requisite certainty the existence at that time of such a link between the
militants and any competent organ of the State.

59. Previously, it is true, the religious leader of the country, the Ayat-
ollah Khomeini, had made several public declarations inveighing against
the United States as responsible for all his country’s problems. In so doing,
it would appear, the Ayatollah Khomeini was giving utterance to the
general resentment felt by supporters of the revolution at the admission of
the former Shah to the United States. The information before the Court
also indicates that a spokesman for the militants, in explaining their action
afterwards, did expressly refer to a message issued by the Ayatollah
Khomeini, on 1 November 1979. In that message the Ayatollah Khomeini
had declared that it was “up to the dear pupils, students and theological
students to expand with all their might their attacks against the United
States and Israel, so they may force the United States to return the deposed
and criminal shah, and to condemn this great plot” (that is, a plot to stir up
dissension between the main streams of Islamic thought). In the view of the
Court, however, it would be going too far to interpret such general decla-
rations of the Ayatollah Khomeini to the people or students of Iran as
amounting to an authorization from the State to undertake the specific
operation of invading and seizing the United States Embassy. To do so
would, indeed, conflict with the assertions of the militants themselves who
are reported to have claimed credit for having devised and carried out the
plan to occupy the Embassy. Again, congratulations after the event, such
as those reportedly telephoned to the militants by the Ayatollah Khomeini
on the actual evening of the attack, and other subsequent statements of
official approval, though highly significant in another context, is that to be
considered, do not alter the initially independent and unofficial character
of the militants’ attack on the Embassy.

60. The first phase, here under examination, of the events complained
of also includes the attacks on the United States Consulates at Tabriz and
Shiraz. Like the attack on the Embassy, they appear to have been executed
by militants not having an official character, and successful because of lack
of sufficient protection.

61. The conclusion just reached by the Court, that the initiation of the
attack on the United States Embassy on 4 November 1979, and of the
attacks on the Consulates at Tabriz and Shiraz the following day, cannot
be considered as in itself imputable to the Iranian State does not mean that
Iran is, in consequence, free of any responsibility in regard to those
attacks: for its own conduct was in conflict with its international obliga-
tions. By a number of provisions of the Vienna Conventions of 1961 and
1963, Iran was placed under the most categorical obligations, as a receiving
State, to take appropriate steps to ensure the protection of the United
States Embassy and Consulates, their staffs, their archives, their means of
communication and the freedom of movement of the members of their
staffs.

62. Thus, after solemnly proclaiming the inviolability of the premises of
a diplomatic mission, Article 22 of the 1961 Convention continues in
paragraph 2:

“The receiving State is under a special duty to take all appropriate steps
to protect the premises of the mission against any intrusion or damage
and to prevent any disturbance of the peace of the mission or impair-
ment of its dignity.” (Emphasis added.)

So, too, after proclaiming that the person of a diplomatic agent shall be
inviolable, and that he shall not be liable to any form of arrest or detention,
Article 29 provides:

“The receiving State shall treat him with due respect and shall take all
appropriate steps to prevent any attack on his person, freedom or
dignity.” (Emphasis added.)

The obligation of a receiving State to protect the inviolability of the
archives and documents of a diplomatic mission is laid down in Article 24, which specifically provides that they are to be “inviolable at any time and wherever they may be”. Under Article 25 it is required to “accord full facilities for the performance of the functions of the mission”, under Article 26 to “ensure to all members of the mission freedom of movement and travel in its territory”, and under Article 27 to “permit and protect free communication on the part of the mission for all official purposes”. Analogous provisions are to be found in the 1963 Convention regarding the privileges and immunities of consular missions and their staffs (Art. 31, para. 3, Arts. 40, 33, 28, 34 and 35). In the view of the Court, the obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law.

63. The facts set out in paragraphs 14 to 27 above establish to the satisfaction of the Court that on 4 November 1979 the Iranian Government failed altogether to take any “appropriate steps” to protect the premises, staff and archives of the United States’ mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion. They also show that on 5 November 1979 the Iranian Government similarly failed to take appropriate steps for the protection of the United States Consulates at Tabriz and Shiraz. In addition they show, in the opinion of the Court, that the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means.

64. The total inaction of the Iranian authorities on that date in face of urgent and repeated requests for help contrasts very sharply with its conduct on several other occasions of a similar kind. Some eight months earlier, on 14 February 1979, the United States Embassy in Tehran had itself been subjected to the armed attack mentioned above (paragraph 14), in the course of which the attackers had taken the Ambassador and his staff prisoner. On that occasion, however, a detachment of Revolutionary Guards, sent by the Government, had arrived promptly, together with a Deputy Prime Minister, and had quickly succeeded in freeing the Ambassador and his staff and restoring the Embassy to him. On 1 March 1979, moreover, the Prime Minister of Iran had sent a letter expressing deep regret at the incident, giving an assurance that appropriate arrangements had been made to prevent any repetition of such incidents, and indicating the willingness of his Government to indemnify the United States for the damage. On 1 November 1979, only three days before the events which gave rise to the present case, the Iranian police intervened quickly and effectively to protect the United States Embassy when a large crowd of demonstrators spent several hours marching up and down outside it. Furthermore, on other occasions in November 1979 and January 1980, invasions or attempted invasions of other foreign embassies in Tehran were frustrated or speedily terminated.

65. A similar pattern of facts appears in relation to consulates. In February 1979, at about the same time as the first attack on the United States Embassy, attacks were made by demonstrators on its Consulates in Tabriz and Shiraz; but the Iranian authorities then took the necessary steps to clear them of the demonstrators. On the other hand, the Iranian authorities took no action to prevent the attack of 5 November 1979, or to restore the Consulates to the possession of the United States. In contrast, when on the next day militants invaded the Iraqi Consulate in Kermann shah, prompt steps were taken by the Iranian authorities to secure their withdrawal from the Consulate. Thus in this case, the Iranian authorities and police took the necessary steps to prevent and check the attempted invasion or return the premises to their rightful owners.

66. As to the actual conduct of the Iranian authorities when faced with the events of 4 November 1979, the information before the Court establishes that, despite assurances previously given by them to the United States Government and despite repeated and urgent calls for help, they took no apparent steps either to prevent the militants from invading the Embassy or to persuade or to compel them to withdraw. Furthermore, after the militants had forced an entry into the premises of the Embassy, the Iranian authorities made no effort to compel or even to persuade them to withdraw from the Embassy and to free the diplomatic and consular staff whom they had made prisoner.

67. This inaction of the Iranian Government by itself constituted clear and serious violation of Iran’s obligations to the United States under the provisions of Article 22, paragraph 2, and Articles 24, 25, 26, 27 and 29 of the 1961 Vienna Convention on Diplomatic Relations, and Articles 5 and 36 of the 1963 Vienna Convention on Consular Relations. Similarly, with respect to the attacks on the Consulates at Tabriz and Shiraz, the inaction of the Iranian authorities entailed clear and serious breaches of its obligations under the provisions of several further articles of the 1963 Convention on Consular Relations. So far as concerns the two private United States nationals seized as hostages by the invading militants, that inaction entailed, albeit incidentally, a breach of its obligations under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights which, in addition to the obligations of Iran existing under general international law, requires the parties to ensure “the most constant protection and security” to each other’s nationals in their respective territories.

68. The Court is therefore led inevitably to conclude, in regard to the first phase of the events which has so far been considered, that on 4 November 1979 the Iranian authorities:

(a) were fully aware of their obligations under the conventions in force to take appropriate steps to protect the premises of the United States Embassy and its diplomatic and consular staff from any attack and from any infringement of their inviolability, and to ensure the
security of such other persons as might be present on the said premises;
(b) were fully aware, as a result of the appeals for help made by the United States Embassy, of the urgent need for action on their part;
(c) had the means at their disposal to perform their obligations;
(d) completely failed to comply with these obligations.

Similarly, the Court is led to conclude that the Iranian authorities were equally aware of their obligations to protect the United States Consulates at Tabriz and Shiraz, and of the need for action on their part, and similarly failed to use the means which were at their disposal to comply with their obligations.

* * *

69. The second phase of the events which are the subject of the United States’ claims comprises the whole series of facts which occurred following the completion of the occupation of the United States Embassy by the militants, and the seizure of the Consulates at Tabriz and Shiraz. The occupation having taken place and the diplomatic and consular personnel of the United States’ mission having been taken hostage, the action required of the Iranian Government by the Vienna Conventions and by general international law was manifest. Its plain duty was at once to make every effort, and to take every appropriate step, to bring these flagrant infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy to a speedy end, to restore the Consulates at Tabriz and Shiraz to United States control, and in general to re-establish the status quo and to offer reparation for the damage.

70. No such step was, however, taken by the Iranian authorities. At a press conference on 5 November the Foreign Minister, Mr. Yazdi, conceded that “according to international regulations the Iranian Government is dutybound to safeguard the life and property of foreign nationals”. But he made no mention of Iran’s obligation to safeguard the inviolability of foreign embassies and diplomats; and he ended by announcing that the action of the students “enjoys the endorsement and support of the government, because America herself is responsible for this incident”. As to the Prime Minister, Mr. Bazargan, he does not appear to have made any statement on the matter before resigning his office on 5 November.

71. In any event expressions of approval of the take-over of the Embassy, and indeed also of the Consulates at Tabriz and Shiraz, by militants came immediately from numerous Iranian authorities, including religious, judicial, executive, police and broadcasting authorities. Above all, the Ayatollah Khomeini himself made crystal clear the endorsement by the State both of the take-over of the Embassy and Consulates and of the detention of the Embassy staff as hostages. At a reception in Qom on 5 November, the Ayatollah Khomeini left his audience in no doubt as to his approval of the action of the militants in occupying the Embassy, to which he said they had resorted “because they saw that the shah was allowed in America”. Saying that he had been informed that the “centre occupied by our young men... has been a lair of espionage and plotting”, he asked how the young people could be expected “simply to remain idle and witness all these things”. Furthermore he expressly stigmatized as “rotten roots” those in Iran who were “hoping we would mediate and tell the young people to leave this place”. The Ayatollah’s refusal to order “the young people” to put an end to their occupation of the Embassy, or the militants in Tabriz and Shiraz to evacuate the United States Consulates there, must have appeared the more significant when, on 6 November, he instructed “the young people” who had occupied the Iraqi Consulate in Kermanshah that they should leave it as soon as possible. The true significance of this was only reinforced when, next day, he expressly forbade members of the Revolutionary Council and all responsible officials to meet the special representatives sent by President Carter to try and obtain the release of the hostages and evacuation of the Embassy.

72. At any rate, thus fortified in their action, the militants at the Embassy at once went one step farther. On 6 November they proclaimed that the Embassy, which they too referred to as “the U.S. centre of plots and espionage”, would remain under their occupation, and that they were watching “most closely” the members of the diplomatic staff taken hostage whom they called “U.S. mercenaries and spies”.

73. The seal of official government approval was finally set on this situation by a decree issued on 17 November 1979 by the Ayatollah Khomeini. His decree began with the assertion that the American Embassy was “a centre of espionage and conspiracy” and that “those people who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respect”. He went on expressly to declare that the premises of the Embassy and the hostages would remain as they were until the United States had handed over the former Shah for trial and returned his property to Iran. This statement of policy the Ayatollah qualified only to the extent of requesting the militants holding the hostages to “hand over the blacks and the women, if it is proven that they did not spy, to the Ministry of Foreign Affairs so that they may be immediately expelled from Iran”. As to the rest of the hostages, he made the Iranian Government’s intentions all too clear:

“The noble Iranian nation will not give permission for the release of the rest of them. Therefore, the rest of them will be under arrest until the American Government acts according to the wish of the nation.”
74. The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible. On 6 May 1980, the Minister for Foreign Affairs, Mr. Ghotbzadeh, is reported to have said in a television interview that the occupation of the United States Embassy had been “done by our nation”. Moreover, in the prevailing circumstances the situation of the hostages was aggravated by the fact that their detention by the militants did not even offer the normal guarantees which might have been afforded by police and security forces subject to the discipline and the control of official superiors.

75. During the six months which have elapsed since the situation just described was created by the decree of the Ayatollah Khomeini, it has undergone no material change. The Court’s Order of 15 December 1979 indicating provisional measures, which called for the immediate restoration of the Embassy to the United States and the release of the hostages, was publicly rejected by the Minister for Foreign Affairs on the following day and has been ignored by all Iranian authorities. On two occasions, namely on 23 February and on 7 April 1980, the Ayatollah Khomeini laid it down that the hostages should remain at the United States Embassy under the control of the militants until the new Iranian parliament should have assembled and taken a decision as to their fate. His adherence to that policy also made it impossible to obtain his consent to the transfer of the hostages from the control of the militants to that of the Government or of the Council of the Revolution. In any event, while highly desirable from the humanitarian and safety points of view, such a transfer would not have resulted in any material change in the legal situation, for its sponsors themselves emphasized that it must not be understood as signifying the release of the hostages.

76. The Iranian authorities’ decision to continue the subjection of the premises of the United States Embassy to occupation by militants and of the Embassy staff to detention as hostages, clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conven-

77. In the first place, these facts constituted breaches additional to those already committed of paragraph 2 of Article 22 of the 1961 Vienna Convention on Diplomatic Relations which requires Iran to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of its peace or impairment of its dignity. Paragraphs 1 and 3 of that Article have also been infringed, and continue to be infringed, since they forbid agents of a receiving State to enter the premises of a mission without consent or to undertake any search, requisition, attachment or like measure on the premises. Secondly, they constitute continuing breaches of Article 29 of the same Convention which forbids any arrest or detention of a diplomatic agent and any attack on his person, freedom or dignity. Thirdly, the Iranian authorities are without doubt in continuing breach of the provisions of Articles 25, 26 and 27 of the 1961 Vienna Convention and of pertinent provisions of the 1963 Vienna Convention concerning facilities for the performance of functions, freedom of movement and communications for diplomatic and consular staff, as well as of Article 24 of the former Convention and Article 33 of the latter, which provide for the absolute inviolability of the archives and documents of diplomatic missions and consulates. This particular violation has been made manifest to the world by repeated statements by the militants occupying the Embassy, who claim to be in possession of documents from the archives, and by various government authorities, purporting to specify the contents thereof. Finally, the continued detention as hostages of the two private individuals of United States nationality entails a renewed breach of the obligations of Iran under Article II, paragraph 4, of the 1955 Treaty of Amity, Economic Relations, and Consular Rights.

78. Inevitably, in considering the compatibility or otherwise of the conduct of the Iranian authorities with the requirements of the Vienna Conventions, the Court has focussed its attention primarily on the occupation of the Embassy and the treatment of the United States diplomatic and consular personnel within the Embassy. It is however evident that the question of the compatibility of their conduct with the Vienna Conventions also arises in connection with the treatment of the United States Chargé d’affaires and two members of his staff in the Ministry of Foreign Affairs on 4 November 1979 and since that date. The facts of this case establish to the satisfaction of the Court that on 4 November 1979 and thereafter the Iranian authorities have withheld from the Chargé d’affaires and the two members of his staff the necessary protection and facilities to permit them to leave the Ministry in safety. Accordingly it appears to the Court that with respect to these three members of the United States’ mission the Iranian authorities have committed a continuing breach of their obligations under Articles 26 and 29 of the 1961 Vienna Convention on Diplomatic Relations. It further appears to the Court that the con-

tions even more serious than those which arose from their failure to take any steps to prevent the attacks on the inviolability of these premises and staff.
81. In his letters of 9 December 1979 and 16 March 1980, as previously recalled, Iran’s Minister for Foreign Affairs referred to the present case as only “a marginal and secondary aspect of an overall problem”. This problem, he maintained, “involves, inter alia, more than 25 years of continual interference by the United States in the internal affairs o’ Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms”. In the first of the two letters he indeed singled out amongst the “crimes” which he attributed to the United States an alleged complicity on the part of the Central Intelligence Agency in the coup d’etat of 1953 and in the restoration of the Shah to the throne of Iran.

82. The Court must however observe, first of all, that the matters alleged in the Iranian Foreign Minister’s letters of 9 December 1979 and 16 March 1980 are of a kind which, if invoked in legal proceedings, must clearly be established to the satisfaction of the tribunal with all the requisite proof. The Court, in its Order of 15 December 1979, pointed out that if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the Application it was open to Iran to present its own case regarding those activities to the Court by way of defence to the United States’ claims. The Iranian Government, however, did not appear before the Court. Moreover, even in his letter of 16 March 1980, transmitted to the Court some three months after the issue of that Order, the Iranian Foreign Minister did not furnish the Court with any further information regarding the alleged criminal activities of the United States in Iran, or explain on what legal basis he considered these allegations to constitute a relevant answer to the United States’ claims. The large body of information submitted by the United States itself to the Court includes, it is true, some statements emanating from Iranian authorities or from the militants in which reference is made to alleged espionage and interference in Iran by the United States centred upon its Embassy in Tehran. These statements are, however, of the same general character as the assertions of alleged criminal activities of the United States contained in the Foreign Minister’s letters, and are unsupported by evidence furnished by Iran before the Court. Hence they do not provide a basis on which the Court could form a judicial opinion on the truth or otherwise of the matters there alleged.

83. In any case, even if the alleged criminal activities of the United States in Iran could be considered as having been established, the question would remain whether they could be regarded by the Court as constituting a justification of Iran’s conduct and thus a defence to the United States’ claims in the present case. The Court, however, is unable to accept that they can be so regarded. This is because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions.

84. The Vienna Conventions of 1961 and 1963 contain express provisions to meet the case when members of an embassy staff, under the cover of diplomatic privileges and immunities, engage in such abuses of their functions as espionage or interference in the internal affairs of the receiving State. It is precisely with the possibility of such abuses in contemplation that Article 41, paragraph 1, of the Vienna Convention on Diplomatic
Relations, and Article 55, paragraph 1, of the Vienna Convention on Consular Relations, provide:

"Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State."

Paragraph 3 of Article 41 of the 1961 Convention further states: "The premises of the mission must not be used in any manner incompatible with the functions of the missions . . .": an analogous provision, with respect to consular premises is to be found in Article 55, paragraph 2, of the 1963 Convention.

85. Thus, it is for the very purpose of providing a remedy for such possible abuses of diplomatic functions that Article 9 of the 1961 Convention on Diplomatic Relations stipulates:

"1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission."

The 1963 Convention contains, in Article 23, paragraphs 1 and 4, analogous provisions in respect of consular officers and consular staff. Paragraph 1 of Article 9 of the 1961 Convention, and paragraph 4 of Article 23 of the 1963 Convention, take account of the difficulty that may be experienced in practice of proving such abuses in every case or, indeed, of determining exactly when exercise of the diplomatic function, expressly recognized in Article 3 (1) (d) of the 1961 Convention, of "ascertaining by all lawful means conditions and developments in the receiving State" may be considered as involving such acts as "espionage" or "interference in internal affairs". The way in which Article 9, paragraph 1, takes account of any such difficulty is by providing expressly in its opening sentence that the receiving State may "at any time and without having to explain its decision" notify the sending State that any particular member of its diplomatic mission is "persona non grata" or "not acceptable" (and similarly Article 23, paragraph 4, of the 1963 Convention provides that "the receiving State is not obliged to give to the sending State reasons for its decision"). Beyond that remedy for dealing with abuses of the diplomatic function by individual members of a mission, a receiving State has in its hands a more radical remedy if abuses of their functions by members of a mission reach serious proportions. This is the power which every receiving State has, at its own discretion, to break off diplomatic relations with a sending State and to call for the immediate closure of the offending mission.

86. The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime, to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of Articles 44 and 45 of the Convention of 1961 (cf. also Articles 26 and 27 of the Convention of 1963). Even 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, property and archives of the mission must be respected by the receiving State. Naturally, the observance of this principle does not mean — and this the Applicant Government expressly acknowledges — that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime. But such eventualities bear no relation at all to what occurred in the present case.

87. In the present case, the Iranian Government did not break off diplomatic relations with the United States; and in response to a question put to him by a Member of the Court, the United States Agent informed the Court that at no time before the events of 4 November 1979 had the Iranian Government declared, or indicated any intention to declare, any member of the United States diplomatic or consular staff in Tehran persona non grata. The Iranian Government did not, therefore, employ the remedies placed at its disposal by diplomatic law specifically for dealing with activities of the kind of which it now complains. Instead, it allowed a group of militants to attack and occupy the United States Embassy by force, and to seize the diplomatic and consular staff as hostages; instead, it has endorsed that action of those militants and has deliberately maintained their occupation of the Embassy and detention of its staff as a
means of coercing the sending State. It has, at the same time, refused altogether to discuss this situation with representatives of the United States. The Court, therefore, can only conclude that Iran did not have recourse to the normal and efficacious means at its disposal, but resorted to coercive action against the United States Embassy and its staff.

88. In an address given on 5 November 1979, the Ayatollah Khomeini traced the origin of the operation carried out by the Islamic militants on the previous day to the news of the arrival of the former Shah of Iran in the United States. That fact may no doubt have been the ultimate catalyst of the resentment felt in certain circles in Iran and among the Iranian population against the former Shah for his alleged misdeeds, and also against the United States Government which was being publicly accused of having restored him to the throne, of having supported him for many years and of planning to go on doing so. But whatever be the truth in regard to those matters, they could hardly be considered as having provided a justification for the attack on the United States Embassy and its diplomatic mission. Whatever extenuation of the responsibility to be attached to the conduct of the Iranian authorities may be found in the offence felt by them because of the admission of the Shah to the United States, that feeling of offence could not affect the imperative character of the legal obligations incumbent upon the Iranian Government which is not altered by a state of diplomatic tension between the two countries. Still less could a mere refusal or failure on the part of the United States to extradite the Shah to Iran be considered to modify the obligations of the Iranian authorities, quite apart from any legal difficulties, in internal or international law, there might be in accordance to such a request for extradition.

89. Accordingly, the Court finds that no circumstances exist in the present case which are capable of negating the fundamentally unlawful character of the conduct pursued by the Iranian State on 4 November 1979 and thereafter. This finding does not however exclude the possibility that some of the circumstances alleged, if duly established, may later be found to have some relevance in determining the consequences of the responsibility incurred by the Iranian State with respect to that conduct, although they could not be considered to alter its unlawful character.

* * *

90. On the basis of the foregoing detailed examination of the merits of the case, the Court finds that Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, the Treaty of Amity, Economic Relations, and Consular Rights of 1955, and the applicable rules of general international law, has incurred responsibility towards the United States. As to the consequences of this finding, it clearly entails an obligation on the part of the Iranian State to make reparation for the injury thereby caused to the United States. Since however Iran's breaches of its obligations are still continuing, the form and amount of such reparation cannot be determined at the present date.

91. At the same time the Court finds itself obliged to stress the cumulative effect of Iran's breaches of its obligations when taken together. A marked escalation of these breaches can be seen to have occurred in the transition from the failure on the part of the Iranian authorities to oppose the armed attack by the militants on 4 November 1979 and their seizure of the Embassy premises and staff, to the almost immediate endorsement by those authorities of the situation thus created, and then to their maintaining deliberately for many months the occupation of the Embassy and detention of its staff by a group of armed militants acting on behalf of the State for the purpose of forcing the United States to bow to certain demands. Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. But what has above all to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the Court must here again strongly affirm. In its Order of 15 December 1979, the Court made a point of stressing that the obligations laid on States by the two Vienna Conventions are of cardinal importance for the maintenance of good relations between States in the interdependent world of today. "There is no more fundamental prerequisite for the conduct of relations between States", the Court there said, "than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose." The institution of diplomacy, the Court continued, has proved to be "an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means" (I.C.J. Reports 1979, p. 19).

92. It is a matter of deep regret that the situation which occasioned those observations has not been rectified since they were made. Having regard to their importance the Court considers it essential to reiterate them in the present Judgment. The frequency with which at the present time the principles of international law governing diplomatic and consular relations are set at naught by individuals or groups of individuals is already deplorable. But this case is unique and of very particular gravity because here it is not only private individuals or groups of individuals that have disregarded and set at naught the inviolability of a foreign embassy, but the government of the receiving State itself. Therefore in recalling yet again the extreme importance of the principles of law which it is called upon to apply
in the present case, the Court considers it to be its duty to draw the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.

93. Before drawing the appropriate conclusions from its findings on the merits in this case, the Court considers that it cannot let pass without comment the incursion into the territory of Iran made by United States military units on 24-25 April 1980, an account of which has been given earlier in this Judgment (paragraph 32). No doubt the United States Government may have had understandable preoccupations with respect to the well-being of its nationals held hostage in its Embassy for over five months. No doubt also the United States Government may have had understandable feelings of frustration at Iran's long-continued detention of the hostages, notwithstanding two resolutions of the Security Council as well as the Court's own Order of 15 December 1979 calling expressly for their immediate release. Nevertheless, in the circumstances of the present proceedings, the Court cannot fail to express its concern in regard to the United States' incursion into Iran. When, as previously recalled, this case had become ready for hearing on 19 February 1980, the United States Agent requested the Court, owing to the delicate stage of certain negotiations, to defer setting a date for the hearings. Subsequently, on 11 March, the Agent informed the Court of the United States Government's anxiety to obtain an early judgment on the merits of the case. The hearings were accordingly held on 18, 19 and 20 March, and the Court was in course of preparing the present judgment adjudicating upon the claims of the United States against Iran when the operation of 24 April 1980 took place. The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations; and to recall that in paragraph 47, 1 B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries.

94. At the same time, however, the Court must point out that neither the question of the legality of the operation of 24 April 1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court. It must also point out that this question can have no bearing on the evaluation of the conduct of the Iranian Government over six months earlier, on 4 November 1979, which is the subject-matter of the United States' Application. It follows that the findings reached by the Court in this Judgment are not affected by that operation.

95. For these reasons,

THE COURT,

1. By thirteen votes to two,

Decides that the Islamic Republic of Iran, by the conduct which the Court has set out in this Judgment, has violated in several respects, and is still violating, obligations owed by it to the United States of America under international conventions in force between the two countries, as well as under long-established rules of general international law;

IN FAVOUR: President Sir Humphrey Waldock; Vice-President Elias; Judges Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.
AGAINST: Judges Morozov and Tarazi.

2. By thirteen votes to two,

Decides that the violations of these obligations engage the responsibility of the Islamic Republic of Iran towards the United States of America under international law;

IN FAVOUR: President Sir Humphrey Waldock; Vice-President Elias; Judges Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.
AGAINST: Judges Morozov and Tarazi.

3. Unanimously,

Decides that the Government of the Islamic Republic of Iran must immediately take all steps to redress the situation resulting from the events of 4 November 1979 and what followed from these events, and to that end:

(a) must immediately terminate the unlawful detention of the United States Chargé d'affaires and other diplomatic and consular staff and other United States nationals now held hostage in Iran, and must immediately release each and every one and entrust them to the protecting Power (Article 45 of the 1961 Vienna Convention on Diplomatic Relations);
(b) must ensure that all the said persons have the necessary means of leaving Iranian territory, including means of transport;

(c) must immediately place in the hands of the protecting Power the premises, property, archives and documents of the United States Embassy in Tehran and of its Consulates in Iran;

4. Unanimously,

Decides that no member of the United States diplomatic or consular staff may be kept in Iran to be subjected to any form of judicial proceedings or to participate in them as a witness;

5. By twelve votes to three,

Decides that the Government of the Islamic Republic of Iran is under an obligation to make reparation to the Government of the United States of America for the injury caused to the latter by the events of 4 November 1979 and what followed from these events;

IN FAVOUR: President Sir Humphrey Waldock; Vice-President Elias; Judges Forster, Gros, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST: Judges Lachs, Morozov and Tarazi.

6. By fourteen votes to one,

Decides that the form and amount of such reparation, failing agreement between the Parties, shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

IN FAVOUR: President Sir Humphrey Waldock; Vice-President Elias; Judges Forster, Gros, Lachs, Nagendra Singh, Ruda, Mosler, Tarazi, Oda, Ago, El-Erian, Sette-Camara and Baxter.

AGAINST: Judge Morozov.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fourth day of May, one thousand nine hundred and eighty, in three copies, one of which will be placed in the archives of the Court, and the others transmitted to the Government of the United States of America and the Government of the Islamic Republic of Iran, respectively.

(Signed) Humphrey WALDOCK,
President.

(Signed) S. AQUARONE,
Registrar.

Judge LACHS append a separate opinion to the Judgment of the Court.

Judges MOROZOV and TARAZI append dissenting opinions to the Judgment of the Court.

(Initialled) H.W.
(Initialled) S.A.
International Court of Justice

Certain Phosphate Lands in Nauru (Nauru v. Australia)
Preliminary Objections, Judgment

I.C.J. Reports 1992
COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DE CERTAINES TERRES
À PHOSPHATES À NAURU
(NAURU c. AUSTRALIE)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 26 JUIN 1992

1992

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
CERTAIN PHOSPHATE LANDS IN NAURU
(NAURU v. AUSTRALIA)

PRELIMINARY OBJECTIONS

JUDGMENT OF 26 JUNE 1992

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CASE CONCERNING
CERTAIN PHOSPHATE LANDS IN NAURU
(NAURU v. AUSTRALIA)

PRELIMINARY OBJECTIONS

Jurisdiction of the Court and admissibility.
Declaration of acceptance of compulsory jurisdiction excluding “any dispute in regard to which the Parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement” — Application to States alone of declarations under Article 36, paragraph 2, of Statute — Respondent’s declaration and exclusion for which it provides.

Alleged waiver of claims prior to independence — (1) Agreement between the local authorities of a trust territory and the Administering Authority — Absence of explicit clause operating as waiver — Absence of implicit waiver — (2) Discussions in the United Nations — Significance of statements by representative of the local authorities.

Alleged breaches of a trusteeship agreement — “Definitive legal effect” of General Assembly resolutions terminating trusteeship agreements — Particular circumstances in which the Trusteeship over Nauru was terminated — Question of discharge said to have been given by resolution.

Need to determine in each case effects of passage of time with regard to the admissibility of an application.

Applicant’s alleged inconsistency and lack of good faith — Absence of an abuse of process.

Mandate conferred on “His Britannic Majesty” as Sovereign of the United Kingdom, Australia and New Zealand — Trusteeship granted to Australia, New Zealand and the United Kingdom “jointly” designated as Administering Authority — Absence of international legal personality of the Administering Authority — (1) Claims based on conduct of Respondent as one of the three States making up the Administering Authority — Suing of Respondent alone a question independent of that of possible “joint and several” liability — Possibility of the Court’s considering a claim of alleged breach by Respondent of its obligations under Trusteeship Agreement — (2) Fundamental principle of consent of States to Court’s jurisdiction — Possibility of the Court’s taking a decision without ruling on legal situation of non-party States — Situation different from that with which the Court had to deal in the Monetary Gold case.

Article 40, paragraph 1, of the Statute of the Court and Article 38, paragraph 2, of the Rules of Court — Claim new in both form and substance whose examination by the Court would transform the subject of the dispute originally submitted to it.

JUDGMENT

Present: President Sir Robert Jennings; Vice-President Oda; Judges Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillame, Shahabuddeen, Aguilar Mawdsley, Ranjeva; Registrar Valencia-Ospina.

In the case concerning certain phosphate lands in Nauru, between

the Republic of Nauru,

represented by

Mr. V. S. Mani, Professor of International Law, Jawaharlal Nehru University, New Delhi; former Chief Secretary and Secretary to Cabinet, Republic of Nauru,

Mr. Leo D. Kek, Presidential Counsel of the Republic of Nauru; former Minister for Justice of the Republic of Nauru; and Member of the Bar of the Republic of Nauru and of the Australian Bar, as Co-Agents, Counsel and Advocates;

H.E. Mr. Hamid DeRoburt, G.C.M.G., O.B.E., M.P., Head Chief and Chairman of the Nauru Local Government Council; former President and Chairman of Cabinet and former Minister for External and Internal Affairs and the Phosphate Industry, Republic of Nauru,

Mr. Ian Brownlie, Q.C., Member of the English Bar; Chichele Professor of Public International Law, University of Oxford; Fellow of All Souls College, Oxford,

Mr. Barry Connell, Associate Professor of Law, Monash University, Melbourne; Member of the Australian Bar; former Chief Secretary and Secretary to Cabinet, Republic of Nauru,

Mr. James Crawford, Challis Professor of International Law and Dean of the Faculty of Law, University of Sydney; Member of the Australian Bar,

as Counsel and Advocates,

and

the Commonwealth of Australia,
PHOSPHATE LANDS IN NAURU (JUDGMENT)

represented by
Mr. Gavan Griffith, Q.C., Solicitor-General of Australia,
as Agent and Counsel;
H.E. Mr. Warwick Weemaes, Ambassador of Australia to the Netherlands,
as Co-Agent;
Mr. Henry Burmester, Principal Adviser in International Law, Australian:
Attorney-General’s Department,
as Co-Agent and Counsel;
Mr. Eduardo Jiménez de Aréchaga, Professor of International Law, Montevideo,
Mr. Derek W. Bowett, Q.C., emeritus Whewell Professor of International
Law, University of Cambridge,
Mr. Alain Pellet, Professor of Law, University of Paris X-Nanterre and Institute
of Political Studies, Paris,
Ms Susan Kenny, of the Australian Bar,
as Counsel;
Mr. Peter Shannon, Deputy Legal Adviser, Australian Department of
Foreign Affairs and Trade,
Mr. Paul Porteous, First Secretary, Australian Embassy in the Netherlands,
as Advisers,
The COURT,
composed as above,
after deliberation,
delivers the following Judgment:

1. On 19 May 1989, the Government of the Republic of Nauru (hereinafter
called “Nauru”) filed in the Registry of the Court an Application instituting
proceedings against the Commonwealth of Australia (hereinafter called “Aus-
tralia”) in respect of a “dispute . . . over the rehabilitation of certain phosphate
lands [in Nauru] worked out before Nauruan independence”. To found the
jurisdiction of the Court the Application relies on the declarations made by the
two States accepting the jurisdiction of the Court, as provided for in Article 36,
paragraph 2, of the Statute of the Court.
2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was
communicated forthwith to the Registrar to the Government of Australia; in
accordance with paragraph 3 of that Article, all other States entitled to appear
before the Court were notified of the Application.
3. Time-limits for the filing of the Memorial of Nauru and the Counter-
Memorial of Australia were fixed by an Order of 18 July 1989. The Memorial
was filed on 20 April 1990, within the time-limit fixed for this purpose. By a
letter dated 19 September 1990, the Agent of Australia informed the Registrar
that, after due consideration of the Memorial of Nauru, his Government had
come to the conclusion that the Court had no jurisdiction in the case and that
the Application was not admissible; he consequently informed the Registrar
that Australia would raise preliminary objections in accordance with the provi-
sions of Article 79 of the Rules of Court. On 16 January 1991, within the time-
limit fixed for the filing of the Counter-Memorial, the Government of Australia
filed Preliminary Objections submitting that the Application was inadmissible
and that the Court lacked jurisdiction to hear the claims made therein. Accord-
ingly, by an Order dated 8 February 1991, the Court, recording that by virtue of
the provisions of Article 79, paragraph 3, of the Rules of Court, the proceedings
on the merits were suspended, fixed a time-limit for the presentation by the
Government of Nauru of a Written Statement of its Observations and Sub-
missions on the Preliminary Objections. That statement was filed on 17 July
1991, within the prescribed time-limit, and the case became ready for hearing in
respect of the preliminary objections.
4. On 11 to 19, and 21 and 22 November 1991, public hearings were held in
the course of which the Court heard the oral arguments and replies of the follow-

For Australia:  Mr. Gavan Griffith, Q.C.,
Mr. Eduardo Jiménez de Aréchaga,
Mr. Derek W. Bowett, Q.C.,
Mr. Henry Burmester,
Mr. Alain Pellet.

For Nauru:  Mr. V. S. Mani,
H.E. Mr. Hammer DeRoburt, G.C.M.G., O.B.E., M.P.,
Mr. Leo D. Keke,
Mr. Barry Connell,
Mr. Ian Brownlie, Q.C.,
Mr. James Crawford.

During the hearings, questions were put by Members of the Court to both
Parties, and replies were given either orally or in writing.

* 

5. In the course of the written proceedings, the following submissions were
presented by the Parties:

On behalf of the Government of Nauru,
in the Memorial:

“On the basis of the evidence and legal argument presented in this
Memorial, the Republic of Nauru
Requests the Court to adjudge and declare
that the Respondent State bears responsibility for breaches of the follow-
ing legal obligations:
First: the obligations set forth in Article 76 of the United Nations
Charter and Articles 3 and 5 of the Trusteeship Agreement for Nauru
of 1 November 1947.
Second: the international standards generally recognized as applicable
in the implementation of the principle of self-determination.
Third: the obligation to respect the right of the Nauruan people to per-
manent sovereignty over their natural wealth and resources.

6 

PHOSPHATE LANDS IN NAURU (JUDGMENT)
Fourth: the obligation of general international law not to exercise powers of administration in such a way as to produce a denial of justice lato sensu.

Fifth: the obligation of general international law not to exercise powers of administration in such a way as to constitute an abuse of rights.

Sixth: the principle of general international law that a State which is responsible for the administration of territory is under an obligation not to bring about changes in the condition of the territory which will cause irreparable damage to, or substantially prejudice, the existing or contingent legal interest of another State in respect of that territory.

Requests the Court to adjudge and declare further
that the Republic of Nauru has a legal entitlement to the Australian allocation of the overseas assets of the British Phosphate Commissioners which were marshalled and disposed of in accordance with the trilateral Agreement concluded on 9 February 1987.

Requests the Court to adjudge and declare
that the Respondent State is under a duty to make appropriate reparation in respect of the loss caused to the Republic of Nauru as a result of the breaches of its legal obligations detailed above and its failure to recognize the interest of Nauru in the overseas assets of the British Phosphate Commissioners.

On behalf of the Government of Australia,
in the Preliminary Objections:

"On the basis of the facts and law presented in these Preliminary Objections, the Government of Australia requests the Court to adjudge and declare that the Application by Nauru is inadmissible and that the Court lacks jurisdiction to hear the claims made by Nauru for all or any of the reasons set out in these Preliminary Objections."

On behalf of the Government of Nauru,
in the Written Statement of its Observations and Submissions on the Preliminary Objections:

"In consideration of the foregoing the Government of Nauru requests the Court:
To reject the preliminary objections of Australia, and
To adjudge and declare:
(a) that the Court has jurisdiction in respect of the claim presented in the Memorial of Nauru, and
(b) that the claim is admissible."

6. In the course of the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Australia,
at the hearing of 21 November 1991:

"On the basis of the facts and law set out in its Preliminary Objections and its oral pleadings, and for all or any of the grounds and reasons set out therein, the Government of Australia requests the Court to adjudge and declare that the claims by Nauru against Australia set out in their Application and Memorial are inadmissible and that the Court lacks jurisdiction to hear the claims."

On behalf of the Government of Nauru,
at the hearing of 22 November 1991:

"In consideration of its written and oral pleadings the Government of the Republic of Nauru requests the Court:
To reject the preliminary objections raised by Australia, and
To adjudge and declare:
(a) that the Court has jurisdiction in respect of the claims presented in the Memorial of Nauru, and
(b) that the claims are admissible.

In the alternative, the Government of the Republic of Nauru requests the Court to declare that some or all of the Australian preliminary objections do not possess, in the circumstances of the case, an exclusively preliminary character, and in consequence, to join some or all of these objections to the merits."

* * *

7. The Court will first consider those of Australia's objections which concern the circumstances in which the dispute relating to rehabilitation of the phosphate lands worked out prior to 1 July 1967 arose between Nauru and Australia. It will then turn to the objection based on the fact that New Zealand and the United Kingdom are not parties to the proceedings. Lastly, it will rule on the objections to Nauru's submissions relating to the overseas assets of the British Phosphate Commissioners.

* * *

8. The Court will begin by considering the question of its jurisdiction. In its Application, Nauru bases jurisdiction on the declarations whereby Australia and Nauru have accepted the jurisdiction of the Court under Article 36, paragraph 2, of the Statute. Those declarations were deposited with the Secretary-General of the United Nations on 17 March 1975 in the case of Australia and on 29 January 1988 in the case of Nauru. The declaration of Nauru stipulates that Nauru's acceptance of the Court's jurisdiction does not extend to "any dispute with respect to which there exists a dispute settlement mechanism under an agreement between the Republic of Nauru and another State". The declaration of Australia, for its part, specifies that it "does not apply to any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement."
lacks jurisdiction to deal with Nauru's Application. It recalls in that respect that Nauru, having been previously administered under a League of Nations Mandate, was placed under the Trusteeship System provided for in Chapter XII of the United Nations Charter by a Trusteeship Agreement approved by the General Assembly on 1 November 1947. That Agreement provided that the administration of Nauru was to be exercised by an Administering Authority made up of the Governments of Australia, New Zealand and the United Kingdom. Australia argues that any dispute which arose in the course of the Trusteeship between "the Administering Authority and the indigenous inhabitants" fell within the exclusive jurisdiction of the United Nations Trusteeship Council and General Assembly. Those organs, kept informed about Nauruan affairs by the Visiting Missions appointed by the Trusteeship Council, by petitions from the inhabitants, and by the reports of the Administering Authority, could make recommendations with respect to such disputes, not only to that Authority, but also to the representatives of the Nauruan people; they could also prompt negotiations with a view to settlement of such disputes. But in any event, according to Australia, any dispute of that type should be regarded as having been settled by the very fact of the termination of the Trusteeship, provided that that termination was unconditional.

10. In the present case, Australia emphasizes that the Nauru Local Government Council — an organ, created in 1951, representing the Nauruan community and which, from 1963 onwards, had been, in many respects, responsible for local administrative tasks — raised with the United Nations the question of rehabilitation of the worked-out phosphate lands from 1965 onwards. That question was discussed in subsequent years, both within the United Nations and in direct contacts. At the end of these discussions, an Agreement relating to the Nauru Island Phosphate Industry was concluded on 14 November 1967 between the Nauru Local Government Council, on the one hand, and Australia, New Zealand and the United Kingdom, on the other, the effect of which, in Australia’s submission, was that Nauru waived its claims to rehabilitation of the phosphate lands. Australia maintains, moreover, that on 19 December 1967, the United Nations General Assembly terminated the Trusteeship without making any reservation relating to the administration of the Territory. In those circumstances, Australia contends that, with respect to the dispute presented in Nauru’s Application, Australia and Nauru had agreed "to have recourse to some other method of peaceful settlement" within the meaning of the reservation in Australia’s declaration, and that consequently the Court lacks jurisdiction to deal with that dispute.

11. The Court does not consider it necessary to enter at this point into the details of the arguments thus advanced. Declarations made pursuant to Article 36, paragraph 2, of the Statute of the Court can only relate to disputes between States. The declaration of Australia only covers that type of dispute; it is made expressly "in relation to any other State accepting the same obligation ...". In these circumstances, the question that arises in this case is whether Australia and the Republic of Nauru did or did not, after 31 January 1968, when Nauru acceded to independence, conclude an agreement whereby the two States undertook to settle their dispute relating to rehabilitation of the phosphate lands by resorting to an agreed procedure other than recourse to the Court. No such agreement has been pleaded or shown to exist. That question has therefore to be answered in the negative. The Court thus considers that the objection raised by Australia on the basis of the above-mentioned reservation must be rejected.

12. Australia’s second objection is that the Nauruan authorities, even before acceding to independence, waived all claims relating to rehabilitation of the phosphate lands. This objection contains two branches. In the first place, the waiver, it is said, was the implicit but necessary result of the above-mentioned Agreement of 14 November 1967. It is also said to have resulted from the statements made in the United Nations in the autumn of 1967 by the Nauruan Head Chief on the occasion of the termination of the Trusteeship. In the view of Australia, Nauru may not go back on that twofold waiver and its claim should accordingly be rejected as inadmissible.

13. The Court does not deem it necessary to enter into the various questions of law that are raised by the foregoing argument and, in particular, to consider whether any waiver by the Nauruan authorities prior to accession to independence is opposable to the Republic of Nauru. It will suffice to note that in fact those authorities did not at any time effect a clear and unequivocal waiver of their claims, whether one takes into consideration the negotiations which led to the Agreement of 14 November 1967, the Agreement itself, or the discussions at the United Nations.

14. The Parties are at one in recognizing that the Agreement of 14 November 1967 laid down the conditions under which the property in the capital assets of the phosphate industry on Nauru was to pass to the local authorities and the ways in which the phosphate would, in future, be worked and sold. They also recognize that that Agreement did not contain any express provision relating to rehabilitation of the phosphate lands previously worked out. However, the Parties disagree as to the significance of that silence. Australia maintains that "the Agreement did represent a comprehensive settlement of all claims by Nauru in relation to the phosphate industry", including rehabilitation of the lands, and that the Agreement was accordingly tantamount to a waiver by Nauru of its previous claims in that regard. Nauru, on the contrary, contends that the absence of any reference to that matter in the Agreement cannot be interpreted as implying a waiver.

15. The Court notes that during the discussions with the Administering Authority the delegation of the Nauru Local Government Council maintained, as early as June 1965, that "there was a responsibility on the Part-
ner Governments to restore at their cost the land that had been mined". In June 1966 the delegation restated that position, noting that costs had been estimated at $1 million Australian dollars and proposing that those costs should be shared by the three Governments in proportion to the benefits they had previously derived from the mining of the phosphate. It concluded by adding that Nauru would be prepared to assume responsibility for the restoration of any land mined subsequently if "the full economic benefit from the phosphate" was made available to the Nauruans at a future time. No agreement was reached on that subject in 1966 and the discussions resumed in April 1967. The Administering Authority then proposed the insertion into the future agreement of a provision to the effect that:

"The Partner Governments consider that the proposed financial arrangements on phosphate cover the future needs of the Nauruan community including rehabilitation or resettlement."

During the meeting held on 16 May 1967, the delegation of the Administering Authority asked

"would the Nauruans press their argument despite any financial arrangements made, that the Partner Governments had a responsibility on rehabilitation?"

The summary record of the discussions goes on to say that

"During the following discussion it emerged that the Nauruans would still maintain their claim on the Partner Governments in respect of rehabilitation of areas mined in the past, even if the Partner Governments did not press for the withdrawal of the claim in a formal manner such as in an agreement."

There is no trace of any subsequent discussion of this question in the documents before the Court.

16. The Court notes that the Agreement of 14 November 1967 contains no clause by which the Nauruan authorities expressly waived their earlier claims. Furthermore, in the view of the Court, the text of the Agreement, read as a whole, cannot, regard being had to the circumstances set out in paragraph 15 above, be construed as implying such a waiver. The first branch of the Australian argument must be rejected.

17. Australia maintains further that the Nauruan authorities also waived their claims to rehabilitation of the lands during the debates at the United Nations that led, in the autumn of 1967, to the termination of the Trusteeship over Nauru and to its independence. Australia relies chiefly upon a statement made in the Fourth Committee of the United Nations General Assembly on 6 December 1967, by the Nauruan Head Chief, Mr. DeRoburt, in which he said:

"[the island had the] good fortune [to possess] large deposits of high-grade phosphate. That economic base, of course, presented its own problems. One which worried the Nauruans derived from the fact that land from which phosphate had been mined would be totally unusable. Consequently, although it would be an expensive operation, that land would have to be rehabilitated and steps were already being taken to build funds to be used for that purpose. That phosphate was a wasting asset was, in itself, a problem; in about twenty-five years the supply would be exhausted. The revenue which Nauru had received in the past and would receive during the next twenty-five years would, however, make it possible to solve the problem. Already some of the revenue was being allocated to development projects. In addition, a much larger proportion of its income was being placed in a long-term investment fund, so that, whatever happened, future generations would be provided for. In short, the Nauruans wanted independence and were confident that they had the resources with which to sustain it."

Australia argues that this statement amounted to an undertaking by the Nauruan authorities to finance any rehabilitation of lands worked out in the past from revenue deriving from future exploitation, and that it consequently constituted a waiver of any claim against the Administering Authority.

18. In order to ascertain the significance of this statement, it needs to be placed in context. As early as 1965, the Nauru Local Government Council had submitted to a Visiting Mission appointed by the United Nations Trusteeship Council a memorandum indicating that the soil on the island "must be fully rehabilitated". Then at its thirty-third session, in the spring of 1966, the Trusteeship Council noted a statement made by the representative of the people of Nauru that:

"the responsibility for rehabilitating the Island, in so far as it is the Administering Authority's, remains with the Administering Authority. If it should turn out that Nauru gets its own independence in January 1968, from then on the responsibility will be ours. A rough assessment of the portions of responsibility for this rehabilitation exercise then is this: one-third is the responsibility of the Administering Authority and two-thirds is the responsibility of the Nauruan people."

In the spring of 1967, the representative of the people of Nauru again emphasized before the Trusteeship Council, at its thirty-fourth session, that "the Administering Authority should accept responsibility for the rehabilitation of the lands already mined".

19. Lastly, on 22 November 1967, the Trusteeship Council met to consider the request by Australia, New Zealand and the United Kingdom for the termination of Nauru's Trusteeship to enable the territory to accede to
independence on 31 January 1968. At that meeting, Head Chief DeRoburt stated that:

"There was one subject, however, on which there was still a difference of opinion — responsibility for the rehabilitation of phosphate lands. The Nauruan people fully accepted responsibility in respect of land mined subsequently to 1 July 1967, since under the new agreement they were receiving the net proceeds of the sale of phosphate. Prior to that date, however, they had not received the net proceeds and it was therefore their contention that the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967. That was not an issue relevant to the termination of the Trusteeship Agreement, nor did the Nauruans wish to make it a matter for United Nations discussion. He merely wished to place on record that the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims."

The Trusteeship Council then adopted a draft resolution recommending the termination of the Trusteeship. Its report was submitted to the Fourth Committee of the General Assembly and it was during the proceedings of the Fourth Committee that Head Chief DeRoburt made the statement quoted above which Australia contends amounted to a waiver.

20. The Court cannot share this view. The statement referred to by Australia (set out in paragraph 17 above) deals with two distinct problems, namely, on the one hand, rehabilitation of the phosphate lands, and, on the other, the future depletion of the deposits. On the first point, which is the only one of interest here to the Court, Head Chief DeRoburt confined himself to stating that measures had already been taken to set aside funds for rehabilitation of the lands. Notwithstanding some ambiguity in the wording, the statement did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations and, in particular, before the Trusteeship Council on 22 November 1967.

21. The Court concludes that the Nauruan local authorities did not, before independence, waive their claim relating to rehabilitation of the phosphate lands worked out prior to 1 July 1967. The second objection raised by Australia must in consequence be rejected.

22. Australia's third objection is that Nauru's claim is "inadmissible on the ground that termination of the Trusteeship by the United Nations precludes allegations of breaches of the Trusteeship Agreement from now being examined by the Court".

Such a resolution had "definitive legal effect" (Northern Cameroons, Judgment, I.C.J. Reports 1963, p. 32). Consequently, the Trusteeship Agreement was "terminated" on that date and "is no longer in force" (ibid., p. 37). In the light of these considerations, it might be possible to question the admissibility of an action brought against the Administering Authority on the basis of the alleged failure by it to comply with its obligations with respect to the administration of the Territory. However, the Court does not consider it necessary to enter into this debate and will confine itself to examining the particular circumstances in which the Trusteeship for Nauru was terminated.

24. It is to be recalled in this respect that from 1965 to 1967 the question of rehabilitation of the worked-out lands was on several occasions discussed in the various competent United Nations bodies, namely, the Trusteeship Council, the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the Fourth Committee of the General Assembly and the General Assembly itself.

members not being "experts in the matter", it was unable to make any recommendation. The Trusteeship Council confined itself to taking note of that report on 29 June 1965. But the General Assembly, on 21 December 1965, requested that

"immediate steps be taken by the Administering Authority towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation" (resolution 2111 (XX)).

26. In agreement with the local authorities, the Administering Authority then commissioned a study by a Committee of Experts, which became known as the Davey Committee, on the possibilities of rehabilitating the phosphate lands. The Trusteeship Council, at its thirty-third session, in the spring of 1966, recalled resolution 2111 (XX) and noted that the study was being prepared. As for the General Assembly, on 20 December 1966, it again recommended that

"the administering authority . . . take immediate steps, irrespective of the cost involved, towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation" (resolution 2226 (XXI)).

27. In May 1967, the report by the Davey Committee was distributed to the members of the Trusteeship Council. A number of members of the Council raised the question of rehabilitation of the lands. The representative of France said he regretted that "no agreement had been reached between the Administering Authority and the Nauruan people" on the question. Liberia subsequently submitted to the Council a draft resolution stressing that it was the responsibility of the Administering Authority to restore the lands at its expense. That draft was not adopted, but the Council, "regretting that differences continue to exist on the question of rehabilitation", expressed the "earnest hope that it will be possible to find a solution to the satisfaction of both parties".

28. During the discussions in the Trusteeship Council in November 1967 with a view to termination of the Trusteeship, Head Chief DeRoburt, as indicated in paragraph 19 above, reserved his position on rehabilitation, expressly placing on record that "the Nauruan Government would continue to seek what was, in the opinion of the Nauruan people, a just settlement of their claims". The representative of the USSR stated that he was "certain "that the legitimate demands of the Nauruan people . . . for the rehabilitation of the land would be fully met". The representatives of the Administering Authority, while indicating that the agreements concluded were financially favourable to Nauru, made no reference in their statements to the question of rehabilitation.

During the discussions in the Fourth Committee, following the statement by Head Chief DeRoburt mentioned in paragraph 17 above, the representative of the USSR again referred to the problem and the representative of India recalled that

"With regard to the question of responsibility for the rehabilitation of the mined areas of the island, there was still a considerable difference of opinion between the Nauruans and the Administering Authority."

The representative of India further expressed the hope that an equitable agreement would be concluded in this respect. Again, the representatives of the Administering Authority did not react.

29. The final resolution of the General Assembly of 19 December 1967, by which it decided, in agreement with the Administering Authority, to terminate the Trusteeship, does not, unlike the earlier resolutions, contain any provision inviting the Administering Authority to rehabilitate the lands. The resolution however recalls those earlier resolutions in its preamble.

30. The facts set out above show that, when, on the recommendation of the Trusteeship Council, the General Assembly terminated the Trusteeship over Nauru in agreement with the Administering Authority, everyone was aware of subsisting differences of opinion between the Nauru Local Government Council and the Administering Authority with regard to rehabilitation of the phosphate lands worked out before 1 July 1967. Accordingly, though General Assembly resolution 2347 (XXII) did not expressly reserve any rights which Nauru might have had in that regard, the Court cannot view that resolution as giving a discharge to the Administering Authority with respect to such rights. In the opinion of the Court, the rights Nauru might have had in connection with rehabilitation of the lands remained unaffected. Regard being had to the particular circumstances of the case, Australia's third objection must in consequence be rejected.

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31. Australia's fourth objection stresses that Nauru achieved independence on 31 January 1968 and that, as regards rehabilitation of the lands, it was not until December 1988 that that State formally "raised with Australia and the other former Administering Powers its position". Australia therefore contends that Nauru's claim is inadmissible on the ground that it has not been submitted within a reasonable time. Nauru's delay in making its claim is alleged to be all the more prejudicial to Australia because the documentation relating to the Mandate and the Trusteeship may have been lost or dispersed in the interval, and because developments in the law during the interval render it more difficult to determine the legal obligations incumbent on the Administering Powers at the time of the alleged breaches of those obligations.

32. The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay
down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.

33. In the present case, it was well known, at the time when Nauru gained its independence, that the question of rehabilitation of the phosphate lands had not been settled. On the day of declaring independence, 31 January 1968, the Nauruan Head Chief, Mr. DeRoburt, stated, according to press reports, that

"We hold it against Britain, Australia and New Zealand to recognize that it is their responsibility to rehabilitate one third of the island."

On 5 December 1968 the President of Nauru wrote to the Minister for External Affairs of Australia indicating his desire to examine a specific rehabilitation scheme for the building of a new airstrip. The Australian Minister replied on 4 February 1969 as follows:

"the Partner Governments, in the talks preceding the termination of the Trusteeship Agreement, did not accept responsibility for the rehabilitation of mined-out phosphate lands. The Partner Governments remain convinced that the terms of the settlement with Your Excellency’s Government were sufficiently generous to enable it to meet its needs for rehabilitation and development."

34. This letter did not elicit any immediate reaction. Five years later, on the occasion of a State visit to Canberra, the President of Nauru raised the question of rehabilitation with the Prime Minister of Australia. In 1974 he brought up the matter a second time, without success, on the occasion of the visit to Nauru of the Australian Acting Minister for External Affairs.

35. It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to “seek a sympathetic reconsideration of Nauru’s position”. That request was declined by Australia on 14 March 1984. Then, on 3 December 1986, Nauru set up a three-member Commission of Inquiry to study the question and informed the three former Administering Governments of the establishment of that Commission. Those Governments maintained their position and, following a series of exchanges of letters, Nauru applied to the Court on 19 May 1989.

36. The Court, in these circumstances, takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru’s

Application was not rendered inadmissible by passage of time. Nevertheless, it will be for the Court, in due time, to ensure that Nauru’s delay in seizing it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.

37. Australia’s fifth objection is that “Nauru has failed to act consistently and in good faith in relation to rehabilitation” and that therefore “the Court in exercise of its discretion, and in order to uphold judicial propriety should . . . decline to hear the Nauruan claims”.

38. The Court considers that the Application by Nauru has been properly submitted in the framework of the remedies open to it. At the present stage, the Court is not called upon to weigh the possible consequences of the conduct of Nauru with respect to the merits of the case. It need merely note that such conduct does not amount to an abuse of process. Australia’s objection on this point must also be rejected.

39. The Court will now consider the objection by Australia based on the fact that New Zealand and the United Kingdom are not parties to the proceedings. Australia recalls that the League of Nations Mandate relating to Nauru was conferred in 1920 upon “His Britannic Majesty” as Sovereign of the United Kingdom as well as of Australia and New Zealand. That Mandate was exercised under arrangements agreed on by the three States. Subsequently a Trusteeship over the Territory was granted in 1947 by the United Nations to the same three Governments, “jointly” designated as Administering Authority. Consequently, according to Australia:

“the claim of Nauru is, in substance, not a claim against Australia itself but a claim against the Administering Authority in relation to Nauru”. The Court, it is argued, could therefore not pass upon the responsibility of the Respondent without adjudicating upon the responsibility of New Zealand and the United Kingdom; these two States are in reality “parties to the dispute”; but they are not parties to the proceedings. Australia accordingly contends that

“the claims [of Nauru] are inadmissible and the Court lacks jurisdiction as any judgment on the question of breach of the Trusteeship Agreement would involve the responsibility of third States that have not consented to the Court’s jurisdiction in the present case.”
40. In order to assess the validity of this objection, the Court will first refer to the Mandate and Trusteeship regimes and the way in which they applied to Nauru.

41. The Mandate system, instituted by virtue of Article 22 of the Covenant of the League of Nations, was conceived for the benefit of the territories "which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world". In accordance with the same Article 22, "the well-being and development of such peoples form a sacred trust of civilisation". Thus the Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object — a sacred trust of civilisation" (International Status of South West Africa, I.C.J. Reports 1950, p. 132). This "trust" had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their own" (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970), I.C.J. Reports 1971, pp. 28-29, para. 46).

42. It is in that context that the Council of the League of Nations granted to His Britannic Majesty, on 17 December 1920, "full power of administration and legislation over the territory subject to the . . . Mandate as an integral portion of his territory". An Agreement concluded between "His Majesty's Government in London, His Majesty's Government of the Commonwealth of Australia, and His Majesty's Government of the Dominion of New Zealand" on 2 July 1919 and amended on 30 May 1923 laid down the conditions "for the exercise of the said Mandate and for the mining of the phosphate deposits on the said island". This exploitation was entrusted to an enterprise managed by three "British Phosphate Commissioners" appointed by the three Governments. Article 1 of the amended Agreement provided that

"The Administration of the Island shall be vested in an Administrator. The first Administrator shall be appointed for a term of five years by the Australian Government; and thereafter the Administrator shall be appointed in such manner as the three Governments decide."

It was further provided that

"All Ordinances made by the Administrator shall be subject to confirmation or disallowance in the name of His Majesty, whose pleasure in respect of such confirmation or disallowance shall be signified by one of His Majesty's Principal Secretaries of State, or by the Governor-General of the Commonwealth of Australia . . . or by the Governor-General of the Dominion of New Zealand . . . according as the Administrator shall have been appointed by His Majesty's Government in London, or by the Government of the Commonwealth of Australia, or by the Government of the Dominion of New Zealand, as the case may be."

The text added:

"The Administrator shall conform to such instructions as he shall from time to time receive from the Contracting Government by which he has been appointed."

Provision was made finally for a system whereby decisions taken by the Administrator were communicated to the three Governments concerned.

43. As a matter of fact, the Administrator was at all times appointed by the Australian Government and was accordingly under the instructions of that Government. His "ordinances, proclamations and regulations" were subject to confirmation or rejection by the Governor-General of Australia. The other Governments, in accordance with the Agreement, received such decisions for information only.

44. On the demise of the League of Nations and with the birth of the United Nations, provisions comparable to those of the Covenant were incorporated into the Charter of the United Nations as it relates to the Trusteeship System therein established. In this connection, Article 76 of the Charter provides that:

"The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

(a) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement."

45. The system of administration applied in Nauru at the time of the League of Nations was maintained in essence when the Mandate was replaced by a Trusteeship. The Trusteeship Agreement for the Territory of Nauru, approved by the United Nations General Assembly on 1 November 1947, provided in Article 2 that:

"The Governments of Australia, New Zealand and the United Kingdom (hereinafter called 'the Administering Authority') are hereby designated as the joint Authority which will exercise the administration of the Territory."

It added in Article 4 that:

"The Administering Authority will be responsible for the peace, order, good government and defence of the Territory, and for this purpose, in pursuance of an Agreement made by the Governments of
Australia, New Zealand and the United Kingdom, the Government of Australia will, on behalf of the Administering Authority and except and until otherwise agreed by the Governments of Australia, New Zealand and the United Kingdom, continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory.

46. Under the régime thus established, the Agreements of 2 July 1919 and 30 May 1923 remained in force and the Administrator continued to be appointed in fact by Australia. The provisions of those Agreements relating to the administration of the Territory were not abrogated until 26 November 1965 by a new Agreement reached between the three Governments, providing for the establishment of a Legislative Council, an Executive Council and Nauruan Courts of Justice. It specified in Article 3 that the "administration of the Territory" was to be vested in "an Administrator appointed by the Government of the Commonwealth of Australia". It provided that the Administrator, the Governor-General of Australia and the Parliament of Australia were to have certain powers. The agreement to establish these new arrangements was implemented by appropriate legislative and other steps taken by Australia. The arrangements continued to apply until Nauru attained independence.

47. In these circumstances, the Court notes that the three Governments mentioned in the Trusteeship Agreement constituted, in the very terms of that Agreement, "the Administering Authority" for Nauru; that this Authority did not have an international legal personality distinct from those of the States thus designated; and that, of those States, Australia played a very special role established by the Trusteeship Agreement of 1947, by the Agreements of 1919, 1923 and 1965, and by practice.

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48. Australia's preliminary objection in this respect appears to contain two branches, the first of which can be dealt with briefly. It is first contended by Australia that, in so far as Nauru's claims are based on the conduct of Australia as one of the three States making up the Administering Authority under the Trusteeship Agreement, the nature of the responsibility in that respect is such that a claim may only be brought against the three States jointly, and not against one of them individually. In this connection, Australia has raised the question whether the liability of the three States would be "joint and several" (solidaire), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This is a question which the Court must reserve for the merits; but it is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible in limine litis merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.

49. Secondly, Australia argues that, since together with itself, New Zealand and the United Kingdom made up the Administering Authority, any decision of the Court as to the alleged breach by Australia of its obligations under the Trusteeship Agreement would necessarily involve a finding as to the discharge by those two other States of their obligations in that respect, which would be contrary to the fundamental principle that the jurisdiction of the Court derives solely from the consent of States. The question that arises is accordingly whether, given the régime thus described, the Court may, without the consent of New Zealand and the United Kingdom, deal with an Application brought against Australia alone.

50. The Court has had to consider questions of this kind on previous occasions. In the case concerning the Monetary Gold Removed from Rome in 1943 (Preliminary Question), the first submission in the Italian Application was worded as follows:

"(1) that the Governments of the French Republic, Great Britain and Northern Ireland and the United States of America should deliver to Italy any share of the monetary gold that might be due to Albania under Part III of the Paris Act of January 14th, 1946, in partial satisfaction for the damage caused to Italy by the Albanian law of January 13th, 1945" (J.C.J. Reports 1954, p. 22).

In its Judgment of 15 June 1954 the Court, noting that only France, Italy, the United Kingdom and the United States of America were parties to the proceedings, found that

"To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent." (Ibid., p. 32.)

Noting that Albania had chosen not to intervene, the Court stated:

"In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania." (Ibid.)
51. Subsequently, in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) the Court observed as follows:

"There is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning Monetary Gold Removed from Rome in 1943, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings 'would not only be affected by a decision, but would form the very subject-matter of the decision' (I.C.J. Reports 1954, p. 32). Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. As the Court has already indicated (paragraph 74, above) other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention. There is no trace, either in the Statute or in the practice of international tribunals, of an 'indispensable parties' rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. The circumstances of the Monetary Gold case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings." (Judgment of 26 November 1984, I.C.J. Reports 1984, p. 431, para. 88.)

52. That jurisprudence was applied by a Chamber of the Court in the case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) by a Judgment given on 13 September 1990, which examined whether the legal interests asserted by Nicaragua in support of an application for permission to intervene in the case did or did not form "part of the very subject-matter of the decision" to be taken or whether they were only affected by that decision (I.C.J. Reports 1990, p. 116, para. 56).

53. National courts, for their part, have more often than not the necessary power to order proprio motu the joinder of third parties who may be affected by the decision to be rendered; that solution makes it possible to settle a dispute in the presence of all the parties concerned. But on the international plane the Court has no such power. Its jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it, even by way of intervention.

54. A State, however, which is not a party to a case is free to apply for permission to intervene in accordance with Article 62 of the Statute, which provides that

"Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene."

But the absence of such a request in no way precludes the Court from adjudicating upon the claims submitted to it, 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. Where the Court is so entitled to act, the interests of the third State which is not a party to the case are protected by Article 59 of the Statute of the Court, which provides that "The decision of the Court has no binding force except between the parties and in respect of that particular case."

55. 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. Australia, moreover, recognizes that in this case there would not be a determination of the possible responsibility of New Zealand and the United Kingdom previous to the determination of Australia's responsibility. It nonetheless asserts that there would be a simultaneous determination of the responsibility of all three States and argues that, so far as concerns New Zealand and the United Kingdom, such a determination would be equally precluded by the fundamental reasons underlying the Monetary Gold decision. The Court cannot accept this contention. 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; as the Court explained.

"In order ... to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her." (I.C.J. Reports 1954, p. 32.)

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.

56. The Court must however emphasize that its ruling in the present Judgment on this objection of Australia does not in any way prejudice the merits. The present Judgment does not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems outlined above and, in particular, the special role played by Australia in the administration of the Territory. These questions are to be dealt with at the merits stage.

57. For the reasons given, the Court considers that the fact that New Zealand and the United Kingdom are not parties to the case is no bar to the proceedings brought by Nauru against Australia. The objection put forward in this respect by Australia must be rejected.

58. Finally, the Court will examine the objections addressed by Australia to the claim by Nauru concerning the overseas assets of the British Phosphate Commissioners. At the end of its Memorial on the merits, Nauru requests the Court to adjudge and declare that:

"the Republic of Nauru has a legal entitlement to the Australian allocation of the overseas assets of the British Phosphate Commissioners which were marshalled and disposed of in accordance with the trilateral Agreement concluded on 9 February 1987" and

"the Respondent State is under a duty to make appropriate reparation in respect of the loss caused to the Republic of Nauru as a result of . . . its failure to recognize the interest of Nauru in the overseas assets of the British Phosphate Commissioners".

59. The British Phosphate Commissioners were established by Article 3 of the Agreement of 2 July 1919 between the United Kingdom, Australia and New Zealand (see paragraph 42 above); that Article provided for the establishment of a body called "Board of Commissioners", composed of three members, one to be appointed by each of the Partner Governments. Article 6 provided that the

"title to the phosphate deposits . . . and to all land, buildings, plant, and equipment on the island used in connection with the working of the deposits shall be vested in the Commissioners".

Article 9 provided on the one hand that the deposits would "be worked and sold under the direction, management, and control of the Commis-

sioners" and, on the other, that it would be the duty of the latter "to dispose of the phosphates for the purpose of the agricultural requirements of the United Kingdom, Australia and New Zealand, so far as those requirements extend"; and, although in accordance with Articles 10 and 11, the sale of phosphates to third States and at market prices was to be exceptional — it being mandatory for priority sales to the three Partner Governments to be at a price close to the cost price —, Article 12 provided that any surplus funds accumulated as a result of sales to third States or otherwise would

"be credited by the Commissioners to the three Governments . . . and held by the Commissioners in trust for the three Governments to such uses as those Governments may direct . . . "

60. The British Phosphate Commissioners conducted their activities on Nauru, in accordance with the Agreement of 2 July 1919, under the Mandate and then under the Trusteeship. The Agreement concluded on 14 November 1967 between the Nauru Local Government Council, on the one hand, and the Governments of Australia, New Zealand and the United Kingdom, on the other (see paragraph 10 above), provided for the sale to Nauru, by the Partner Governments, of the capital assets of the phosphate industry on the island, which had been vested in the Commissioners on behalf of those Governments (Arts. 7-11); the Agreement also provided for the transfer to Nauru of the management and supervision of phosphate operations on the island (Arts. 12-15). The assets of the British Phosphate Commissioners on Nauru were transferred to the Government of Nauru in 1970, after the final payment therefor had been made and the British Phosphate Commissioners thereupon terminated their activities on Nauru. Following the entry into force of an Agreement of 9 June 1981 between New Zealand and Australia, which put an end to the functions that the Commissioners exercised on Christmas Island, Australia, New Zealand and the United Kingdom decided to wind up the affairs of the British Phosphate Commissioners and to divide among themselves the remaining assets and liabilities of the Commissioners: to that end, they concluded on 9 February 1987 an Agreement to "terminate the Nauru Island Agreement [of] 1919".

61. During 1987, there were various exchanges of correspondence between the Parties concerning the winding up of the affairs of the British Phosphate Commissioners. Having requested and obtained confirmation of the intention of the Partner Governments to proceed with the disposal of the assets of the Commissioners, and having asked to be consulted, the Department of External Affairs of Nauru, on 30 January 1987, addressed a Note to the Australian High Commission, in which it requested the said Governments
“to be good enough at least to keep the funds of the British Phosphate Commissioners intact without disbursement until the conclusion of the task of the . . . Commission of Inquiry (into rehabilitation set up by Nauru on 3 December 1986) and that the office records and other documents of the . . . Commissioners may kindly be kept preserved and that the said Commission of Inquiry be permitted to have access to and use of these records and documents”.

After the conclusion of the Tripartite Agreement of 9 February 1987, the President of Nauru addressed, on 4 May 1987, a letter to the Australian Minister for Foreign Affairs in which, among other things, he stated that:

“My government takes the strong view that such assets, whose ultimate derivation largely arises from the very soil of Nauru Island, should be directed towards assistance in its rehabilitation, particularly to that one-third which was mined prior to independence.”

By a letter of 15 June 1987, the Australian Minister for Foreign Affairs replied in the following terms:

“The BPC and the Partner Governments have discharged fairly all outstanding obligations. The residual assets of the BPC were not derived from its Nauru operations.”

Lastly, a further letter addressed on 23 July 1987 to the Australian Minister for Foreign Affairs by the President of Nauru contained the following passage:

“I am sure, taking into account my Government’s knowledge of the manner of accumulation of surplus funds by the BPC, that you would not be surprised if I were to say that I find it difficult to accept your statement that the residual assets of the BPC were not derived in part from its Nauru operations. I shall not, however, pursue that here but leave it perhaps for another place and another time.”

62. Australia asserts that Nauru’s claim concerning the overseas assets of the British Phosphate Commissioners is inadmissible and that the Court has no jurisdiction in relation to that claim, on the grounds that: the claim is a new one: Nauru has not established that the claim arises out of a “legal dispute” between the Parties, within the meaning of Article 36, paragraph 2, of the Statute of the Court; Nauru cannot claim any legal title to the assets in question and has not proven a legal interest capable of justifying its claim in this regard; and each of the objections raised by Australia concerning the other claims by Nauru also applies to the claim relating to the overseas assets.

63. The Court will first deal with the Australian objection based on its contention that the Nauruan claim is a new one. Australia maintains that the claim in question is inadmissible on the ground that it appeared for the first time in the Nauruan Memorial; that Nauru has not proved the existence of any real link between that claim, on the one hand, and its claims relating to the alleged failure to observe the Trusteeship Agreement and to the rehabilitation of the phosphate lands, on the other; and that the claim in question seeks to transform the dispute brought before the Court into a dispute that would be of a different nature. Nauru, for its part, argues that its claim concerning the overseas assets of the British Phosphate Commissioners does not constitute a new basis of claim and that, even if it were formally so, the Court could nevertheless entertain it; that the claim is closely related to the matrix of fact and law concerning the management of the phosphate industry during the period from 1919 until independence; and that the claim is “implicit” in the claims relating to the violations of the Trusteeship Agreement and “consequential” on them.

64. The Court notes in the first place that no reference to the disposal of the overseas assets of the British Phosphate Commissioners appears in Nauru’s Application, either as an independent claim or in relation to the claim for reparation submitted, and that the Application nowhere mentions the Agreement of 9 February 1987, notwithstanding the statement contained in the letter of the President of Nauru dated 23 July 1987 that he was leaving the matter “perhaps for another place and another time” (see paragraph 61 above). On the other hand, the Court notes that, after reiterating the claims previously made in its Application, Nauru adds, at the end of its Memorial, the following submission:

“Requests the Court to adjudge and declare further that the Republic of Nauru has a legal entitlement to the Australian allocation of the overseas assets of the British Phosphate Commissioners...” (Emphasis added.)

This submission is presented separately, in the form of a distinct paragraph.

65. Consequently, the Court notes that, from a formal point of view, the claim relating to the overseas assets of the British Phosphate Commissioners, as presented in the Nauruan Memorial, is a new claim in relation to the claims presented in the Application. Nevertheless, as the Permanent Court of International Justice pointed out in the Mavrommatis Palecones Concessions case:

“The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law.” (P.C.I.J., Series A, No. 2, p. 34; cf. also Northern Cameroon, I.C.J. Reports 1963, p. 28.)

The Court will therefore consider whether, although formally a new
claim, the claim in question can be considered as included in the original claim in substance.

66. It appears to the Court difficult to deny that links may exist between the claim made in the Memorial and the general context of the Application. What is more, Australia has acknowledged before the Court that the “assets distributed in 1987 were derived from a number of sources” and that “some of them may have been derived from the proceeds of sale of Nauruan phosphate”; and Nauru, in its Application, has alleged that the phosphate industry on the island was carried on in such a way that the real benefit went to the three States — principally Australia — that exploitation of the phosphate had resulted in the devastation of the land and that inadequate royalties had been paid to the Nauruan people. Moreover, the Court also notes that the diplomatic correspondence exchanged by the Parties in 1987 (see paragraph 61 above) indicates that the Nauruan Government considered that there was a link between its claim for rehabilitation of the worked-out lands and the disposal of the overseas assets of the British Phosphate Commissioners.

67. The Court, however, is of the view that, for the claim relating to the overseas assets of the British Phosphate Commissioners to be held to have been, as a matter of substance, included in the original claim, it is not sufficient that there should be links between them of a general nature. An additional claim must have been implicit in the application (Temple of Preah Vihear, Merits, I.C.J. Reports 1962, p. 36) or must arise “directly out of the question which is the subject-matter of that Application” (Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, I.C.J. Reports 1974, p. 203, para. 72). The Court considers that these criteria are not satisfied in the present case.

68. Moreover, while not seeking in any way to prejudge the question whether there existed, on the date of the filing of the Application, a dispute of a legal nature between the Parties as to the disposal of the overseas assets of the British Phosphate Commissioners, the Court is convinced that, if it had to entertain such a dispute on the merits, the subject of the dispute on which it would ultimately have to pass would be necessarily distinct from the subject of the dispute originally submitted to it in the Application. To settle the dispute on the overseas assets of the British Phosphate Commissioners the Court would have to consider a number of questions that appear to it to be extraneous to the original claim, such as the precise make-up and origin of the whole of these overseas assets; and the resolution of an issue of this kind would lead it to consider the activities conducted by the Commissioners not only, ratione temporis, after 1 July 1967, but also, ratione loci, outside Nauru (on Ocean Island (Banaba) and Christmas Island) and, ratione materiae, in fields other than the exploitation of the phosphate (for example, shipping).

69. Article 40, paragraph 1, of the Statute of the Court provides that the “subject of the dispute” must be indicated in the Application; and Ar-

ticle 38, paragraph 2, of the Rules of Court requires “the precise nature of the claim” to be specified in the Application. These provisions are so essential from the point of view of legal security and the good administration of justice that they were already, in substance, part of the text of the Statute of the Permanent Court of International Justice, adopted in 1920 (Art. 40, first paragraph), and of the text of the first Rules of that Court, adopted in 1922 (Art. 35, second paragraph), respectively. On several occasions the Permanent Court had to indicate the precise significance of these texts. Thus, in its Order of 24 February 1933 in the case concerning the Prince von Pless Administration (Preliminary Objection), it stated that:

“under Article 40 of the Statute, it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein . . . .” (P.C.I.J., Series A/B, No. 52, p. 14).

In the case concerning the Société commerciale de Belgique, the Permanent Court stated:

“It is to be observed that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the Rules which provide that the Application must indicate the subject of the dispute . . . . it is clear that the Court 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. A practice of this kind would be calculated to prejudice the interests of third States to which, under Article 40, paragraph 2, of the Statute, all submissions must be communicated in order that they may be in a position to avail themselves of the right of intervener provided for in Articles 62 and 63 of the Statute.” (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, I.C.J. Reports 1984, p. 427, para. 80.)

70. In the light of the foregoing, the Court concludes that the Nauruan claim relating to the overseas assets of the British Phosphate Commissioners is inadmissible inasmuch as it constitutes, both in form and in substance, a new claim, and the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim.

71. The preliminary objection raised by Australia on this point is therefore well founded. It follows that it is not necessary for the Court to consider here the other objections of Australia with regard to the submissions of Nauru concerning the overseas assets of the British Phosphate Commissioners.

* * *
72. For these reasons,

THE COURT,

(i) rejects, unanimously, the preliminary objection based on the reservation made by Australia in its declaration of acceptance of the compulsory jurisdiction of the Court;

(ii) rejects, by twelve votes to one, the preliminary objection based on the alleged waiver by Nauru, prior to accession to independence, of all claims concerning the rehabilitation of the phosphate lands worked out prior to 1 July 1967;

In favour: President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabaddeen, Aguilar Mawdsley, Ranjeva;
Against: Vice-President Oda;

(iii) rejects, by twelve votes to one, the preliminary objection based on the termination of the Trusteeship over Nauru by the United Nations;

In favour: President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabaddeen, Aguilar Mawdsley, Ranjeva;
Against: Vice-President Oda;

(iv) rejects, by twelve votes to one, the preliminary objection based on the effect of the passage of time on the admissibility of Nauru’s Application;

In favour: President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabaddeen, Aguilar Mawdsley, Ranjeva;
Against: Vice-President Oda;

(v) rejects, by twelve votes to one, the preliminary objection based on Nauru’s alleged lack of good faith;

In favour: President Sir Robert Jennings; Judges Lachs, Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabaddeen, Aguilar Mawdsley, Ranjeva;
Against: Vice-President Oda;

(vi) rejects, by nine votes to four, the preliminary objection based on the fact that New Zealand and the United Kingdom are not parties to the proceedings;

In favour: Judges Lachs, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabaddeen, Aguilar Mawdsley, Ranjeva;
Against: President Sir Robert Jennings; Vice-President Oda; Judges Ago, Schwebel;

(vii) upholds, unanimously, the preliminary objection based on the claim concerning the overseas assets of the British Phosphate Commissioners being a new one;

(2) finds, by nine votes to four, that, on the basis of Article 36, paragraph 2, of the Statute of the Court, it has jurisdiction to entertain the Application filed by the Republic of Nauru on 19 May 1989 and that the said Application is admissible;

In favour: Judges Lachs, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabaddeen, Aguilar Mawdsley, Ranjeva;
Against: President Sir Robert Jennings; Vice-President Oda; Judges Ago, Schwebel;

(3) finds, unanimously, that the claim concerning the overseas assets of the British Phosphate Commissioners, made by Nauru in its Memorial of 20 April 1990, is inadmissible.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of June, one thousand nine hundred and ninety-two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Nauru and the Government of the Commonwealth of Australia, respectively.

(Signed) R. Y. JENNINGS,
President.
(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judge SHAHABUDEEN appends a separate opinion to the Judgment of the Court.

President Sir Robert JENNINGS, Vice-President ODA, Judges AGO and SCHWEBEL append dissenting opinions to the Judgment of the Court.

(Initialled) R.Y.J.
(Initialled) E.V.O.
International Court of Justice

Gabčíkovo-Nagymaros Project
(Hungary/Slovakia)
Judgment

I.C.J. Reports 1997
INTERNATIONAL COURT OF JUSTICE
REPORTS OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
THE GABČÍKOVO-NAGYMAROS PROJECT
(HUNGARY/SLOVAKIA)

JUDGMENT OF 25 SEPTEMBER 1997

1997

COUR INTERNATIONALE DE JUSTICE
RECUEIL DES ARRÊTS, AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE AU PROJET
GABČÍKOVO-NAGYMAROS
(HONGRIE/SLOVAQUIE)

ARRÊT DU 25 SEPTEMBRE 1997

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25 September 1997

CASE CONCERNING

THE GABČIKOVO-NAGYMAROS PROJECT

(HUNGARY/SLOVAKIA)

Treaty of 16 September 1977 concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks — “Related instruments”.

Suspension and abandonment by Hungary, in 1989, of works on the Project — Applicability of the Vienna Convention of 1969 on the Law of Treaties — Law of treaties and law of State responsibility — State of necessity as a ground for precluding the wrongfulness of an act — “Essential interest” of the State committing the act — Environment — “Grave and imminent peril” — Act having to constitute the “only means” of safeguarding the interest threatened — State having “contributed to the occurrence of the state of necessity”.

Czechoslovakia’s proceeding, in November 1991, to “Variant C” and putting into operation, from October 1992, this Variant — Arguments drawn from a proposed principle of approximate application — Respect for the limits of the Treaty — Right to an equitable and reasonable share of the resources of an international watercourse — Commission of a wrongful act and prior conduct of a preparatory character — Obligation to mitigate damages — Principle concerning only the calculation of damages — Countermeasures — Response to an internationally wrongful act — Proportionality — Assumption of unilateral control of a shared resource.

Notification by Hungary, on 19 May 1992, of the termination of the 1977 Treaty and related instruments — Legal effects — Matter falling within the law of treaties — Articles 60 to 62 of the Vienna Convention on the Law of Treaties — Customary law — Impossibility of performance — Permanent disappearance or destruction of an “object” indispensable for execution — Impossibility of performance resulting from the breach, by the party invoking it, of an obligation under the Treaty — Fundamental change of circumstances — Essential basis of the consent of the parties — Extent of obligations still to be performed — Stability of treaty relations — Material breach of the Treaty — Date on which the breach occurred and date of notification of termination — Victim of a breach having itself committed a prior breach of the Treaty — Emergence of new norms of environmental law — Sustainable development — Treaty provisions permit-

ting the parties, by mutual consent, to take account of those norms — Repudiation of the Treaty — Reciprocal non-compliance — Integrity of the rule pacta sunt servanda — Treaty remaining in force until terminated by mutual consent.

Legal consequences of the Judgment of the Court — Dissolution of Czechoslovakia — Article 12 of the Vienna Convention of 1978 on Succession of States in respect of Treaties — Customary law — Succession of States without effect on a treaty creating rights and obligations “attaching” to the territory — Irregular state of affairs as a result of failure of both Parties to comply with their treaty obligations — Ex injuria jus non oritur — Objectives of the Treaty — Obligations overtaken by events — Positions adopted by the parties after conclusion of the Treaty — Good faith negotiations — Effects of the Project on the environment — Agreed solution to be found by the Parties — Joint régime — Reparation for acts committed by both Parties — Co-operation in the use of shared water resources — Damages — Succession in respect of rights and obligations relating to the Project — Intersecting wrongs — Settlement of accounts for the construction of the works.

JUDGMENT

Present: President Schwebel; Vice-President Weeramantry; Judges Oda, Bediagou, Guillaumes, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchegin, Parra-Aranguren, Koumounos, Rezek; Judge ad hoc Skubiszewski; Registrar Valencia-Ospina.

In the case concerning the Gabčíkovo-Nagymaros Project, between

the Republic of Hungary, represented by

H.E. Mr. György Szénási, Ambassador, Head of the International Law Department, Ministry of Foreign Affairs, as Agent and Counsel;

H.E. Mr. Dénes Tomaj, Ambassador of the Republic of Hungary to the Netherlands, as Co-Agent;

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge,

Mr. Pierre-Marie Dupuy, Professor at the University Panthéon-Assas (Paris II) and Director of the Institut des hautes études internationales of Paris,

Mr. Alexandre Kiss, Director of Research, Centre national de la recherche scientifique (red.),

Mr. László Valki, Professor of International Law, Eötvös Loránd University, Budapest,
Mr. Boldizsár Nagy, Associate Professor of International Law, Eötvös Loránd University, Budapest,
Mr. Philippe Sands, Reader in International Law, University of London, School of Oriental and African Studies, and Global Professor of Law, New York University,
Ms Katherine Gorove, consulting Attorney,
as Counsel and Advocates;
Dr. Howard Wheater, Professor of Hydrology, Imperial College, London,
Dr. Gábor Vida, Professor of Biology, Eötvös Loránd University, Budapest,
Member of the Hungarian Academy of Sciences,
Dr. Roland Carbiener, Professor emeritus of the University of Strasbourg,
Dr. Klaus Kern, consulting Engineer, Karlsruhe,
as Advocates;
Mr. Edward Helgeson,
Mr. Stuart Oldham,
Mr. Péter Molnár,
as Advisers;
Dr. György Kovács,
Mr. Timothy Walsh,
Mr. Zoltán Kovács,
as Technical Advisers;
Dr. Attila Nyikos,
as Assistant;
Mr. Axel Gosserys, LL.M.,
as Translator;
Ms Éva Kocsis,
Ms Katinka Tompa,
as Secretaries,
and
the Slovak Republic,
represented by
H.E. Dr. Peter Tomka, Ambassador, Legal Adviser of the Ministry of Foreign Affairs,
as Agent;
Dr. Václav Mikulka, Member of the International Law Commission,
as Co-Agent, Counsel and Advocate;
Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A., Whewell Professor emeritus of International Law at the University of Cambridge, former Member of the International Law Commission,
as Counsel;
Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, former Member of the International Law Commission,
Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the
Institute of Political Studies, Paris, Member of the International Law Commission,
Mr. Walter D. Sohier, Member of the Bar of the State of New York and of the District of Columbia,
Sir Arthur Watts, K.C.M.G., Q.C., Barrister, Member of the Bar of England and Wales,
Mr. Samuel S. Wordsworth, avocat à la cour d'appel de Paris, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley, Paris,
as Counsel and Advocates;
Mr. Igor Mucha, Professor of Hydrogeology and Former Head of the Groundwater Department at the Faculty of Natural Sciences of Comenius University in Bratislava,
Dr. Karra Venkateswara Rao, Director of Water Resources Engineering, Department of Civil Engineering, City University, London,
as Counsel and Experts;
Dr. Cecilia Kandráčová, Director of Department, Ministry of Foreign Affairs,
Mr. Luděk Krajhanzl, Attorney at Law, Vyroubal Krajhanzl Skácel and Partners, Prague,
Mr. Miroslav Líška, Head of the Division for Public Relations and Expertise, Water Resources Development State Enterprise, Bratislava,
Dr. Peter Vršanský, Minister-Counsellor, Chargé d'Affaires a.i., of the Embassy of the Slovak Republic, The Hague,
as Counsellors;
Miss Anouche Beaudouin, allocataire de recherche at the University of Paris X-Nanterre,
Ms Cheryl Dunn, Frere Cholmeley, Paris,
Ms Nikoleta Glindová, attaché, Ministry of Foreign Affairs,
Mr. Drahošlav Šefánek, attaché, Ministry of Foreign Affairs,
as Legal Assistants,

THE COURT,
composed as above,
after deliberation,
delivers the following Judgment:

1. By a letter dated 2 July 1993, filed in the Registry of the Court on the same day, the Ambassador of the Republic of Hungary (hereinafter called "Hungary") to the Netherlands and the Chargé d'Affaires ad interim of the Slovak Republic (hereinafter called "Slovakia") to the Netherlands jointly notified to the Court a Special Agreement in English that had been signed at Brussels on 7 April 1993 and had entered into force on 28 June 1993, on the date of the exchange of instruments of ratification.
2. The text of the Special Agreement reads as follows:
"The Republic of Hungary and the Slovak Republic,

Considering that differences have arisen between the Czech and Slovak Federal Republic and the Republic of Hungary regarding the implementation and the termination of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System signed in Budapest on 16 September 1997 and related instruments (hereinafter referred to as ‘the Treaty’), and on the construction and operation of the ‘provisional solution’;

Bearing in mind 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;

Recognising that the Parties concerned have been unable to settle these differences by negotiations;

Having in mind that both the Czechoslovak and Hungarian delegations expressed their commitment to submit the differences connected with the Gabčíkovo-Nagymaros Project in all its aspects to binding international arbitration or to the International Court of Justice;

Desiring that these differences should be settled by the International Court of Justice;

Recalling their commitment to apply, pending the Judgment of the International Court of Justice, such a temporary water management régime of the Danube as shall be agreed between the Parties;

Desiring further to define the issues to be submitted to the International Court of Justice.

Have agreed as follows:

Article 1

The Parties submit the questions contained in Article 2 to the International Court of Justice pursuant to Article 40, paragraph 1, of the Statute of the Court.

Article 2

(1) The Court is requested to decide on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable,

(a) whether the Republic of Hungary was 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 Treaty attributed responsibility to the Republic of Hungary;

(b) 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);

(c) what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary.

(2) The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph 1 of this Article.

Article 3

(1) All questions of procedure and evidence shall be regulated in accordance with the provisions of the Statute and the Rules of Court.

(2) However, the Parties request the Court to order that the written proceedings should consist of:

(a) a Memorial presented by each of the Parties not later than ten months after the date of notification of this Special Agreement to the Registrar of the International Court of Justice;

(b) a Counter-Memorial presented by each of the Parties not later than seven months after the date on which each has received the certified copy of the Memorial of the other Party;

(c) a Reply presented by each of the Parties within such time-limits as the Court may order.

(d) The Court may request additional written pleadings by the Parties if it so determines.

(3) The above-mentioned parts of the written proceedings and their annexes presented to the Registrar will not be transmitted to the other Party until the Registrar has received the corresponding part of the proceedings from the said Party.

Article 4

(1) The Parties agree that, pending the final Judgment of the Court, they will establish and implement a temporary water management régime for the Danube.

(2) They further agree that, in the period before such a régime is established or implemented, if either Party believes its rights are endangered by the conduct of the other, it may request immediate consultation and reference, if necessary, to experts, including the Commission of the European Communities, with a view to protecting those rights; and that protection shall not be sought through a request to the Court under Article 41 of the Statute.

(3) This commitment is accepted by both Parties as fundamental to the conclusion and continuing validity of the Special Agreement.

Article 5

(1) The Parties shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

(2) Immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution.

(3) If they are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment.

Article 6

(1) The present Special Agreement shall be subject to ratification.
(2) The instruments of ratification shall be exchanged as soon as possible in Brussels.
(3) The present Special Agreement shall enter into force on the date of exchange of instruments of ratification. Thereafter it will be notified jointly to the Registrar of the Court.

In witness whereof the undersigned being duly authorized thereto, have signed the present Special Agreement and have affixed thereto their seals.

3. Pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the notification and of the Special Agreement were transmitted by the Registrar to the Secretary-General of the United Nations, Members of the United Nations and other States entitled to appear before the Court.

Since the Court included upon the Bench no judge of Slovak nationality, Slovakia 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. Krzysztof Jan Skubi-szewski.

5. By an Order dated 14 July 1993, the Court fixed 2 May 1994 as the time-limit for the filing by each of the Parties of a Memorial and 5 December 1994 for the filing by each of the Parties of a Counter-Memorial, having regard to the provisions of Article 3, paragraph 2 (a) and (b), of the Special Agreement. Those pleadings were duly filed within the prescribed time-limits.

6. By an Order dated 20 December 1994, the President of the Court, having heard the Agents of the Parties, fixed 20 June 1995 as the time-limit for the filing of the Replies, having regard to the provisions of Article 3, paragraph 2 (c), of the Special Agreement. The Replies were duly filed within the time-limit thus prescribed and, as the Court had not asked for the submission of additional pleadings, the case was then ready for hearing.

7. By letters dated 27 January 1997, the Agent of Slovakia, referring to the provisions of Article 56, paragraph 1, of the Rules of Court, expressed his Government’s wish to produce two new documents; by a letter dated 10 February 1997, the Agent of Hungary declared that his Government objected to their production. On 26 February 1997, after having duly ascertained the views of the two Parties, the Court decided, in accordance with Article 56, paragraph 2, of the Rules of Court, to authorize the production of those documents under certain conditions of which the Parties were advised. Within the time-limit fixed by the Court to that end, Hungary submitted comments on one of those documents under paragraph 3 of that same Article. The Court authorized Slovakia to comment in turn upon those observations, as it had expressed a wish to do so; its comments were received within the time-limit prescribed for that purpose.

8. Moreover, each of the Parties asked to be allowed to show a video cassette in the course of the oral proceedings. The Court agreed to those requests, provided that the cassettes in question were exchanged in advance between the Parties, through the intermediary of the Registry. That exchange was effected accordingly.

9. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after having ascertained 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. By a letter dated 16 June 1995, the Agent of Slovakia invited the Court to visit the locality to which the case relates and there to exercise its functions with regard to the obtaining of evidence, in accordance with Article 66 of the Rules of Court. For his part, the Agent of Hungary indicated, by a letter dated 28 June 1995, that, if the Court should decide that a visit of that kind would be useful, his Government would be pleased to co-operate in organizing it. By a letter dated 14 November 1995, the Agents of the Parties jointly notified to the Court the text of a Protocol of Agreement, concluded in Budapest and New York the same day, with a view to proposing to the Court the arrangements that might be made for such a visit in situ; and, by a letter dated 3 February 1997, they jointly notified it the text of Agreed Minutes drawn up in Budapest and New York the same day, which supplemented the Protocol of Agreement of 14 November 1995. By an Order dated 5 February 1997, the Court decided to accept the invitation to exercise its functions with regard to the obtaining of evidence at a place to which the case relates and, to that end, to adopt the arrangements proposed by the Parties. The Court visited the area from 1 to 4 April 1997; it visited a number of locations along the Danube and took note of the technical explanations given by the representatives who had been designated for the purpose by the Parties.

11. The Court held a first round of ten public hearings from 3 to 7 March and from 24 to 27 March 1997, and a second round of four public hearings on 10, 11, 14 and 15 April 1997, after having made the visit in situ referred to in the previous paragraph. During those hearings, the Court heard the oral arguments and replies of:

For Hungary: H.E. Mr. Szénaási,
Professor Valki,
Professor Kiss,
Professor Vida,
Professor Carbiener,
Professor Crawford,
Professor Nagy,
Dr. Kern,
Professor Wheeler,
Ms Gorove,
Professor Dupuy,
Professor Sands.

For Slovakia: H.E. Dr. Tomka,
Dr. Mikulka,
Mr. Wordsworth,
Professor McCaffrey,
Professor Mucha,
Professor Pellet,
Mr. Reisgaard,
Sir Arthur Watts.

12. The Parties replied orally and in writing to various questions put by Members of the Court. Referring to the provisions of Article 72 of the Rules of Court, each of the Parties submitted to the Court its comments upon the replies given by the other Party to some of those questions.
13. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of Hungary,
in the Memorial, the Counter-Memorial and the Reply (mutatis mutandis identical texts):

"On the basis of the evidence and legal argument presented in the Memorial, Counter-Memorial and this Reply, the Republic of Hungary requests the Court to adjudge and declare:

First, that the Republic of Hungary was entitled to suspend and subsequently abandon the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

Second, that the Czech and Slovak Federal Republic was not entitled to proceed to the 'provisional solution' (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);


Requests the Court to adjudge and declare further that the legal consequences of these findings and of the evidence and the arguments presented to the Court are as follows:

1. that the Treaty of 16 September 1977 has never been in force between the Republic of Hungary and the Slovak Republic;
2. that the Slovak Republic bears responsibility to the Republic of Hungary for maintaining in operation the 'provisional solution' referred to above;
3. that the Slovak Republic is internationally responsible for the damage and loss suffered by the Republic of Hungary and by its nationals as a result of the 'provisional solution';
4. that the Slovak Republic is under an obligation to make reparation in respect of such damage and loss, the amount of such reparation, if it cannot be agreed by the Parties within six months of the date of the Judgment of the Court, to be determined by the Court;
5. that the Slovak Republic is under the following obligations:
   (a) to return the waters of the Danube to their course along the international frontier between the Republic of Hungary and the Slovak Republic, that is to say the main navigable channel as defined by applicable treaties;
   (b) to restore the Danube to the situation it was in prior to the putting into effect of the provisional solution; and
   (c) to provide appropriate guarantees against the repetition of the damage and loss suffered by the Republic of Hungary and by its nationals."

On behalf of Slovakia,
in the Memorial, the Counter-Memorial and the Reply (mutatis mutandis identical texts):

"On the basis of the evidence and legal arguments presented in the Slovak Memorial, Counter-Memorial and in this Reply, and reserving the right to supplement or amend its claims in the light of further written pleadings, the Slovak Republic requests the Court to adjudge and declare:

1. That the Treaty between Czechoslovakia and Hungary of 16 September 1977 concerning the construction and operation of the Gabčíkovo/Nagymaros System of Locks, and related instruments, and to which the Slovak Republic is the acknowledged successor, is a treaty in force and has been so from the date of its conclusion; and that the notification of termination by the Republic of Hungary on 19 May 1992 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 1977 Treaty attributed responsibility to the Republic of Hungary.
3. That the act of proceeding with and putting into operation Variant C, the 'provisional solution', was lawful.
4. That the Republic of Hungary must therefore cease forthwith all conduct which impedes the full and bona fide implementation of the 1977 Treaty and must take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty.
5. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary is liable to pay, and the Slovak Republic is entitled to receive, full compensation for the loss and damage caused to the Slovak Republic by those breaches, plus interest and loss of profits, in the amounts to be determined by the Court in a subsequent phase of the proceedings in this case."

14. In the oral proceedings, the following submissions were presented by the Parties:

On behalf of Hungary,
at the hearing of 11 April 1997:

The submissions read at the hearing were mutatis mutandis identical to those presented by Hungary during the written proceedings.

On behalf of Slovakia,
at the hearing of 15 April 1997:

"On the basis of the evidence and legal arguments presented in its written and oral pleadings, the Slovak Republic requests the Court to adjudge and declare:

1. That the Treaty, as defined in the first paragraph of the Preamble to the Compromises between the Parties, dated 7 April 1993, concerning the construction and operation of the Gabčíkovo/Nagymaros System of Locks and related instruments, concluded between Hungary and
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 19 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 1977 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 with 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 those 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 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 Szigetköz. Čunovo and, further downstream, Gabčíkovo, are situated in this sector of the river on Slovak territory. Čunovo 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 hillier. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Széntendre before reaching Budapest (see sketch-map No. 1, p. 19 below).

17. The Danube has always played a vital part in the commercial and economic development of its riparian States, and has underlined and reinforced their interdependence, making international co-operation essential. Improvements to the navigation channel have enabled the Danube, now linked by canal to the Main and thence to the Rhine, to become an important navigational artery connecting the North Sea to the Black Sea. In the stretch of river to which the case relates, flood protection measures have been constructed over the centuries, farming and forestry practised, and, more recently, there has been an increase in population and industrial activity in the area. The cumulative effects on the river and on the environment of various human activities over the years have not all been favourable, particularly for the water regime.
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 Dunakili-Hrušov head-water area, the State frontier shall run from boundary point 161.V.O.á. 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 channeled into the old bed. Lastly, according to paragraph 7.7 of the Plan:

"The common operational regulation stipulates that concerning the operation of the Dunakili 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 rinsing 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-1-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 per cent of the production of Gabčíkovo, for an installed power only equal to 21 per cent 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 Dunakúll 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
the same time as the Treaty itself. The Agreement moreover made some adjustments to the allocation of the works between the parties as laid down by the Treaty.

Work on the Project started in 1978. On Hungary’s initiative, the two parties first agreed, by two Protocols signed on 10 October 1983 (one amending Article 4, paragraph 4, of the 1977 Treaty and the other the Agreement on mutual assistance), to slow the work down and to postpone putting into operation the power plants, and then, by a Protocol signed on 6 February 1989 (which amended the Agreement on mutual assistance), to accelerate the Project.

22. As a result of intense criticism which the Project had generated in Hungary, the Hungarian Government decided on 13 May 1989 to suspend the works at Nagymaros pending the completion of various studies which the competent authorities were to finish before 31 July 1989. On 21 July 1989, the Hungarian Government extended the suspension of the works at Nagymaros until 31 October 1989, and, in addition, suspended the works at Dunakiliti until the same date. Lastly, on 27 October 1989, Hungary decided to abandon the works at Nagymaros and to maintain the status quo at Dunakiliti.

23. During this period, negotiations were being held between the parties. Czechoslovakia also started investigating alternative solutions. One of them, subsequently known as “Variant C”, entailed a unilateral diversion of the Danube by Czechoslovakia on its territory some 10 kilometres upstream of Dunakiliti (see sketch-map No. 3, p. 26 below). Its final stage, Variant C included the construction at Čunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. The corresponding reservoir was to have a smaller surface area and provide approximately 30 per cent less storage than the reservoir initially contemplated. Provision was made for ancillary works, namely: an intake structure to supply the Mosoni Danube; a weir to enable, inter alia, floodwater to be directed along the old bed of the Danube; an auxiliary shiplock; and two hydroelectric power plants (one capable of an annual production of 4 GWh on the Mosoni Danube, and the other with a production of 174 GWh on the old bed of the Danube). The supply of water to the side-arms of the Danube on the Czechoslovak bank was to be secured by means of two intake structures in the bypass canal at Dobrohošt and Gabčíkovo. A solution was to be found for the Hungarian bank. Moreover, the question of the deepening of the bed of the Danube at the confluence of the bypass canal and the old bed of the river remained outstanding.

On 23 July 1991, the Slovak Government decided “to begin, in September 1991, construction to put the Gabčíkovo Project into operation by the provisional solution”. That decision was endorsed by the Federal Czechoslovak Government on 25 July. Work on Variant C began in November 1991. Discussions continued between the two parties but to no avail, and, on 19 May 1992, the Hungarian Government transmitted
to the Czechoslovak Government a Note Verbale terminating the 1977 Treaty with effect from 25 May 1992. On 15 October 1992, Czechoslovakia began work to enable the Danube to be closed and, starting on 23 October, proceeded to the damming of the river.

24. On 23 October 1992, the Court was seised of an “Application of the Republic of Hungary v. The Czech and Slovak Federal Republic on the Diversion of the Danube River”; however, Hungary acknowledged that there was no basis on which the Court could have founded its jurisdiction to entertain that application, on which Czechoslovakia took no action. In the meanwhile, the Commission of the European Communities had offered to mediate and, during a meeting of the two parties with the Commission held in London on 28 October 1992, the parties entered into a series of interim undertakings. They principally agreed that the dispute would be submitted to the International Court of Justice, that a tripartite fact-finding mission should report on Variant C not later than 31 October, and that a tripartite group of independent experts would submit suggestions as to emergency measures to be taken.

25. On 1 January 1993 Slovakia became an independent State. On 7 April 1993, the “Special Agreement for Submission to the International Court of Justice of the Differences between the Republic of Hungary and the Slovak Republic concerning the Gabčíkovo-Nagymaros Project” was signed in Brussels, the text of which is reproduced in paragraph 2 above. After the Special Agreement was notified to the Court, Hungary informed the Court, by a letter dated 9 August 1993, that it considered its “initial Application [to be] now without object, and . . . lapsed”.

According to Article 4 of the Special Agreement, “The Parties [agreed] that, pending the final Judgment of the Court, they [would] establish and implement a temporary water management regime for the Danube.” However, this regime could not easily be settled. The filling of the Čunovo dam had rapidly led to a major reduction in the flow and in the level of the downstream waters in the old bed of the Danube as well as in the side-arms of the river. On 26 August 1993, Hungary and Slovakia reached agreement on the setting up of a tripartite group of experts (one expert designated by each party and three independent experts designated by the Commission of the European Communities)

“In order to provide reliable and undisputed data on the most important effects of the current water discharge and the remedial measures already undertaken as well as to make recommendations for appropriate measures.”

On 1 December 1993, the experts designated by the Commission of the European Communities recommended the adoption of various measures to remedy the situation on a temporary basis. The Parties were unable to agree on these recommendations. After lengthy negotiations, they finally concluded an Agreement “concerning Certain Temporary Technical Measures and Discharges in the Danube and Mosoni branch of the Danube”,

on 19 April 1995. That Agreement raised the discharge of water into the Mosoni Danube to 43 m³/s. It provided for an annual average of 400 m³/s in the old bed (not including flood waters). Lastly, it provided for the construction by Hungary of a partially underwater weir near to Dunakiliti with a view to improving the water supply to the side-arms of the Danube on the Hungarian side. It was specified that this temporary agreement would come to an end 14 days after the Judgment of the Court.

* * *

26. The first subparagraph of the Preamble to the Special Agreement covers the disputes arising between Czechoslovakia and Hungary concerning the application and termination, not only of the 1977 Treaty, but also of “related instruments”; the subparagraph specifies that, for the purposes of the Special Agreement, the 1977 Treaty and the said instruments shall be referred to as “the Treaty”. “The Treaty” is expressly referred to in the wording of the questions submitted to the Court in Article 2, paragraph 1, subparagraphs (a) and (c), of the Special Agreement.

The Special Agreement however does not define the concept of “related instruments”, nor does it list them. As for the Parties, they gave some consideration to that question — essentially in the written proceedings — without reaching agreement as to the exact meaning of the expression or as to the actual instruments referred to. The Court notes however that the Parties seemed to agree to consider that that expression covers at least the instruments linked to the 1977 Treaty which implement it, such as the Agreement on mutual assistance of 16 September 1977 and its amending Protocols dated, respectively, 10 October 1983 and 6 February 1989 (see paragraph 21 above), and the Agreement as to the common operational regulations of Pleniopotentiaries fulfilling duties related to the construction and operation of the Gabčíkovo-Nagymaros Barrage System signed in Bratislava on 11 October 1979. The Court notes that Hungary, unlike Slovakia, declined to apply the description of related instruments to the 1977 Treaty to the Joint Contractual Plan (see paragraph 19 above), which it refused to see as “an agreement at the same level as the other . . . related Treaties and inter-State agreements”.

Lastly the Court notes that the Parties, in setting out the replies which should in their view be given to the questions put in the Special Agreement, concentrated their reasoning on the 1977 Treaty; and that they would appear to have extended their arguments to “related instruments” in considering them as accessories to a whole treaty system, whose fate was in principle linked to that of the main part, the 1977 Treaty. The Court takes note of the positions of the Parties and considers that it does not need to go into this matter further at this juncture.

* * *
27. The Court will now turn to a consideration of the questions submitted by the Parties. In terms of Article 2, paragraph 1 (a), of the Special Agreement, the Court is requested to decide first:

"whether the Republic of Hungary was 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 Treaty attributed responsibility to the Republic of Hungary."

28. The Court would recall that the Gabčíkovo-Nagymaros System of Locks is characterized in Article 1, paragraph 1, of the 1977 Treaty as a "single and indivisible operational system of works."

The principal works which were to constitute this system have been described in general terms above (see paragraph 18). Details of them are given in paragraphs 2 and 3 of Article 1 of the Treaty.

For Gabčíkovo, paragraph 2 lists the following works:

(a) the Dunajská-Hrušov head-water installations in the Danube sector at r.km. (river kilometre(s)) 1860-1842, designed for a maximum flood stage of 131.10 m.B. (metres above sea-level, Baltic system), in Hungarian and Czechoslovak territory;

(b) the Dunajská dam and auxiliary navigation lock at r.km. 1842, in Hungarian territory;

(c) the by-pass canal (head-water canal and tail-water canal) at r.km. 1842-1811, in Czechoslovak territory;

(d) series of locks on the by-pass canal, in Czechoslovak territory, consisting of a hydroelectric power plant with installed capacity of 720 MW, double navigation locks and apportunities thereto;

(e) improved old bed of the Danube at r.km. 1842-1811, in the joint Hungarian-Czechoslovak section;

(f) deepened and regulated bed of the Danube at r.km. 1811-1791, in the joint Hungarian-Czechoslovak section."

For Nagymaros, paragraph 3 specifies the following works:

(a) head-water installations and flood-control works in the Danube sector at r.km. 1791-1696.25 and in the sectors of tributaries affected by flood waters, designed for a maximum flood stage of 107.83 m.B., in Hungarian and Czechoslovak territory;

(b) series of locks at r.km. 1696.25, in Hungarian territory, consisting of a dam, a hydroelectric power plant with installed capacity of 158 MW, double navigation locks and apportunities thereto;

(c) deepened and regulated bed of the Danube, in both its branches, at r.km. 1696.25-1657, in the Hungarian section."

29. Moreover, the precise breakdown of the works incumbent on each party was set out in Article 5, paragraph 5, of the 1977 Treaty, as follows:

"5. The labour and supplies required for the realization of the joint investment shall be apportioned between the Contracting Parties in the following manner:

(a) The Czechoslovak Party shall be responsible for:

(1) the Dunajská-Hrušov head-water installations on the left bank, in Czechoslovak territory;

(2) the head-water canal of the by-pass canal, in Czechoslovak territory;

(3) the Gabčíkovo series of locks, in Czechoslovak territory;

(4) the flood-control works of the Nagymaros head-water installations, in Czechoslovak territory, with the exception of the lower Ipel district;

(5) restoration of vegetation in Czechoslovak territory;

(b) The Hungarian Party shall be responsible for:

(1) the Dunajská-Hrušov head-water installations on the right bank, in Czechoslovak territory, including the connecting weir and the diversionary weir;

(2) the Dunajská-Hrušov head-water installations on the right bank, in Hungarian territory;

(3) the Dunajská dam, in Hungarian territory;

(4) the tail-water canal of the by-pass canal, in Czechoslovak territory;

(5) deepening of the bed of the Danube below Palkovičovo, in Hungarian and Czechoslovak territory;

(6) improvement of the old bed of the Danube, in Hungarian and Czechoslovak territory;

(7) operational equipment of the Gabčíkovo system of locks (transport equipment, maintenance machinery), in Czechoslovak territory;

(8) the flood-control works of the Nagymaros head-water installations in the lower Ipel district, in Czechoslovak territory;

(9) the flood-control works of the Nagymaros head-water installations, in Hungarian territory;

(10) the Nagymaros series of locks, in Hungarian territory;

(11) deepening of the tail-water bed below the Nagymaros system of locks, in Hungarian territory;

(12) operational equipment of the Nagymaros system of locks (transport equipment, maintenance machinery), in Hungarian territory;

(13) restoration of vegetation in Hungarian territory."
30. As the Court has already indicated (see paragraph 18 above), Article 1, paragraph 4, of the 1977 Treaty stipulated in general terms that the "technical specifications" concerning the System of Locks would be included in the "joint contractual plan". 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 (see paragraph 21 above). In accordance with the provisions of Article 1, paragraph 1, of that Agreement, the whole of the works of the barrage system were to have been completed in 1991. As indicated in paragraph 2 of that same article, a summary construction schedule was appended to the Agreement, and provision was made for a more detailed schedule to be worked out in the Joint Contractual Plan. The Agreement of 16 September 1977 was twice amended further. By a Protocol signed on 10 October 1983, the parties agreed first to postpone the works and the putting into operation of the power plants for four more years; then, by a Protocol signed on 6 February 1989, the parties decided, conversely, to bring them forward by 15 months, the whole system having to be operational in 1994. A new summary construction schedule was appended to each of those Protocols; those schedules were in turn to be implemented by means of new detailed schedules, included in the Joint Contractual Plan.

31. In spring 1989, the work on the Gabčíkovo sector was well advanced: the Dunakiliti dam was 90 per cent complete, the Gabčíkovo dam was 85 per cent complete, and the bypass canal was between 60 per cent complete (downstream of Gabčíkovo) and 95 per cent complete (upstream of Gabčíkovo) and the dykes of the Dunakiliti-Hrušov reservoir were between 70 and 98 per cent complete, depending on the location. This was not the case in the Nagymaros sector where, although dykes had been built, the only structure relating to the dam itself was the coffer-dam which was to facilitate its construction.

32. In the wake of the profound political and economic changes which occurred at this time in central Europe, the Gabčíkovo-Nagymaros Project was the object, in Czechoslovakia and more particularly in Hungary, of increasing apprehension, both within a section of public opinion and in some scientific circles. The uncertainties not only about the economic viability of the Project, but also, and more so, as to the guarantees it offered for preservation of the environment, engendered a climate of growing concern and opposition with regard to the Project.

33. It was against this background that, on 13 May 1989, the Government of Hungary adopted a resolution to suspend works at Nagymaros, and ordered

"the Ministers concerned to commission further studies in order to place the Council of Ministers in a position where it can make well-founded suggestions to the Parliament in connection with the amendment of the international treaty on the investment. In the interests of the above, we must examine the international and legal consequences, the technical considerations, the obligations related to continuous navigation on the Danube and the environmental/ecological and seismic impacts of the eventual stopping of the Nagymaros investment. To be further examined are the opportunities for the replacement of the lost electric energy and the procedures for minimising claims for compensation."

The suspension of the works at Nagymaros was intended to last for the duration of these studies, which were to be completed by 31 July 1989. Czechoslovakia immediately protested and a document defining the position of Czechoslovakia was transmitted to the Ambassador of Hungary in Prague on 15 May 1989. The Prime Ministers of the two countries met on 24 May 1989, but their talks did not lead to any tangible result. On 2 June, the Hungarian Parliament authorized the Government to begin negotiations with Czechoslovakia for the purpose of modifying the 1977 Treaty.

34. At a meeting held by the Plenipotentiaries on 8 and 9 June 1989, Hungary gave Czechoslovakia a number of assurances concerning the continuation of works in the Gabčíkovo sector, and the signed Protocol which records that meeting contains the following passage:

"The Hungarian Government Commissioner and the Hungarian Plenipotentiary stated, that the Hungarian side will complete construction of the Gabčíkovo Project in the agreed time and in accordance with the project plans. Directives have already been given to continue works suspended in the area due to misunderstanding."

These assurances were reiterated in a letter that the Commissioner of the Government of Hungary addressed to the Czechoslovak Plenipotentiary on 9 June 1989.

35. With regard to the suspension of work at Nagymaros, the Hungarian Deputy Prime Minister, in a letter dated 24 June 1989 addressed to his Czechoslovak counterpart, expressed himself in the following terms:

"The Hungarian Academy of Sciences (HAS) has studied the environmental, ecological and water quality as well as the seismological impacts of abandoning or implementing the Nagymaros Barrage of the Gabčíkovo-Nagymaros Barrage System (GNBS).

Having studied the expected impacts of the construction in accordance with the original plan, the Committee [ad hoc] of the Academy [set up for this purpose] came to the conclusion that we do not have adequate knowledge of the consequences of environmental risks. In its opinion, the risk of constructing the Barrage System in accordance with the original plan cannot be considered acceptable. Of course, it cannot be stated either that the adverse impacts will
ensue for certain, therefore, according to their recommendation, further thorough and time consuming studies are necessary.”

36. The Hungarian and Czechoslovak Prime Ministers met again on 20 July 1989 to no avail. Immediately after that meeting, the Hungarian Government adopted a second resolution, under which the suspension of work at Nagymaros was extended to 31 October 1989. However, this resolution went further, as it also prescribed the suspension, until the same date, of the “Preparatory works on the closure of the riverbed at... Dunakiliit” the purpose of this measure was to invite “international scientific institutions [and] foreign scientific institutes and experts” to co-operate with “the Hungarian and Czechoslovak institutes and experts” with a view to an assessment of the ecological impact of the Project and the “development of a technical and operational water quality guarantee system and... its implementation.”

37. In the ensuing period, negotiations were conducted at various levels between the two States, but proved fruitless. Finally, by a letter dated 4 October 1989, the Hungarian Prime Minister formally proposed to Czechoslovakia that the Nagymaros sector of the Project be abandoned and that an agreement be concluded with a view to reducing the ecological risks associated with the Gabčíkovo sector of the Project. He proposed that that agreement should be concluded before 30 July 1990.

The two Heads of Government met on 26 October 1989, and were unable to reach agreement. By a Note Verbale dated 30 October 1989, Czechoslovakia, confirming the views it had expressed during those talks, proposed to Hungary that they should negotiate an agreement on a system of technical, operational and ecological guarantees relating to the Gabčíkovo-Nagymaros Project, “on the assumption that the Hungarian party will immediately commence preparatory work on the refilling of the Danube’s bed in the region of Dunakiliit.” It added that the technical principles of the agreement could be initialled within two weeks and that the agreement itself ought to be signed before the end of March 1990. After the principles had been initialled, Hungary “[was to] start the actual closure of the Danube bed”. Czechoslovakia further stated its willingness to “conclude[... a] separate agreement in which both parties would oblige themselves to limitations or exclusion of peak hour operation mode of the... System”. It also proposed “to return to deadlines indicated in the Protocol of October 1983”, the Nagymaros construction deadlines being thus extended by 15 months, so as to enable Hungary to take advantage of the time thus gained to study the ecological issues and formulate its own proposals in due time. Czechoslovakia concluded by announcing that, should Hungary continue unilaterally to breach the Treaty, Czechoslovakia would proceed with a provisional solution.

In the meantime, the Hungarian Government had on 27 October adopted a further resolution, deciding to abandon the construction of the Nagymaros dam and to leave in place the measures previously adopted for suspending the works at Dunakiliit. Then, by Notes Verbales dated 3 and 30 November 1989, Hungary proposed to Czechoslovakia a draft treaty incorporating its earlier proposals, relinquishing peak power operation of the Gabčíkovo power plant and abandoning the construction of the Nagymaros dam. The draft provided for the conclusion of an agreement on the completion of Gabčíkovo in exchange for guarantees on protection of the environment. It finally envisaged the possibility of one or other party seising an arbitral tribunal or the International Court of Justice in the event that differences of view arose and persisted between the two Governments about the construction and operation of the Gabčíkovo dam, as well as measures to be taken to protect the environment. Hungary stated that it was ready to proceed immediately “with the preparatory operations for the Dunakiliit bed-decanting”, but specified that the river would not be dammed at Dunakiliit until the agreement on guarantees had been concluded.

38. During winter 1989-1990, the political situation in Czechoslovakia and Hungary alike was transformed, and the new Governments were confronted with many new problems.

In spring 1990, the new Hungarian Government, in presenting its National Renewal Programme, announced that the whole of the Gabčíkovo-Nagymaros Project was a “mistake” and that it would initiate negotiations as soon as possible with the Czechoslovak Government “on remedying and sharing the damages”. On 20 December 1990, the Hungarian Government adopted a resolution for the opening of negotiations with Czechoslovakia on the termination of the Treaty by mutual consent and the conclusion of an agreement addressing the consequences of the termination. On 15 February 1991, the Hungarian Plenipotentiary transmitted a draft agreement along those lines to his Czechoslovak counterpart.

On the same day, the Czechoslovak President declared that the Gabčíkovo-Nagymaros Project constituted a “totalitarian, gigomaniac monument which is against nature”, while emphasizing that “the problem [was] that [the Gabčíkovo power plant] [had] already been built”. For his part, the Czechoslovak Minister of the Environment stated, in a speech given to Hungarian parliamentary committees on 11 September 1991, that “the G/N Project [was] an old, obsolete one”, but that, if there were “many reasons to change, modify the treaty... it [was] not acceptable to cancel the treaty... and negotiate later on”.

During the ensuing period, Hungary refrained from completing the work for which it was still responsible at Dunakiliit. Yet it continued to maintain the structures it had already built and, at the end of 1991, completed the works relating to the tailrace canal of the bypass canal assigned to it under Article 5, paragraph 5 (b), of the 1977 Treaty.

* * *
39. The two Parties to this case concur in recognizing that the 1977 Treaty, the above-mentioned Agreement on mutual assistance of 1977 and the Protocol of 1989 were validly concluded and were duly in force when the facts recounted above took place.

Further, they do not dispute the fact that, however flexible they may have been, these texts did not envisage the possibility of the signatories unilaterally suspending or abandoning the work provided for therein, or even carrying it out according to a new schedule not approved by the two partners.

40. Throughout the proceedings, Hungary contended that, although it did suspend or abandon certain works, on the contrary, it never suspended the application of the 1977 Treaty itself. To justify its conduct, it relied essentially on a “state of ecological necessity”.

Hungary contended that the various installations in the Gabčíkovo-Nagymaros System of Locks had been designed to enable the Gabčíkovo power plant to operate in peak mode. Water would only have come through the plant twice each day, at times of peak power demand. Operation in peak mode required the vast expanse (60 km²) of the planned reservoir at Dunakiliti, as well as the Nagymaros dam, which was to alleviate the tidal effects and reduce the variation in the water level downstream of Gabčíkovo. Such a system, considered to be more economically profitable than using run-of-the-river plants, carried ecological risks which it found unacceptable.

According to Hungary, the principal ecological dangers which would have been caused by this system were as follows. At Gabčíkovo/Dunakiliti, under the original Project, as specified in the Joint Contractual Plan, the residual discharge into the old bed of the Danube was limited to 50 m³/s, in addition to the water provided to the system of side-arms. That volume could be increased to 200 m³/s during the growing season. Additional discharges, and in particular a number of artificial floods, could also be affected, at an unspecified rate. In these circumstances, the groundwater level would have fallen in most of the Szigetköz. Furthermore, the groundwater would then no longer have been supplied by the Danube — which, on the contrary, would have acted as a drain — but by the reservoir of stagnant water at Dunakiliti and the side-arms which would have become silted up. In the long term, the quality of water would have been seriously impaired. As for the surface water, risks of eutrophication would have arisen, particularly in the reservoir; instead of the old Danube there would have been a river choked with sand, where only a relative trickle of water would have flowed. The network of arms would have been for the most part cut off from the principal bed. The fluvial fauna and flora, like those in the alluvial plains, would have been condemned to extinction.

As for Nagymaros, Hungary argued that, if that dam had been built, the bed of the Danube upstream would have silted up and, consequently, the quality of the water collected in the bank-filtered wells would have deteriorated in this sector. What is more, the operation of the Gabčíkovo power plant in peak mode would have occasioned significant daily variations in the water level in the reservoir upstream, which would have constituted a threat to aquatic habitats in particular. Furthermore, the construction and operation of the Nagymaros dam would have caused the erosion of the riverbed downstream, along Szentendre Island. The water level of the river would therefore have fallen in this section and the yield of the bank-filtered wells providing two-thirds of the water supply of the city of Budapest would have appreciably diminished. The filter layer would also have shrunk or perhaps even disappeared, and fine sediments would have been deposited in certain pockets in the river. For this twofold reason, the quality of the infiltrating water would have been severely jeopardized.

From all these predictions, in support of which it quoted a variety of scientific studies, Hungary concluded that a “state of ecological necessity” did indeed exist in 1989.

41. In its written pleadings, Hungary also accused Czechoslovakia of having violated various provisions of the 1977 Treaty from before 1989 — in particular Articles 15 and 19 relating, respectively, to water quality and nature protection — in refusing to take account of the now evident ecological dangers and insisting that the works be continued, notably at Nagymaros. In this context Hungary contended that, in accordance with the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 concerning the Joint Contractual Plan, Czechoslovakia bore responsibility for research into the Project’s impact on the environment; Hungary stressed that the research carried out by Czechoslovakia had not been conducted adequately, the potential effects of the Project on the environment of the construction having been assessed by Czechoslovakia only from September 1990. However, in the final stage of its argument, Hungary does not appear to have sought to formulate this complaint as an independent ground formally justifying the suspension and abandonment of the works for which it was responsible under the 1977 Treaty. Rather, it presented the violations of the Treaty prior to 1989, which it imputes to Czechoslovakia, as one of the elements contributing to the emergence of a state of necessity.

42. Hungary moreover contended from the outset that its conduct in the present case should not be evaluated only in relation to the law of treaties. It also observed that, in accordance with the provisions of Article 4, the Vienna Convention of 23 May 1969 on the Law of Treaties could not be applied to the 1977 Treaty, which was concluded before that Convention entered into force as between the parties. Hungary has indeed acknowledged, with reference to the jurisprudence of the Court, that in many respects the Convention reflects the existing customary law. Hungary nonetheless stressed the need to adopt a cautious attitude, while
suggested that the Court should consider, in each case, the conformity of the prescriptions of the Convention with customary international law.

43. Slovakia, for its part, denied that the basis for suspending or abandoning the performance of a treaty obligation can be found outside the law of treaties. It acknowledged that the 1969 Vienna Convention could not be applied as such to the 1977 Treaty, but at the same time stressed that a number of its provisions are a reflection of pre-existing rules of customary international law and specified that this is, in particular, the case with the provisions of Part V relating to invalidity, termination and suspension of the operation of treaties. Slovakia has moreover observed that, after the Vienna Convention had entered into force for both parties, Hungary affirmed its accession to the substantive obligations laid down by the 1977 Treaty when it signed the Protocol of 6 February 1989 that cut short the schedule of work; and this led it to conclude that the Vienna Convention was applicable to the "contractual legal régime" constituted by the network of interrelated agreements of which the Protocol of 1989 was a part.

44. In the course of the proceedings, Slovakia argued that the state of necessity upon which Hungary relied did not constitute a reason for the suspension of a treaty obligation recognized by the law of treaties. At the same time, it cast doubt upon whether "ecological necessity" or "ecological risk" could, in relation to the law of State responsibility, constitute a circumstance precluding the wrongfulness of an act. In any event, Slovakia denied that there had been any kind of "ecological state of necessity" in this case either in 1989 or subsequently. It invoked the authority of various scientific studies when it claimed that Hungary had given an exaggeratedly pessimistic description of the situation. Slovakia did not, of course, deny that ecological problems could have arisen. However, it asserted that they could to a large extent have been remedied. It accordingly stressed that no agreement had been reached with respect to the modalities of operation of the Gabčíkovo power plant in peak mode, and claimed that the apprehensions of Hungary related only to operating conditions of an extreme kind. In the same way, it contended that the original Project had undergone various modifications since 1977 and that it would have been possible to modify it even further, for example with respect to the discharge of water reserved for the old bed of the Danube, or the supply of water to the side-arms by means of underwater weirs.

45. Slovakia moreover denied that it in any way breached the 1977 Treaty — particularly its Articles 15 and 19 — and maintained, inter alia, that according to the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 relating to the Joint Contractual Plan, research into the impact of the Project on the environment was not the exclusive responsibility of Czechoslovakia but of either one of the parties, depending on the location of the works.

Lastly, in its turn, it reproached Hungary with having adopted its unilateral measures of suspension and abandonment of the works in violation 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 25 March 1951 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 1950, p. 228; and see Article 17 of the Draft Articles on State Responsi-

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"

1. 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).

It 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. 35, 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.

55. 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 Gab-
čikovo 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 into the river 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 that 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.

56. 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 Szigetköz, 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 Szigetköz, 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 more developed than at present. The examination of biological indicator objects that can sensitively 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 distribution 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 summa 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 impair[ed] 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

“(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the ‘provisional solution’
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 Dunakiliti, 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 those 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 finalizing 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 Gabčíkovo 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 Gabčíkovo 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 Czech-Slovak 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 Gabčíkovo 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
65. On August 5, 1992, the Czechoslovak representative to the Danube Commission informed it that "work on the Danube's flow will beginclass on 15 October 1992 if the agreement with Hungary is not reached within the framework of the treaty and without the implementation of the provisions in question."

66. In the course of this new governmental negotiation meeting, on 2 December 1991, the parties agreed to entrust the task of studying the whole of the question of the Czechoslovakian project to the Joint Committee for the Danube, which Hungary had agreed to have created in 1977. As a result, 18 January 1992, Czechoslovakia submitted a concrete technical solution to the Danube Commission, in accordance with the principles of sovereignty, territorial integrity, with the proviso of the involvement of the Danube Treaty and the spirit of the 1948 Belgrade Convention on the International Rivers.

67. The construction permit for Variant C was issued on 30 October 1991. In November 1991, it was decided that the Danube was going to be dammed at Cunovo, where both banks of the Danube are on the territory of the Czech Republic. The Czech side prepared the mutually agreed solution and was to start damming the river. The construction was to begin on 15 October 1992.

68. However, the Danube Commission, at its meeting on 26 October 1992, decided that the construction of Variant C was to be delayed. It had to be postponed because of the ongoing conflict between Hungary, which wanted to complete the dam on时间的尽，并且在1992年2月23日，匈牙利和 collisions and the 1987 Treaty. The Commission proposed that "work on the Danube's flow will begin on 15 October 1992 if the agreement with Hungary is not reached within the framework of the treaty and without the implementation of the provisions in question."
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 Czecho-

Slovakia . . . 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).


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 construc
tion 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 pur-

poses 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 wrongdoing 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 Dunakiliti/Gabčíkovo 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 Conven
tion of 31 May 1976 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 erro
eous 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 damage[s]”, it claimed that this has to do with the quantification of loss, and could not serve to excuse conduct which is substantively unlawful. Hun
gary 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 par
graph 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 approximation 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 give effect to the instrument — not to change it.” (Admissibility of Hearings of Petitioners 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, to provide for 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 failed to take 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-

84. Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation 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. 23, 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 Szigetköz — 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-
tions under international law, and that the measure must therefore be reversible.

* * *

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 18 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 impossibility 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, justifying 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 on 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 fulfil 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 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.”

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.

96. Hungary further argued that termination of the Treaty was justified by Czechoslovakia’s material breaches 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 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 jus cogens 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 inasmuch as 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 46), 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 records 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 Nagymaros 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 'at 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 adapt 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.
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.

** **

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.

117. 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 31 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 another State succeeds to it by express agreement between the 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-by-case basis; and Hungary emphasized that no agreement was ever reached with regard to the 1977 Treaty.

119. Hungary claimed that there was no rule of succession which could operate in the present case to override the absence of consent.

Referring to Article 34 of the Vienna Convention of 23 August 1978 on Succession of States in respect of Treaties, in which “a rule of automatic succession to all treaties is provided for”, based on the principle of continuity, Hungary argued not only that it never signed or ratified the Convention, but that the “concept of automatic succession” contained in that Article was not and is not, and has never been accepted as, a statement of general international law.

Hungary further submitted that the 1977 Treaty did not create “obligations and rights . . . relating to the régime of a boundary” within the meaning of Article 11 of that Convention, and noted that the existing course of the boundary was unaffected by the Treaty. It also denied that the Treaty was a “localized” treaty, or that it created rights “considered as attaching to [the] territory” within the meaning of Article 12 of the 1978 Convention, which would, as such, be unaffected by a succession of States. The 1977 Treaty was, Hungary insisted, simply a joint investment. Hungary’s conclusion was that there is no basis on which the Treaty could have survived the disappearance of Czechoslovakia so as to be binding as between itself and Slovakia.

120. According to Slovakia, the 1977 Treaty, which was not lawfully terminated by Hungary’s notification in May 1992, remains in force between itself, as successor State, and Hungary.

Slovakia acknowledged that there was no agreement on succession to the Treaty between itself and Hungary. It relied instead, in the first place, on the “general rule of continuity which applies in the case of dissolution”; it argued, secondly, that the Treaty is one “attaching to [the] territory” within the meaning of Article 12 of the 1978 Vienna Convention, and that it contains provisions relating to a boundary.

121. In support of its first argument Slovakia cited Article 34 of the 1978 Vienna Convention, which it claimed is a statement of customary international law, and which imposes the principle of automatic succession as the rule applicable in the case of dissolution of a State where the predecessor State has ceased to exist. Slovakia maintained that State practice in cases of dissolution tends to support continuity as the rule to be followed with regard to bilateral treaties. Slovakia having succeeded to part of the territory of the former Czechoslovakia, this would be the rule applicable in the present case.

122. Slovakia’s second argument rests on “the principle of ipso jure continuity of treaties of a territorial or localized character”. This rule, Slovakia said, is embodied in Article 12 of the 1978 Convention, which in part provides as follows:
Article 12
Other Territorial Regimes

2. A succession of States does not as such affect:
(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;
(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.”

According to Slovakia, “[this] article [too] can be considered to be one of those provisions of the Vienna Convention that represent the codification of customary international law”. The 1977 Treaty is said to fall within its scope because of its “specific characteristics . . . which place it in the category of treaties of a localized or territorial character”. Slovakia also described the Treaty as one “which contains boundary provisions and lays down a specific territorial régime” which operates in the interest of all Danube riparian States, and as “a dispositive treaty, creating rights in rem, independently of the legal personality of its original signatories”. Here, Slovakia relied on the recognition by the International Law Commission of the existence of a “special rule” whereby treaties “intended to establish an objective régime” must be considered as binding on a successor State (Official Records of the United Nations Conference on the Succession of States in respect of Treaties, Vol. III, doc. A/CONF.80/16/Add.2, p. 34). Thus, in Slovakia’s view, the 1977 Treaty was not one which could have been terminated through the disappearance of one of the original parties.

In its Commentary on the Draft Articles on Succession of States in respect of Treaties, adopted at its twenty-sixth session, the International Law Commission identified “treaties of a territorial character” as having been regarded both in traditional doctrine and in modern opinion as unaffected by a succession of States (Official Records of the United Nations Conference on the Succession of States in respect of Treaties, Vol. III, doc. A/CONF.80/16/Add.2, p. 27, para. 2). The draft text of Article 12, which reflects this principle, was subsequently adopted unchanged in the 1978 Vienna Convention. The Court considers that Article 12 reflects a rule of customary international law, it notes that neither of the Parties disputed this. Moreover, the Commission indicated that “treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties” (ibid., p. 33, para. 26). The Court observes that Article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However the Court concludes that this formulation was devised rather than take account of the fact that, in many cases, treaties which had established boundaries or territorial régimes were no longer in force (ibid., pp. 26-37). Those that remained in force would nonetheless bind a successor State.

Taking all these factors into account, the Court finds that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of Article 12 of the 1978 Vienna Convention. It created rights and obligations “attaching to” the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

124. It might be added that Slovakia also contended that, while still a constituent part of Czechoslovakia, it played a role in the development of the project, as it did later, in the most critical phase of negotiations with Hungary about the fate of the Project. The evidence shows that the Slovak Government passed resolutions prior to the signing of the 1977 Treaty in preparation for its implementation; and again, after signature, expressing its support for the Treaty. It was the Slovak Prime Minister who attended the meeting held in Budapest on 22 April 1991 as the Plenipotentiary of the Federal Government to discuss questions arising out of the Project. It was his successor as Prime Minister who notified his Hun-
garian counterpart by letter on 30 July 1991 of the decision of the Government of the Slovak Republic, as well as of the Government of the Czech and Slovak Federal Republic, to proceed with the "provisional solution" (see paragraph 63 above); and who wrote again on 18 December 1991 to the Hungarian Minister without Portfolio, renewing an earlier suggestion that a joint commission be set up under the auspices of the European Communities to consider possible solutions. The Slovak Prime Minister also wrote to the Hungarian Prime Minister in May 1992 on the subject of the decision taken by the Hungarian Government to terminate the Treaty, informing him of resolutions passed by the Slovak Government in response.

It is not necessary, in the light of the conclusions reached in paragraph 123 above, for the Court to determine whether there are legal consequences to be drawn from the prominent part thus played by the Slovak Republic. Its role does, however, deserve mention.

* * *

125. The Court now turns to the other legal consequences arising from its Judgment.

As to this, Hungary argued that future relations between the Parties, as far as Variant C is concerned, are governed by the 1977 Treaty. It claims that it is entitled, pursuant to the Convention of 1976 on the Regulation of Water Management Issues of Boundary Waters, to "50% of the natural flow of the Danube at the point at which it crosses the boundary below Čunovo" and considers that the Parties "are obliged to enter into negotiations in order to produce the result that the water conditions along the area from below Čunovo to below the confluence at Sap become jointly defined water conditions as required by Article 3 (a) of the 1976 Convention".

Hungary moreover indicated that any mutually accepted long-term discharge régime must be "capable of avoiding damage, including especially damage to biodiversity prohibited by the [1992 Rio Convention on Biological Diversity]". It added that "a joint environmental impact assessment of the region and of the future of Variant C structures in the context of the sustainable development of the region" should be carried out.

126. Hungary also raised the question of financial accountability for the failure of the original project and stated that both Parties accept the fact that the other has "proprietary and financial interests in the residues of the original Project and that an accounting has to be carried out". Furthermore, it noted that:

"Other elements of damage associated with Variant C on Hungarian territory also have to be brought into the accounting . . ., as well as electricity production since the diversion".

127. Hungary stated that Slovakia had incurred international responsibility and should make reparation for the damage caused to Hungary by the operation of Variant C. In that connection, it referred, in the context of reparation of the damage to the environment, to the rule of restitutio in integrum, and called for the re-establishment of "joint control by the two States over the installations maintained as they are now", and the "re-establishment of the flow of [the] waters to the level at which it stood prior to the unlawful diversion of the river". It also referred to reparation of the damage to the fauna, the flora, the soil, the sub-soil, the groundwater and the aquifer; the damages suffered by the Hungarian population on account of the increase in the uncertainties weighing on its future (premia doloris), and the damage arising from the unlawful use, in order to divert the Danube, of installations over which the two Parties exercised joint ownership.

Lastly, Hungary called for the "cessation of the continuous unlawful acts" and a "guarantee that the same actions will not be repeated", and asked the Court to order "the permanent suspension of the operation of Variant C".

128. Slovakia argued for its part that Hungary should put an end to its unlawful conduct and cease to impede the application of the 1977 Treaty, taking account of its "flexibility and of the important possibilities of development for which it provides, or even of such amendments as might be made to it by agreement between the Parties, further to future negotiations". It stated that joint operations could resume on a basis jointly agreed upon and emphasized the following:

"whether Nagymaros is built as originally planned, or built elsewhere in a different form, or, indeed, not built at all, is a question to be decided by the Parties some time in the future."

Provided the bypass canal and the Gabčíkovo Power-station and Locks — both part of the original Treaty, and not part of Variant C — remain operational and economically viable and efficient, Slovakia is prepared to negotiate over the future roles of Dunakiliti and Čunovo, bearing Nagymaros in mind."

It indicated that the Gabčíkovo power plant would not operate in peak mode "if the evidence of environmental damage [was] clear and accepted by both Parties". Slovakia noted that the Parties appeared to agree that an accounting should be undertaken "so that, guided by the Court’s findings on responsibility, the Parties can try to reach a global settlement". It
added that the Parties would have to agree on how the sums due are to be paid.

129. Slovakia stated that Hungary must make reparation for the deleterious consequences of its failures to comply with its obligations, "whether they relate to its unlawful suspensions and withdrawals of works or to its formal repudiation of the Treaty as from May 1992," and that compensation should take the form of a "restitutio in integrum. It indicated that "Unless the Parties come to some other arrangement by concluding an agreement, a return by Hungary, at a future time, to its obligations under the Treaty" and that "For compensation to be full, ... to 'wipe out all the consequences of the illegal act' ... a payment of compensation must ... be added to the 'restitutio' ..." Slovakia claims compensation which must include both interest and loss of profits and should cover the following heads of damage, which it offers by way of guidance:

(1) Losses caused to Slovakia in the Gabčíkovo sector: costs incurred from 1990 to 1992 by Czechoslovakia in protecting the structures of the G/N project and adjacent areas; the cost of maintaining the old bed of the River Danube pending the availability of the new navigation canal, from 1990 to 1992; losses to the Czechoslovak navigation authorities due to the unavailability of the bypass canal from 1990 to 1992; construction costs of Variant C (1990-1992).

(2) Losses caused to Slovakia in the Nagymaros sector: losses in the field of navigation and flood protection incurred since 1992 by Slovakia due to the failure of Hungary to proceed with the works.

(3) Loss of electricity production.

Slovakia also calls for Hungary to "give the appropriate guarantees that it will abstain from preventing the application of the Treaty and the continuous operation of the system". It argued from that standpoint that it is entitled "to be given a formal assurance that the internationally wrongful acts of Hungary will not recur", and it added that "the maintenance of the closure of the Danube at Cunovo constitutes a guarantee of that kind", unless Hungary gives an equivalent guarantee "within the framework of the negotiations that are to take place between the Parties".

* * *

130. The Court observes that the part of its Judgment which answers the questions in Article 2, paragraph 1, of the Special Agreement has a declaratory character. It deals with the past conduct of the Parties and determines the lawfulness or unlawfulness of that conduct between 1989 and 1992 as well as its effects on the existence of the Treaty.

131. Now the Court has, on the basis of the foregoing findings, to determine what the future conduct of the Parties should be. This part of the Judgment is prescriptive rather than declaratory because it determines what the rights and obligations of the Parties are. The Parties will have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement.

* * *

132. In this regard it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a lex specialis.

133. The Court, however, cannot disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation — or the practical possibilities and impossibilities to which it gives rise — when deciding on the legal requirements for the future conduct of the Parties.

This does not mean that facts — in this case facts which flow from wrongful conduct — determine the law. The principle ex injuria jus non oritur is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct.

What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as that is feasible. For it is only then that the irregular state of affairs which exists as the result of the failure of both Parties to comply with their treaty obligations can be remedied.

134. What might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of justice if prescribed in 1997. The Court cannot ignore the fact that the Gabčíkovo power plant has been in operation for nearly five years, that the bypass canal which feeds the plant receives its water from a significantly smaller reservoir formed by a dam which is built not at Dunakiliti but at Cunovo, and that the plant is operated in a run-of-the-river mode and not in a peak hour mode as originally foreseen. Equally, the Court cannot ignore the fact that, not only has Nagymaros not been built, but that, with the effective discarding by both Parties of peak power operation, there is no longer any point in building it.

135. As the Court has already had occasion to point out, the 1977 Treaty was not only a joint investment project for the production of
energy, but it was designed to serve other objectives as well: the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment. None of these objectives has been given absolute priority over the other, in spite of the emphasis which is given in the Treaty to the construction of a System of Locks for the production of energy. None of them has lost its importance. In order to achieve these objectives the parties accepted obligations of conduct, obligations of performance, and obligations of result.

136. It could be said that that part of the obligations of performance which related to the construction of the System of Locks — in so far as they were not yet implemented before 1992 — have been overtaken by events. It would be an administration of the law altogether out of touch with reality if the Court were to order those obligations to be fully reinstated and the works at Čunovo to be demolished when the objectives of the Treaty can be adequately served by the existing structures.

137. Whether this is indeed the case is, first and foremost, for the Parties to decide. Under the 1977 Treaty its several objectives must be attained in an integrated and consolidated programme, to be developed in the Joint Contractual Plan. The Joint Contractual Plan was, until 1989, adapted and amended frequently to better fit the wishes of the parties. This Plan was also expressly described as the means to achieve the objectives of maintenance of water quality and protection of the environment.

138. The 1977 Treaty never laid down a rigid system, albeit that the construction of a system of locks at Gabčíkovo and Nagymaros was prescribed by the Treaty itself. In this respect, however, the subsequent positions adopted by the parties should be taken into consideration. Not only did Hungary insist on terminating construction at Nagymaros, but Czechoslovakia stated, on various occasions in the course of negotiations, that it was willing to consider a limitation or even exclusion of operation in peak hour mode. In the latter case the construction of the Nagymaros dam would have become pointless. The explicit terms of the Treaty itself were therefore in practice acknowledged by the parties to be negotiable.

139. The Court is of the opinion that the Parties are under a legal obligation, during the negotiations to be held by virtue of Article 5 of the Special Agreement, to consider, within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty can best be served, keeping in mind that all of them should be fulfilled.

140. It is clear that the Project’s impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the Court by the Parties — even if their conclusions are often contradictory — provide abundant evidence that this impact and these implications are considerable.

In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of

Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature.

The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

141. It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses. The Court will recall in this context that, as it said in the North Sea Continental Shelf cases:

"[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it" (I.C.J. Reports 1969, p. 47, para. 85).

142. What is required in the present case by the rule pacta sunt servanda, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the cooperative context of the Treaty.

Article 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and
must be performed by them in good faith.” This latter element, in the Court’s view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.

143. During this dispute both Parties have called upon the assistance of the Commission of the European Communities. Because of the diametrically opposed positions the Parties took with regard to the required outcome of the trilateral talks which were envisaged, those talks did not succeed. When, after the present Judgment is given, bilateral negotiations without pre-conditions are held, both Parties can profit from the assistance and expertise of a third party. The readiness of the Parties to accept such assistance would be evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the Judgment of the Court.

144. The 1977 Treaty not only contains a joint investment programme, it also establishes a régime. According to the Treaty, the main structures of the System of Locks are the joint property of the Parties; their operation will take the form of a co-ordinated single unit; and the benefits of the project shall be equally shared.

Since the Court has found that the Treaty is still in force and that, under its terms, the joint régime is a basic element, it considers that, unless the Parties agree otherwise, such a régime should be restored.

145. Article 10, paragraph 1, of the Treaty states that works of the System of Locks constituting the joint property of the contracting parties shall be operated, as a co-ordinated single unit and in accordance with jointly agreed operating and operational procedures, by the authorized operating agency of the contracting party in whose territory the works are built. Paragraph 2 of that Article states that works on the System of Locks owned by one of the contracting parties shall be independently operated or maintained by the agencies of that contracting party in the jointly prescribed manner.

The Court is of the opinion that the works at Čunovo should become a jointly operated unit within the meaning of Article 10, paragraph 1, in view of their pivotal role in the operation of what remains of the Project and for the water-management régime. The dam at Čunovo has taken over the role which was originally destined for the works at Dunajská Streda, and therefore should have a similar status.

146. The Court also concludes that Variant C, which it considers operates in a manner incompatible with the Treaty, should be made to conform to it. By associating Hungary, on an equal footing, in its operation, management and benefits, Variant C will be transformed from a de facto status into a treaty-based régime.

It appears from various parts of the record that, given the current state of information before the Court, Variant C could be made to function in such a way as to accommodate both the economic operation of the system of electricity generation and the satisfaction of essential environmental concerns.

Regularization of Variant C by making it part of a single and indivisible operational system of works also appears necessary to ensure that Article 9 of the Treaty, which provides that the contracting parties shall participate in the use and in the benefits of the System of Locks in equal measure, will again become effective.

147. Re-establishment of the joint régime will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the Treaty, in accordance with Article 5, paragraph 2, of the Convention on the Law of the Non-Navigational Uses of International Watercourses, according to which:

“Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.”

(General Assembly doc. A/51/869 of 11 April 1997.)

* * *

148. Thus far the Court has indicated what in its view should be the effects of its finding that the 1977 Treaty is still in force. Now the Court will turn to the legal consequences of the internationally wrongful acts committed by the Parties.

149. The Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the Factory at Chorzów:

“reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish 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).

150. Reparation must, “as far as possible”, wipe out all the consequences of the illegal act. In this case, the consequences of the wrongful acts of both Parties will be wiped out “as far as possible” if they resume their co-operation in the utilization of the shared water resources of the Danube, and if the multi-purpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner. What is possible for the Parties to do is to re-establish co-operative administration of what remains of the Project. To that end, it is open to them to agree to maintain the works at Čunovo, with changes in the mode of operation in respect of the allocation of water and electricity, and not to build works at Nagymaros.
151. The Court has been asked by both Parties to determine the consequences of the Judgment as they bear upon payment of damages. According to the Preamble to the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project. Slovakia thus may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary.

152. The Court has not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid. Both Parties claimed to have suffered considerable financial losses and both claim pecuniary compensation for them.

It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it. In the present Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation.

Slovakia is accordingly entitled to compensation for the damage suffered by Czechoslovakia as well as by itself as a result of Hungary's decision to suspend and subsequently abandon the works at Nagymaros and Dunakiliti, as those actions caused the postponement of the putting into operation of the Gabčíkovo power plant, and changes in its mode of operation once in service.

Hungary is entitled to compensation for the damage sustained as a result of the diversion of the Danube, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, deprived Hungary of its rightful part in the shared water resources, and exploited those resources essentially for their own benefit.

153. Given the fact, however, that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims.

154. At the same time, the Court wishes to point out that the settlement of accounts for the construction of the works is different from the issue of compensation, and must be resolved in accordance with the 1977 Treaty and related instruments. If Hungary is to share in the operation and benefits of the Čunovo complex, it must pay a proportionate share of the building and running costs.

* * *

155. For these reasons,

THE COURT,

(1) Having regard to Article 2, paragraph 1, of the Special Agreement,

A. By fourteen votes to one,

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 Treaty of 16 September 1977 and related instruments attributed responsibility to it;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judge Herczegh;

B. By nine votes to six,

Finds that Czechoslovakia was entitled to proceed, in November 1991, to the “provisional solution” as described in the terms of the Special Agreement;

IN FAVOUR: Vice-President Weeramantry; Judges Oda, Guillaume, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; Judge ad hoc Skubiszewski;

AGAINST: President Schwebel; Judges Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek;

C. By ten votes to five,

Finds that Czechoslovakia was not entitled to put into operation, from October 1992, this “provisional solution”;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Kooijmans, Rezek;

AGAINST: Judges Oda, Koroma, Vereshchetin, Parra-Aranguren; Judge ad hoc Skubiszewski;

D. By eleven votes to four,

Finds that the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them;

IN FAVOUR: Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; Judge ad hoc Skubiszewski;

AGAINST: President Schwebel; Judges Herczegh, Fleischhauer, Rezek;
(2) Having regard to Article 2, paragraph 2, and Article 5 of the Special Agreement,

A. By twelve votes to three,

Finds that Slovakia, as successor to Czechoslovakia, became a party to the Treaty of 16 September 1977 as from 1 January 1993;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchctin, Parra-Aranguren, Kooijmans; Judge ad hoc Skubiczewski;
AGAINST: Judges Herczegh, Fleischhauer, Rezek;

B. By thirteen votes to two,

Finds that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchctin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiczewski;
AGAINST: Judges Herczegh, Fleischhauer;

C. By thirteen votes to two,

Finds that, unless the Parties otherwise agree, a joint operational régime must be established in accordance with the Treaty of 16 September 1977;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchctin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiczewski;
AGAINST: Judges Herczegh, Fleischhauer;

D. By twelve votes to three,

Finds that, unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiczewski;
AGAINST: Judges Oda, Koroma, Vereshchctin;

E. By thirteen votes to two,

Finds that the settlement of accounts for the construction and operation of the works must be effected in accordance with the relevant provisions of the Treaty of 16 September 1977 and related instruments, taking due account of such measures as will have been taken by the Parties in application of points 2 B and 2 C of the present operative paragraph.

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchctin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiczewski;
AGAINST: Judges Herczegh, Fleischhauer.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fifth day of September, one thousand nine hundred and ninety-seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Hungary and the Government of the Slovak Republic, respectively.

(Signed) Stephen M. SCHWEBEL,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

President SCHWEBEL and Judge REZEK append declarations to the Judgment of the Court.

Vice-President WEERAMANTRY and Judges BEDJAOU and KOROMA append separate opinions to the Judgment of the Court.

Judges ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, VERESHCHCTIN and PARRA-ARANGUREN and Judge AD HOC SKUVICESZEWSKI append dissenting opinions to the Judgment of the Court.

(Initialled) S.M.S.
(Initialled) E.V.O.
International Court of Justice


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<tr>
<td>ARBiH</td>
<td>Army of the Republic of Bosnia and Herzegovina</td>
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<td>FRY</td>
<td>Federal Republic of Yugoslavia</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>JNA</td>
<td>Yugoslav People’s Army</td>
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<td>MUP</td>
<td>Ministarstvo Unutrašnjih Poljova</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>SFRY</td>
<td>Socialist Federal Republic of Yugoslavia</td>
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<td>TO</td>
<td>Territorial Defence Forces</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<td>UNPROFOR</td>
<td>United Nations Protection Force</td>
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<td>VJ</td>
<td>Yugoslav Army</td>
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<td>VRS</td>
<td>Army of the Republika Srpska</td>
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Application of Genocide Convention (Judgment)

List of Acronyms
INTERNATIONAL COURT OF JUSTICE

YEAR 2007

26 February 2007

CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA v. SERBIA AND MONTENEGRO)

JUDGMENT

Present: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepulveda-Amor, Bennouna, Skofinkov; Judges ad hoc Mahiju, Kriča; Registrar Couveur.

In the case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide,

between

Bosnia and Herzegovina,

represented by

Mr. Sakib Sofić,

as Agent;

Mr. Phon van den Biesen, Attorney at Law, Amsterdam,

as Deputy Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the United Nations International Law Commission,

Mr. Thomas M. Franck, Professor Emeritus of Law, New York University School of Law,

Ms Brigitte Stern, Professor at the University of Paris I,

and

Serbia and Montenegro,

represented by

H.E. Mr. Radoslav Stojanović, S.J.D., Head of the Law Council of the Ministry of Foreign Affairs of Serbia and Montenegro, Professor at the Belgrade University School of Law,

as Agent;

Mr. Saša Obradović, First Counsellor of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands,

Mr. Vladimir Cvetkovic, Second Secretary of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands,

as Co-Agents;

Mr. Tibor Varady, S.J.D. (Harvard), Professor of Law at the Central European University, Budapest, and Emory University, Atlanta,

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Member of the International Law Commission, member of the English Bar, Distinguished Fellow of All Souls College, Oxford,

Mr. Xavier de Roux, Maîtrise de droit, avocat à la cour, Paris,

Ms Nataša Fauveau-Ivanović, avocat à la cour, Paris, member of the Council of the International Criminal Bar,

Mr. Andreas Zimmerman, LL.M. (Harvard), Professor of Law at the University of Kiel, Director of the Walther-Schücking Institute,
JUDGMENT

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 20 March 1993, the Government of the Republic of Bosnia and Herzegovina (with effect from 14 December 1995 “Bosnia and Herzegovina”) filed in the Registry of the Court an Application instituting proceedings against the Federal Republic of Yugoslavia (with effect from 4 February 2003, “Serbia and Montenegro” and with effect from 3 June 2006, the Republic of Serbia — see paragraphs 67 and 79 below) in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter “the Genocide Convention” or “the Convention”), as well as various matters which Bosnia and Herzegovina claimed were connected therewith. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Application was immediately communicated to the Government of the Federal Republic of Yugoslavia (hereinafter “the FRY”) by the Registrar; and in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. In conformity with Article 43 of the Rules of Court, the Registrar addressed the notification provided for in Article 63, paragraph 1, of the Statute to all the States appearing on the list of the parties to the Genocide Convention held by the Secretary-General of the United Nations as depositary. The Registrar also sent to the Secretary-General the notification provided for in Article 34, paragraph 3, of the Statute.

4. On 20 March 1993, immediately after the filing of its Application, Bosnia and Herzegovina submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court. On 31 March 1993, Bosnia and Herzegovina filed in the Registry, and invoked as an additional basis of jurisdiction, the text of a letter dated 8 June 1992, addressed jointly by the President of the then Republic of Montenegro and the President of the then Republic of Serbia to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia. On 1 April 1993, the FRY submitted written observations on Bosnia and Herzegovina’s request for provisional measures, in which it, in turn, recommended that the Court indicate provisional measures to be applied to Bosnia and Herzegovina. By an Order dated 8 April 1993, the Court, after hearing the Parties, indicated certain provisional measures with a view to the protection of rights under the Genocide Convention.

5. By an Order dated 16 April 1993, the President of the Court fixed 15 October 1993 as the time-limit for the filing of the Memorial of Bosnia and Herzegovina and 15 April 1994 as the time-limit for the filing of the Counter-Memorial of the FRY.

6. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case; Bosnia and Herzegovina chose Mr. Elihu Lauterpacht and the FRY chose Mr. Milenko Kreca.

7. On 27 July 1993, Bosnia and Herzegovina submitted a new request for the indication of provisional measures. By letters of 6 August and 10 August 1993, the Agent of Bosnia and Herzegovina indicated that his Government wished to invoke additional bases of jurisdiction in the case: the Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes on the Protection of Minorities, signed at Saint-Germain-en-Laye on 10 September 1919, and customary and conventional international laws of war and international humanitarian law. By a letter of 13 August 1993, the Agent of Bosnia and Herzegovina confirmed his Government’s intention also to rely on the above-mentioned letter from the Presidents of Montenegro and Serbia dated 8 June 1992 as an additional basis of jurisdiction (see paragraph 4).

8. On 10 August 1993, the FRY also submitted a request for the indication of provisional measures and on 10 August and 23 August 1993, it filed written observations on Bosnia and Herzegovina’s new request. By an Order dated 13 September 1993, the Court, after hearing the Parties, reaffirmed the measures indicated in its Order of 8 April 1993 and stated that those measures should be immediately and effectively implemented.

9. By an Order dated 7 October 1993, the Vice-President of the Court, at the request of Bosnia and Herzegovina, extended the time-limit for the filing of the Memorial to 15 April 1994 and accordingly extended the time-limit for the filing of the Counter-Memorial to 15 April 1995. Bosnia and Herzegovina filed its Memorial within the time-limit thus extended. By a letter dated 9 May 1994, the Agent of the FRY submitted that the Memorial filed by Bosnia and Herzegovina failed to meet the requirements of Article 43 of the Statute and Articles 50 and 51 of the Rules of Court. By letter of 30 June 1994, the Registrar, acting on the instructions of the Court, requested Bosnia and Herzegovina, pursuant to Article 50, paragraph 2, of the Rules of Court, to file as annexes to its Memorial the extracts of the documents to which it referred therein. Bosnia and
Herzegovina accordingly filed Additional Annexes to its Memorial on 4 January 1998, the day of the deadline for the submission of additional pleading to the Counter-Memorial of the Federal Republic of Yugoslavia. By a letter dated 14 May 1998, the Deputy Agent of Bosnia and Herzegovina, referring to Articles 50 and 52 of the Rules of Court, objected to the admissibility of these documents in view of the deadline set for the filing of the Counter-Memorial. By a letter dated 27 November 1998, the FRY requested that the time-limit for the filing of the Counter-Memorial be extended for a period of three months. By an Order dated 9 December 1998, the Deputy Agent of Bosnia and Herzegovina had been granted an extension for the filing of the Counter-Memorial within the time-limit established after the FRY's request.

By an Order of 11 December 1998, the Court, having regard to the fact that the FRY had not submitted its Counter-Memorial by the time-limit fixed by the Order, extended the time-limit for the filing of the Counter-Memorial to 30 June 1999. Within the time-limit thus extended, the FRY, referring to Article 79, paragraph 1, of the Rules of Court of 14 April 1978, requested the Court to inform the Parties of the possibility of filing written observations on the preliminary objections concerning the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, by an Order of 14 July 1995, the President of the Court noted that, by virtue of Article 79, paragraph 3, of the 1978 Rules of Court, the proceedings on the merits were suspended, and fixed 14 November 1995 as the time-limit within which Bosnia and Herzegovina might present a written statement of its observations and submissions on the preliminary objections raised by the FRY. Bosnia and Herzegovina filed such a statement within the time-limit thus fixed.

On 23 April 1998, within the time-limit, Bosnia and Herzegovina filed its Reply. By a letter dated 27 November 1998, the FRY informed the Court of the request of the FRY, extending the time-limit for the filing of the Counter-Memorial to 30 June 1999. Within the time-limit thus extended, the FRY, referring to Article 79, paragraph 1, of the Rules of Court of 14 April 1978, raised preliminary objections concerning the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, by an Order of 14 July 1995, the President of the Court noted that, by virtue of Article 79, paragraph 3, of the 1978 Rules of Court, the proceedings on the merits were suspended, and fixed 14 November 1995 as the time-limit within which Bosnia and Herzegovina might present a written statement of its observations and submissions on the preliminary objections raised by the FRY. Bosnia and Herzegovina filed such a statement within the time-limit thus fixed.

By a letter dated 2 February 1996, the Agent of the FRY submitted to the Court the text of the General Framework Agreement for Peace in Bosnia and Herzegovina and the annexes thereto, entitled the Framework Agreement. On 13 February 1996, the Court informed the Parties that it had jurisdiction to adjudicate on the dispute and that the Parties' agreement was not a final and binding settlement of the dispute. By a letter dated 23 July 1996, the President of the Court fixed 23 July 1997 as the time-limit for the filing of the Counter-Memorial of Bosnia and Herzegovina, and 3 May 1996, fixed 3 May 1997 as the time-limit for the filing of the Rejoinder of the FRY. By a letter dated 14 November 1995, the President of the Court informed the Parties of the time-limit fixing for the filing of the Counter-Memorial and Rejoinder and that any such document established after that date would have to be submitted as an Annex to the Rejoinder, if Yugoslavia so wished.

On 30 June 1995, the Agent of the FRY submitted the Association Agreement of Peace in Bosnia and Herzegovina and the annexes thereto, entitled the Framework Agreement. On 13 February 1996, the Court informed the Parties that it had jurisdiction to adjudicate on the dispute and that the Parties' agreement was not a final and binding settlement of the dispute. By a letter dated 23 July 1996, the President of the Court fixed 23 July 1997 as the time-limit for the filing of the Counter-Memorial of Bosnia and Herzegovina, and 3 May 1996, fixed 3 May 1997 as the time-limit for the filing of the Rejoinder of the FRY. By a letter dated 14 November 1995, the President of the Court informed the Parties of the time-limit fixing for the filing of the Counter-Memorial and Rejoinder and that any such document established after that date would have to be submitted as an Annex to the Rejoinder, if Yugoslavia so wished.

By a letter dated 14 May 1998, the Deputy Agent of Bosnia and Herzegovina, referring to Articles 50 and 52 of the Rules of Court, objected to the admissibility of these documents in view of the deadline set for the filing of the Counter-Memorial. By a letter dated 27 November 1998, the FRY requested that the time-limit for the filing of the Counter-Memorial be extended for a period of three months. By an Order dated 9 December 1998, the Deputy Agent of Bosnia and Herzegovina had been granted an extension for the filing of the Counter-Memorial within the time-limit established after the FRY's request.

By an Order of 11 December 1998, the Court, having regard to the fact that the FRY had not submitted its Counter-Memorial by the time-limit fixed by the Order, extended the time-limit for the filing of the Counter-Memorial to 30 June 1999. Within the time-limit thus extended, the FRY, referring to Article 79, paragraph 1, of the Rules of Court of 14 April 1978, requested the Court to inform the Parties of the possibility of filing written observations on the preliminary objections concerning the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, by an Order of 14 July 1995, the President of the Court noted that, by virtue of Article 79, paragraph 3, of the 1978 Rules of Court, the proceedings on the merits were suspended, and fixed 14 November 1995 as the time-limit within which Bosnia and Herzegovina might present a written statement of its observations and submissions on the preliminary objections raised by the FRY. Bosnia and Herzegovina filed such a statement within the time-limit thus fixed.

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APPLICATION OF GENOCIDE CONVENTION (JUDGMENT)

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Application of Genocide Convention (Judgment)

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By letter dated 13 April 2000, the Agent of the FRY informed the Court that the case should proceed and he requested the Court to set a date for the opening of the oral proceedings. On 25 April 2000, the Registrar informed the Parties that the Court intended to schedule hearings in the case beginning in the latter part of February 2000 and requested the Chairman of the Presidency of Bosnia and Herzegovina to confirm that Bosnia and Herzegovina's position was that the case should proceed. By letter dated 25 September 2000, the Agent of Bosnia and Herzegovina confirmed that, at its meeting on 10 October 2000, the Presidency had decided that the case should proceed. By letter dated 5 October 2000, the Agent of Bosnia and Herzegovina informed the Court that, as Co-Agent, it was prepared to undertake its duties and responsibilities with respect to the case. By letter dated 10 October 2000, the Agent of Bosnia and Herzegovina informed the Court that, in accordance with Article 54 of the Rules, the Government was to be considered the Agent of the State in whose territory the case took place. By letter dated 12 October 2000, the Agent of Bosnia and Herzegovina informed the Court that the case should proceed and that the Agent of Bosnia and Herzegovina was prepared to undertake its duties and responsibilities with respect to the case. By letter dated 16 October 2000, the President of the Court informed the Parties that the Court intended to schedule hearings in the case beginning in the latter part of February 2000 and requested the Chairman of the Presidency of Bosnia and Herzegovina to confirm that Bosnia and Herzegovina's position was that the case should proceed. By letter dated 20 October 2000, the Agent of Bosnia and Herzegovina confirmed that the position of his Government was that the case should proceed and he requested the Court to set a date for the opening of the oral proceedings.

21. By letter dated 23 March 2000 transmitting to the Court a letter dated 15 September 1999 from the Prime Minister of the Republic of Srpska, the letter of 15 September 1999 was not subject to the veto mechanism contained in the Constitution of Bosnia and Herzegovina. The Agent of the FRY requested the Court to set a date for oral proceedings at its earliest convenience. By letter dated 19 March 2000, the Agent of the FRY informed the Court of a legal opinion of which the Agent was aware, that the decision of 22 October 1999 could not be appealed. By letter dated 22 March 2000, the Agent of the FRY informed the Court that the case could not be scheduled until the issue of the FRY's objections to jurisdiction had been determined by the Court. By letter dated 28 March 2000, the Agent of the FRY informed the Court that the case could not be scheduled until the issue of the FRY's objections to jurisdiction had been determined by the Court.

22. By letter dated 22 April 2000, the Agent of the FRY informed the Court that the case could not be scheduled until the issue of the FRY's objections to jurisdiction had been determined by the Court. By letter dated 25 April 2000, the Agent of the FRY informed the Court that the case could not be scheduled until the issue of the FRY's objections to jurisdiction had been determined by the Court. By letter dated 15 May 2000, the Agent of the FRY informed the Court that the case could not be scheduled until the issue of the FRY's objections to jurisdiction had been determined by the Court.

23. By letter dated 29 September 2000, Mr. Svetozar Miletic, who had purportedly been appointed Co-Agent on 9 June 1999 by the then Chairman of the Presidency of Bosnia and Herzegovina, reiterated his position that the case had been discontinued. By letter dated 6 October 2000, the Agent of Bosnia and Herzegovina informed the Court that the case should proceed and that the Government was prepared to undertake its duties and responsibilities with respect to the case. By letter dated 13 October 2000, the Agent of Bosnia and Herzegovina informed the Court that the case should proceed and that the Government was prepared to undertake its duties and responsibilities with respect to the case. By letter dated 16 October 2000, the Agent of Bosnia and Herzegovina informed the Court that the case should proceed and that the Government was prepared to undertake its duties and responsibilities with respect to the case.

24. By letter dated 4 October 1999, the Agent of Bosnia and Herzegovina confirmed that the position of his Government was that the case should proceed and he requested the Court to set a date for the opening of the oral proceedings. By letter dated 11 November 1999, the Agent of Bosnia and Herzegovina informed the Court that the case could not be scheduled until the issue of his Government's objections to jurisdiction had been determined by the Court. By letter dated 22 January 2000, the Agent of Bosnia and Herzegovina informed the Court that the case could not be scheduled until the issue of his Government's objections to jurisdiction had been determined by the Court. By letter dated 25 January 2001, the Agent of Bosnia and Herzegovina informed the Court that the case could not be scheduled until the issue of his Government's objections to jurisdiction had been determined by the Court. By letter dated 25 January 2001, the Agent of Bosnia and Herzegovina informed the Court that the case could not be scheduled until the issue of his Government's objections to jurisdiction had been determined by the Court. By letter dated 25 January 2001, the Agent of Bosnia and Herzegovina informed the Court that the case could not be scheduled until the issue of his Government's objections to jurisdiction had been determined by the Court.

25. By letter dated 18 January 2001, the Minister for Foreign Affairs of the Republic of Srpska, the letter of 15 September 1999 was not subject to the veto mechanism contained in the Constitution of Bosnia and Herzegovina. The Agent of the Republic of Srpska requested the Court to set a date for oral proceedings at its earliest convenience. By letter dated 19 January 2001, the Agent of the Republic of Srpska requested the Court to set a date for oral proceedings at its earliest convenience. By letter dated 22 January 2001, the Agent of the Republic of Srpska requested the Court to set a date for oral proceedings at its earliest convenience.

26. By letter dated 20 April 2001, the Agent of the FRY informed the Court that the case could not be scheduled until the issue of the FRY's objections to jurisdiction had been determined by the Court. By letter dated 22 April 2001, the Agent of the FRY informed the Court that the case could not be scheduled until the issue of the FRY's objections to jurisdiction had been determined by the Court. By letter dated 25 April 2001, the Agent of the FRY informed the Court that the case could not be scheduled until the issue of the FRY's objections to jurisdiction had been determined by the Court.
Following a further exchange of letters between the Parties in March and April 2003, the Registrar informed the Court that, due to major new developments since the filing of the last written pleading, additional written pleadings were necessary in order to make the oral proceedings more effective and less time-consuming. On 5 January 2004, the President of the Court decided, after considering the request made by Serbia and Montenegro pursuant to Article 62, paragraph 2, of the Rules of Court, that, for the hearing scheduled for 10 January 2004, the Parties were to submit additional written pleadings on the merits. On 27 January 2004, the President of the Court held a meeting with the Agents of the Parties to discuss the preliminary objections of the FRY and the questions of procedure raised by the Registrar. Following that meeting, the President of the Court informed the Registry of the Parties' views with respect to the organization of the oral proceedings. By a letter dated 27 January 2004, the Registry informed the Parties that, in the light of the views expressed by the Parties, it had decided to follow the procedural plan set out in its communication of 22 January 2004. The oral proceedings on the merits were scheduled to begin on Monday 27 February 2006.

On 10 March 2004, in a letter to the President of the Court, received in the Registry and transmitted to the Parties, the Agent of the FRY informed the Court that he had withdrawn the counter-claims submitted in the Counter-Memorial. On 14 March 2005, the President of the Court informed the Parties that the counter-claims had been withdrawn by operation of law. The oral proceedings were scheduled to begin on Monday 27 February 2006.

On 14 March 2005, the Court held a meeting with the Agents of the Parties to discuss questions of procedure and the organization of the oral proceedings. Following that meeting, the Court agreed to fix the following dates for the oral proceedings:

- Monday 27 February 2006, for the opening of the oral proceedings;
- Monday 3 March 2006, for the presentation of the Parties' oral arguments.

By a letter dated 26 October 2004, the Registrar informed the Parties that, after examining the list of cases before it ready for hearing and considering all relevant circumstances, the Court had decided to fix Monday 27 February 2006 for the opening of the oral proceedings in the case.

By letters dated 26 October 2004, the Parties were informed that, after examining the list of cases before it ready for hearing and considering all relevant circumstances, the Court had decided to fix Monday 27 February 2006 for the opening of the oral proceedings in the case.
of Court, of the five witnesses proposed by Serbia and Montenegro. However, the Court reserved the right to exercise subsequently, if necessary, its powers under that provision to call persons of its choosing on its own initiative. The Registrar also requested the Parties to provide certain information related to the hearing of the witnesses, experts and witness-experts including, inter alia, the language in which each witness, expert or witness-expert would speak and, in respect of those speaking in a language other than English or French, the arrangements which the Party intended to make, pursuant to Article 70, paragraph 2, of the Rules of Court, for interpretation into one of the official languages of the Court. Finally the Registrar transmitted to the Parties the calendar for the oral proceedings as adopted by the Court.

43. By a letter dated 12 December 2005, the Agent of Serbia and Montenegro informed the Court, inter alia, that eight of the ten witnesses and witness-experts it wished to call would speak in Serbian and outlined the arrangements that Serbia and Montenegro would make for interpretation from Serbian to one of the official languages of the Court. By a letter dated 15 December 2005, the Deputy Agent of Bosnia and Herzegovina informed the Court, inter alia, that the three experts called by Bosnia and Herzegovina would speak in one of the official languages of the Court.

44. By a letter dated 28 December 2005, the Deputy Agent of Bosnia and Herzegovina, on behalf of the Government, requested that the Court call upon Serbia and Montenegro, under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to produce a certain number of documents. By a letter dated 16 January 2006, the Agent of Serbia and Montenegro informed the Court of his Government’s views on this request. By a letter dated 19 January 2006, the Registrar, acting on the instructions of the Court, asked Bosnia and Herzegovina to provide certain information relating to its request under Article 49 of the Statute and Article 62, paragraph 2, of the Rules of Court. By letters dated 19 and 24 January 2006, the Deputy Agent of Bosnia and Herzegovina submitted additional information and informed the Court that Bosnia and Herzegovina had decided not to make any observations regarding the new documents produced by Serbia and Montenegro.

45. By a letter dated 16 January 2006, the Deputy Agent of Bosnia and Herzegovina transmitted to the Registry copies of new documents that Bosnia and Herzegovina wished to produce pursuant to Article 56 of the Rules of Court. Under cover of the same letter and of a letter dated 23 January 2006, the Deputy Agent of Serbia and Montenegro also transmitted to the Registry copies of video material, extracts of which Bosnia and Herzegovina intended to present at the oral proceedings. By a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro informed the Court of his Government’s views regarding this modified request. By letters dated 2 February 2006, the Registrar informed the Parties that the Court had decided, at this stage of the proceedings, not to call upon Serbia and Montenegro to produce the documents in question. However, the Court reserved the right to exercise subsequently, if necessary, its powers under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to request, proprio motu, the production by Serbia and Montenegro of the documents in question.

46. Under cover of a letter dated 18 January 2006 and received on 20 January 2006, the Agent of Serbia and Montenegro provided the Registry with copies of new documents which his Government wished to produce pursuant to Article 56 of the Rules of Court. By a letter of 1 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina did not object to the production of the said documents by Serbia and Montenegro. By a letter dated 2 February 2006, the Registrar informed the Parties that, in view of the fact that no objection had been raised by Bosnia and Herzegovina, the Court had decided to authorise the production of the new documents by Serbia and Montenegro. By a letter dated 9 February 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court certain missing elements of the new documents submitted on 20 January 2006 and made a number of observations concerning the new documents produced by Bosnia and Herzegovina. By a letter dated 20 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina did not intend to make any observations regarding the new documents produced by Serbia and Montenegro.

47. Under cover of a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court a list of public documents that his Government intended to use in its oral argument. By a letter dated 14 February 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court the list of public documents referred to in the list submitted on 31 January 2006 and informed the Court that Serbia and Montenegro had decided not to submit the video material included in that list. By a letter dated 20 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina had no observations to make regarding the list of public documents submitted by Serbia and Montenegro on 31 January 2006. He also stated that Bosnia and Herzegovina would refer to similar sources during its pleadings and was planning to provide the Court and the Respondent, at the end of the first round of its oral argument, with a CD-ROM containing materials it had quoted (see below, paragraph 54).

48. By a letter dated 26 January 2006, the Registrar informed the Parties of certain decisions taken by the Court with regard to the hearing of the witnesses, experts and witness-experts called by the Parties included, inter alia, that, even where formally, the video recordings of the sittings at which the witnesses and witness-experts were heard would not be made available to the public or posted on the website of the Court until the end of the oral proceedings.

49. By a letter dated 13 February 2006, the Agent of Serbia and Montenegro informed the Court that his Government had decided not to call two of the witnesses and witness-experts included in the list transmitted to the Court on 8 September 2005 and that the order in which the remaining witnesses and witness-expert would be heard had been modified. By a letter dated 21 February 2006, the Agent of Serbia and Montenegro requested the Court’s per-
mission for the examination of three of the witnesses called by his Government to be conducted in Serbian (namely, Mr. Dušan Mihajlović, Mr. Vladimir Milicević, Mr. Dragoljub Micunović). By a letter dated 22 February 2006, the Registrar informed the Agent of Serbia and Montenegro that there was no objection to such a procedure being followed, pursuant to the provisions of Article 39, paragraph 3, of the Statute and Article 70 of the Rules of Court.

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.

Public sittings were held from 27 February to 9 May 2006, at which the Court heard the oral arguments and replies of:

**For Bosnia and Herzegovina:**
- Mr. Sakib Softić
- Mr. Phon van den Biesen
- Mr. Alain Pellet
- Mr. Thomas M. Franck
- Ms Brigitte Stern
- Mr. Luigi Condorelli
- Ms Magda Karagiannakis
- Ms Joanna Koner
- Ms Laura Dauban
- Mr. Antoine Ollivier
- Mr. Morten Torkildsen

**For Serbia and Montenegro:**
- H.E. Mr. Radoslav Stojanović
- Mr. Saša Obradović
- Mr. Vladimir Cvetković
- Mr. Tibor Varady
- Mr. Ian Brownlie
- Mr. Xavier de Roux
- Ms Nataša Fauveau-Ivanović
- Mr. Andreas Zimmerman
- Mr. Vladimir Djerić
- Mr. Igor Olujić

On 1 March 2006, the Registrar, on the instructions of the Court, requested Bosnia and Herzegovina to specify the precise origin of each of the extracts of video material and of the graphics, charts and photographs shown or to be shown at the oral proceedings. On 2 March 2006 Bosnia and Herzegovina provided the Court with certain information regarding the extracts of video material shown at the sitting on 1 March 2006 and those to be shown at the sittings on 2 March 2006 including the source of such video material. Under cover of a letter dated 5 March 2006, the Agent of Bosnia and Herzegovina transmitted to the Court a list detailing the origin of the extracts of video material, graphics, charts and photographs shown or to be shown by it during its first round of oral argument, as well as transcripts, in English and in French, of the above-mentioned extracts of video material.

By a letter dated 5 March 2006, the Agent of Bosnia and Herzegovina informed the Court that it wished to withdraw one of the experts it had intended to call. In that letter, the Agent of Bosnia and Herzegovina also asked the Court to request each of the Parties to provide a one-page outline per witness, expert or witness-expert detailing the topics which would be covered in his evidence or statement. By letters dated 7 March 2006, the Parties were informed that the Court requested them to provide, at least three days before the hearing of each witness, expert or witness-expert, a one-page summary of the latter’s evidence or statement.

On 7 March 2006, Bosnia and Herzegovina provided the Court and the Respondent with a CD-ROM containing “ICTY Public Exhibits and other Documents cited by Bosnia and Herzegovina during its Oral Pleadings (07/03/2006)”. By a letter dated 10 March 2006, Serbia and Montenegro informed the Court that it objected to the production of the CD-ROM on the grounds that the submission at such a late stage of so many documents “raised[d] serious concerns related to the respect for the Rules of Court and the principles of fairness and equality of the parties”. It also pointed out that the documents included on the CD-ROM “appear[d] questionable from the point of view of Article 56, paragraph 4, of the Rules of Court”. By a letter dated 13 March 2006, the Agent of Bosnia and Herzegovina informed the Court of his Government’s views regarding the above-mentioned objections raised by Serbia and Montenegro.

In that letter, the Agent submitted, inter alia, that all the documents on the CD-ROM had been referred to by Bosnia and Herzegovina in its oral argument and were documents which were in the public domain and were readily available within the terms of Article 56, paragraph 4, of the Rules of Court. The Agent added that Bosnia and Herzegovina was prepared to withdraw the CD-ROM if the Court found it advisable. By a letter of 14 March 2006, the Registrar informed Bosnia and Herzegovina that, given that Article 56, paragraph 4, of the Rules of Court did not require or authorize the submission to the Court of the full text of a document to which reference was made during the oral proceedings pursuant to that provision and since it was difficult for the other Party and the Court to come to terms, at the late stage of the proceedings, with such an immense mass of documents, which in any case were in the public domain and could thus be consulted if necessary, the Court had decided that it was in the interests of the good administration of justice that the CD-ROM be withdrawn. By a letter dated 16 March 2006, the Agent of Bosnia and Herzegovina withdrew the CD-ROM which it had submitted on 7 March 2006.

On 17 March 2006, Bosnia and Herzegovina submitted a map for use during the statement to be made by one of its experts on the morning of 20 March 2006. On 20 March 2006, Serbia and Montenegro produced a folder of further documents to be used in the examination of that expert. Serbia and Montenegro objected strongly to the production of the documents at such a late stage since its counsel would not have time to prepare for cross-examination. On 20 March 2006, the Court decided that the map submitted on 17 March 2006 could not be used during the statement of the expert. Moreover, having consulted both Parties, the Court decided to cancel the morning sitting and instead hear the expert during an afternoon sitting in order to allow Serbia and Montenegro to be ready for cross-examination.

On 20 March 2006, Serbia and Montenegro informed the Court that one of the witnesses it had intended to call finally would not be giving evidence.

The following experts were called by Bosnia and Herzegovina and made their statements at public sittings on 17 and 20 March 2006: Mr. András J. Riedlmayer and General Sir Richard Dannatt. The experts were examined by
counsel for Bosnia and Herzegovina and cross-examined by counsel for Serbia and Montenegro. The experts were subsequently re-examined by counsel for Bosnia and Herzegovina. Questions were put to Mr. Riedlmayer by Judges Kreča, Tomka, Simma and the Vice-President and replies were given orally. Questions were put to General Dannatt by the President, Judge Koroma and Judge Tomka and replies were given orally.

58. The following witnesses and witness-expert were called by Serbia and Montenegro and gave evidence at public sittings on 23, 24, 27 and 28 March 2006: Mr. Vladimir Lukić; Mr. Vojmir Popović; General Sir Michael Rose; Mr. Jean-Paul Sardon (witness-expert); Mr. Dušan Mihajlović; Mr. Vladimir Milević; Mr. Dragojub Mićunović. The witnesses and witness-expert were examined by counsel for Serbia and Montenegro and cross-examined by counsel for Bosnia and Herzegovina. General Rose, Mr. Mihajlović and Mr. Milević were subsequently re-examined by counsel for Serbia and Montenegro. Questions were put to Mr. Lukić by Judges Ranjeva, Simma, Tomka and Bennouna and replies were given orally. Questions were put to General Rose by the Vice-President and Judges Owada and Simma and replies were given orally.

59. With the exception of General Rose and Mr. Jean-Paul Sardon, the above-mentioned witnesses called by Serbia and Montenegro gave their evidence in Serbian and, in accordance with Article 39, paragraph 3, of the Statute and Article 70, paragraph 2, of the Rules of Court, Serbia and Montenegro made the necessary arrangements for interpretation into one of the official languages of the Court and the Registry verified this interpretation. Mr. Stojanović conducted his examination of Mr. Dragoljub Mićunović in Serbian in accordance with the exchange of correspondence between Serbia and Montenegro and the Court on 21 and 22 February 2006 (see paragraph 49 above).

60. In the course of the hearings, questions were put by Members of the Court, to which replies were given orally and in writing, pursuant to Article 61, paragraph 4, of the Rules of Court.

61. By a letter of 8 May 2006, the Agent of Bosnia and Herzegovina requested the Court to allow the Deputy Agent to take the floor briefly on 9 May 2006, in order to correct an assertion about one of the counsel and of one of the experts called by Bosnia and Herzegovina which had been made by Serbia and Montenegro in its oral argument. By a letter dated 9 May 2006, the Agent of Serbia and Montenegro communicated the views of his Government on that matter. On 9 May 2006, the Court decided, in the particular circumstances of the case, to authorize the Deputy Agent of Bosnia and Herzegovina to make a very brief statement regarding the assertion made about its counsel.

62. By a letter dated 3 May 2006, the Agent of Bosnia and Herzegovina informed the Court that there had been a number of errors in references included in its oral argument presented on 2 March 2006 and provided the Court with the corrected references. By a letter dated 8 May 2006, the Agent of Serbia and Montenegro, “in light of the belated corrections by the Applicant, and for the sake of the equality between the parties”, requested the Court to accept a paragraph of its draft oral argument of 2 May 2006 which responded to one of the corrections made by Bosnia and Herzegovina but had been left out of the final version of its oral argument “in order to fit the schedule of [Serbia and Montenegro’s] presentations”. By a letter dated 7 June 2006, the Parties were informed that the Court had taken due note of both the explana-

63. In January 2007, Judge Parra-Aranguren, who had attended the oral proceedings in the case, and had participated in part of the deliberation, but had for medical reasons been prevented from participating in the later stages thereof, informed the President of the Court, pursuant to Article 24, paragraph 1, of the Statute, that he considered that he should not take part in the decision of the case. The President took the view that the Court should respect and accept Judge Parra-Aranguren’s position, and so informed the Court.

64. In its Application, the following requests were made by Bosnia and Herzegovina:

(a) that Yugoslavia (Serbia and Montenegro) has breached, and is continuing to breach, its legal obligations toward the People and State of Bosnia and Herzegovina under Articles I, II (a), II (b), II (c), II (d), III (a), III (b), III (c), III (d), III (e), IV and V of the Genocide Convention;

(b) that Yugoslavia (Serbia and Montenegro) has violated and is continuing to violate its legal obligations toward the People and State of Bosnia and Herzegovina under the four Geneva Conventions of 1949, their Additional Protocol I of 1977, the customary international laws of war including the Hague Regulations on Land Warfare of 1907, and other fundamental principles of international humanitarian law;

(c) that Yugoslavia (Serbia and Montenegro) has violated and continues to violate Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28 of the Universal Declaration of Human Rights with respect to the citizens of Bosnia and Herzegovina;

(d) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the citizens of Bosnia and Herzegovina, and is continuing to do so;

(e) that in its treatment of the citizens of Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) has violated, and is continuing to violate, its solemn obligations under Articles 1 (3), 55 and 56 of the United Nations Charter;

(f) that Yugoslavia (Serbia and Montenegro) has used and is continuing to use force and the threat of force against Bosnia and Herzegovina in violation of Articles 2 (1), 2 (2), 2 (3), 2 (4) and 33 (1), of the United Nations Charter;

(g) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has used and is using force and the threat of force against Bosnia and Herzegovina;
that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has violated and is violating the sovereignty of Bosnia and Herzegovina by:

- armed attacks against Bosnia and Herzegovina by air and land;
- aerial trespass into Bosnian airspace;
- efforts by direct and indirect means to coerce and intimidate the Government of Bosnia and Herzegovina;

that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has intervened and is intervening in the internal affairs of Bosnia and Herzegovina;

that Yugoslavia (Serbia and Montenegro), in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Bosnia and Herzegovina by means of its agents and surrogates, has violated and is violating its express charter and treaty obligations to Bosnia and Herzegovina and, in particular, its charter and treaty obligations under Article 2 (4), of the United Nations Charter, as well as its obligations under general and customary international law;

that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right to defend itself and its people under United Nations Charter Article 51 and customary international law, including by means of immediately obtaining military weapons, equipment, supplies and troops from other States;

that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right under United Nations Charter Article 51 and customary international law to request the immediate assistance of any State to come to its defence, including by military means (weapons, equipment, supplies, troops, etc.);

that Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

that all subsequent Security Council resolutions that refer to or reaffirm resolution 713 (1991) must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

that Security Council resolution 713 (1991) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24 (1) and 51 of the United Nations Charter and in accordance with the customary doctrine of ultra vires;

that pursuant to the right of collective self-defence recognized by United Nations Charter Article 51, all other States parties to the Charter have the right to come to the immediate defence of Bosnia and Herzegovina — at its request — including by means of immediately providing it with weapons, military equipment and supplies, and armed forces (soldiers, sailors, air-people, etc.);

that Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations, and is under a particular duty to cease and desist immediately:

- from its systematic practice of so-called ‘ethnic cleansing’ of the citizens and sovereign territory of Bosnia and Herzegovina;
- from the murder, summary execution, torture, rape, kidnapping, mayhem, wounding, physical and mental abuse, and detention of the citizens of Bosnia and Herzegovina;
- from the wanton devastation of villages, towns, districts, cities, and religious institutions in Bosnia and Herzegovina;

that Security Council resolution 713 (1991) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24 (1) and 51 of the United Nations Charter and in accordance with the customary doctrine of ultra vires;

that Yugoslavia (Serbia and Montenegro) has an obligation to pay Bosnia and Herzegovina, in its own right and as parens patriae for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court. Bosnia and Herzegovina reserves the right to introduce to the Court a precise evaluation of the damages caused by Yugoslavia (Serbia and Montenegro)."
On behalf of the Government of Serbia and Montenegro:

1. That the Federal Republic of Yugoslavia, Serbia and Montenegro, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;

2. That the Federal Republic of Yugoslavia, Serbia and Montenegro, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;

3. That the Federal Republic of Yugoslavia, Serbia and Montenegro, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by committing genocide;

4. That the Federal Republic of Yugoslavia, Serbia and Montenegro, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by failing to prevent and to punish acts of genocide;

5. That the Federal Republic of Yugoslavia, Serbia and Montenegro, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide committed by its organs.

The Republic of Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare:

1. In view of the fact that no obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide have been violated with regard to Muslims and Croats,

2. That the Federal Republic of Yugoslavia, Serbia and Montenegro, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;

3. That the Federal Republic of Yugoslavia, Serbia and Montenegro, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by committing genocide;

4. That the Federal Republic of Yugoslavia, Serbia and Montenegro, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by failing to prevent and to punish acts of genocide;

5. That the Federal Republic of Yugoslavia, Serbia and Montenegro, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide committed by its organs.

The Republic of Bosnia and Herzegovina also respectfully draws the attention of the Court to the fact that it has not reiterated, at this point, several of the requests it made in its Application, on the formal assumption that the Federal Republic of Yugoslavia (Serbia and Montenegro) has submitted a counter-Memorial on the Prevention and Punishment of the Crime of Genocide. If the Respondent were to reconsider its acceptance of the jurisdiction of the Court under the terms of that Convention — which it is, in any event, not entitled to do — the Government of Bosnia and Herzegovina reserves its right to invoke also all or some of its previous rulings and requests.
therefore the Court rejects all claims of the Applicant; and

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against the Serbs in Bosnia and Herzegovina and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,
   — because it has incited acts of genocide by the ‘Islamic Declaration’, and in particular by the position contained in it that “there can be no peace or coexistence between “Islamic faith” and “non-Islamic” social and political institutions’
   — because it has incited acts of genocide by the Novi Vox, paper of the Muslim youth, and in particular by the verses of a ‘Patriotic Song’ which read as follows:
     ‘Dear mother, I’m going to plant willows, We’ll hang Serbs from them.
     Dear mother, I’m going to sharpen knives, We’ll soon fill pits again’;
   — because it has incited acts of genocide by the paper Zivaj od Bosne, and in particular by the sentence in an article published in it that ‘Each Muslim must name a Serb and take oath to kill him’;
   — because public calls for the execution of Serbs were broadcast on radio ‘Hajat’ and thereby acts of genocide were incited;
   — because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;
   — because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial;

4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;

5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future;

6. Bosnia and Herzegovina is bound to eliminate all consequences of the violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and provide adequate compensation.”

On behalf of the Government of Bosnia and Herzegovina,
in the Reply:

“Therefore the Applicant persists in its claims as presented to this Court on 14 April 1994, and recapitulates its Submissions in their entirety.
for the proposition that genocidal acts have been committed against Serbs in Bosnia and Herzegovina. There is no basis in fact and no basis in law for the proposition that any such acts, if proven, would have been committed under the responsibility of Bosnia and Herzegovina or that such acts, if proven, would be attributable to Bosnia and Herzegovina. Also, there is no basis in fact and no basis in law for the proposition that Bosnia and Herzegovina has violated any of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide. On the contrary, Bosnia and Herzegovina has continuously done everything within its possibilities to adhere to its obligations under the Convention, and will continue to do so;

10. For these reasons, Bosnia and Herzegovina requests the International Court of Justice to reject the counter-claims submitted by the Respondent in its Counter-Memorial of 23 July 1997.”

On behalf of the Government of Serbia and Montenegro, in the Rejoinder:

“The Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

1. In view of the fact that no obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide have been violated with regard to Muslims and Croats,
— since the acts alleged by the Applicant have not been committed at all,
or not to the extent and in the way alleged by the Applicant, or
— if some have been committed, there was absolutely no intention of committing genocide, and/or
— they have not been directed specifically against the members of one ethnic or religious group, i.e. they have not been committed against individuals just because they belong to some ethnic or religious group,
consequently they cannot be qualified as acts of genocide or other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and/or

2. In view of the fact that the acts alleged by the Applicant in its submissions cannot be attributed to the Federal Republic of Yugoslavia,
— since they have not been committed by the organs of the Federal Republic of Yugoslavia,
— since they have not been committed on the territory of the Federal Republic of Yugoslavia,
— since they have not been committed by the order or under control of the organs of the Federal Republic of Yugoslavia,
— since there are no other grounds based on the rules of international law to consider them as acts of the Federal Republic of Yugoslavia,

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against Serbs in Bosnia and Herzegovina and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,
— because it has incited acts of genocide by the ‘Islamic Declaration’, and in particular by the position contained in it that ‘there can be no peace or coexistence between “Islamic faith” and “non-Islamic” social and political institutions’,
— because it has incited acts of genocide by the Novi Vox, paper of the Muslim youth, and in particular by the verses of a ‘Patriotic Song’ which read as follows:
‘Dear mother, I’m going to plant willows, We’ll hang Serbs from them. Dear mother, I’m going to sharpen knives, We’ll soon fill pits again’;
— because it has incited acts of genocide by the paper Zmaj od Bosne, and in particular by the sentence in an article published in it that ‘Each Muslim’ must name a Serb and take oath to kill him;
— because public calls for the execution of Serbs were broadcast on radio ‘Hajat’ and thereby acts of genocide were incited;
— because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (enumerated in Article III), against Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;
— because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (enumerated in Article III), against Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial;

4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;

5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future;

6. Bosnia and Herzegovina is bound to eliminate all the consequences of violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and to provide adequate compensation.”

66. At the oral proceedings, the following final submissions were presented by the Parties: On behalf of the Government of Bosnia and Herzegovina, at the hearing of 24 April 2006:
“Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare:

1. That Serbia and Montenegro, through its organs or entities under its control, has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by intentionally destroying in part the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population, by
   — killing members of the group;
   — causing serious bodily or mental harm to members of the group;
   — deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   — imposing measures intended to prevent births within the group;
   — forcibly transferring children of the group to another group;

2. Subsidiarily:
   (i) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by complicity in genocide as defined in paragraph 1, above; and/or
   (ii) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals, groups and entities engaged in acts of genocide, as defined in paragraph 1 above;

3. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide and by inciting to commit genocide, as defined in paragraph 1 above;

4. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed to prevent genocide;

5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;

6. That the violations of international law set out in submissions 1 to 5 constitute wrongful acts attributable to Serbia and Montenegro which entail its international responsibility, and, accordingly,
   (a) that Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;

7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court.”

On behalf of the Government of Serbia and Montenegro, at the hearing of 9 May 2006:

“Serbia and Montenegro asks the Court to adjudge and declare:
   — that this Court has no jurisdiction because the Respondent had no access to the Court at the relevant moment; or, in the alternative;
   — that this Court has no jurisdiction over the Respondent because the Respondent never remained or became bound by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, and because there is no other ground on which jurisdiction over the Respondent could be based.

In case the Court determines that jurisdiction exists Serbia and Montenegro asks the Court to adjudge and declare:
   — That the requests in paragraphs 1 to 6 of the Submissions of Bosnia...
and Herzegovina relating to alleged violations of the obligations under
the Convention on the Prevention and Punishment of the Crime of
Genocide be rejected as lacking a basis either in law or in fact.

— In any event, that the acts and/or omissions for which the respondent
State is alleged to be responsible are not attributable to the respondent
State. Such attribution would necessarily involve breaches of the law
applicable in these proceedings.

— Without prejudice to the foregoing, that the relief available to the
applicant State in these proceedings, in accordance with the appro-
priate interpretation of the Convention on the Prevention and
Punishment of the Crime of Genocide, is limited to the rendering of a
declaratory judgment.

— Further, without prejudice to the foregoing, that any question of legal
responsibility for alleged breaches of the Orders for the indication of
provisional measures, rendered by the Court on 8 April 1993 and
13 September 1993, does not fall within the competence of the Court to
provide appropriate remedies to an applicant State in the context of
contentious proceedings, and, accordingly, the request in paragraph 7
of the Submissions of Bosnia and Herzegovina should be rejected."

* * *

II. IDENTIFICATION OF THE RESPONDENT PARTY

67. The Court has first to consider a question concerning the identifi-
cation of the Respondent Party before it in these proceedings. After
the close of the oral proceedings, by a letter dated 3 June 2006, the President
of the Republic of Serbia informed the Secretary-General of the United
Nations that, following the Declaration of Independence adopted by the
National Assembly of Montenegro on 3 June 2006, “the membership of
the state union Serbia and Montenegro in the United Nations, including
all organs and organisations of the United Nations system, [would be] continued by the Republic of Serbia on the basis of Article 60 of the Con-
stitutional Charter of Serbia and Montenegro”. He further stated that “in
the United Nations the name ‘Republic of Serbia’ [was] to be henceforth
used instead of the name ‘Serbia and Montenegro’ ” and added that the
Republic of Serbia “remain[ed] responsible in full for all the rights and
obligations of the state union of Serbia and Montenegro under the UN
Charter”.

68. By a letter of 16 June 2006, the Minister for Foreign Affairs of the
Republic of Serbia informed the Secretary-General, inter alia, that “[t]he
Republic of Serbia continue[d] to exercise its rights and honour its com-
mittments deriving from international treaties concluded by Serbia and
Montenegro” and requested that “the Republic of Serbia be considered a
party to all international agreements in force, instead of Serbia and Mon-
tenegro”. By a letter addressed to the Secretary-General dated 30 June
2006, the Minister for Foreign Affairs confirmed the intention of the
Republic of Serbia to continue to exercise its rights and honour its com-
mittments deriving from international treaties concluded by Serbia and
Montenegro. He specified that “all treaty actions undertaken by Serbia
and Montenegro would continue in force with respect to the Republic of
Serbia with effect from 3 June 2006”, and that, “all declarations,
reservations and notifications made by Serbia and Montenegro would
be maintained by the Republic of Serbia until the Secretary-General,
as depositary, were duly notified otherwise”.}

69. On 28 June 2006, by its resolution 60/264, the General Assembly
admitted the Republic of Montenegro (hereinafter “Montenegro”) as a
new Member of the United Nations.

70. By letters dated 19 July 2006, the Registrar requested the Agent of
Bosnia and Herzegovina, the Agent of Serbia and Montenegro and the
Foreign Minister of Montenegro to communicate to the Court the views
of their Governments on the consequences to be attached to the above-
mentioned developments in the context of the case. By a letter dated
26 July 2006, the Agent of Serbia and Montenegro explained that, in his
Government’s opinion, “there was continuity between Serbia and Mon-
tenegro and the Republic of Serbia (on the grounds of Article 60 of the
Constitutional Charter of Serbia and Montenegro)”. He noted that the
entity which had been Serbia and Montenegro “had been replaced by
two distinct States, one of them [was] Serbia, the other [was] Monte-
negro”. In those circumstances, the view of his Government was that
“the Applicant had first to take a position, and to decide whether it
would maintain its original claim encompassing both Serbia and Montenegro, or whether it chose to do otherwise”.

71. By a letter to the Registrar dated 16 October 2006, the Agent of
Bosnia and Herzegovina referred to the letter of 26 July 2006 from the
Agent of Serbia and Montenegro, and observed that Serbia’s definition
of itself as the continuator of the former Serbia and Montenegro had
been accepted both by Montenegro and the international community. He
continued however as follows: “this acceptance cannot have, and does not have, any effect on the applicable rules of state responsibility. Obviously, these cannot be altered bilaterally or retroactively. At the time when genocide was committed and at the time of the initiation of this case, Serbia and Montenegro constituted a single state. Therefore, Bosnia and Herzegovina is of the opinion that both Serbia and Montenegro, jointly and severally, are responsible for the unlawful conduct that constitute the cause of action in this case.”

72. By a letter dated 29 November 2006, the Chief State Prosecutor of
Montenegro, after indicating her capacity to act as legal representative of
the Republic of Montenegro, referred to the letter from the Agent of
Bosnia and Herzegovina dated 16 October 2006, quoted in the previous paragraph, expressing the view that “both Serbia and Montenegro, jointly and severally, are responsible for the unlawful conduct that constitute[s] the cause of action in this case”. The Chief State Prosecutor stated that the allegation concerned the liability in international law of the sovereign State of Montenegro, and that Montenegro regarded it as an attempt to have it become a participant in this way, without its consent, “i.e. to become a respondent in this procedure”. The Chief State Prosecutor drew attention to the fact that, following the referendum held in Montenegro on 21 May 2006, the National Assembly of Montenegro had adopted a decision pronouncing the independence of the Republic of Montenegro. In the view of the Chief State Prosecutor, the Republic of Montenegro had become “an independent state with full international legal personality within its existing administrative borders”, and she continued:

“The issue of international-law succession of [the] State union of Serbia and Montenegro is regulated in Article 60 of [the] Constitutional Charter, and according to [that] Article the legal successor of [the] State union of Serbia and Montenegro is the Republic of Serbia, which, as a sovereign state, [has] become [the] follower of all international obligations and successor in international organizations.”

The Chief State Prosecutor concluded that in the dispute before the Court, “the Republic of Montenegro may not have [the] capacity of respondent, [for the] above mentioned reasons”.

73. By a letter dated 11 December 2006, the Agent of Serbia referred to the letters from the Applicant and from Montenegro described in paragraphs 71 and 72 above, and observed that there was “an obvious contradiction between the position of the Applicant on the one hand and the position of Montenegro on the other regarding the question whether these proceedings may or may not yield a decision which would result in the international responsibility of Montenegro” for the unlawful conduct invoked by the Applicant. The Agent stated that “Serbia is of the opinion that this issue needs to be resolved by the Court”.

74. The Court observes that the facts and events on which the final submissions of Bosnia and Herzegovina are based occurred at a period of time when Serbia and Montenegro constituted a single State.

75. The Court notes that Serbia has accepted “continuity between Serbia and Montenegro and the Republic of Serbia” (paragraph 70 above), and has assumed responsibility for “its commitments deriving from international treaties concluded by Serbia and Montenegro” (paragraph 68 above), thus including commitments under the Genocide Convention. Montenegro, on the other hand, does not claim to be the continuator of Serbia and Montenegro.

76. The Court recalls a fundamental principle that no State may be subject to its jurisdiction without its consent; as the Court observed in the case of Certain Phosphate Lands in Nauru (Nauru v. Australia), the Court’s “jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it…” (Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 260, para. 53). In its Judgment of 11 July 1996 (see paragraph 12 above), the significance of which will be explained below, the Court found that such consent existed, for the purposes of the present case, on the part of the FRY, which subsequently assumed the name of Serbia and Montenegro, without however any change in its legal personality. The events related in paragraphs 67 to 69 above clearly show that the Republic of Montenegro does not continue the legal personality of Serbia and Montenegro; it cannot therefore have acquired, on that basis, the status of Respondent in the present case. It is also clear from the letter of 29 November 2006 quoted in paragraph 72 above that it does not give its consent to the jurisdiction of the Court over it for the purposes of the present dispute. Furthermore, the Applicant did not in its letter of 16 October 2006 assert that Montenegro is still a party to the present case; it merely emphasized its views as to the joint and several liability of Serbia and of Montenegro.

77. The Court thus notes that the Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent. Accordingly, any findings that the Court may make in the operative part of the present Judgment are to be addressed to Serbia.

78. That being said, it has to be borne in mind that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro.

79. The Court observes that the Republic of Montenegro is a party to the Genocide Convention. Parties to that Convention have undertaken the obligations flowing from it, in particular the obligation to co-operate in order to punish the perpetrators of genocide.

III. THE COURT’S JURISDICTION

1) Introduction: The Jurisdictional Objection of Serbia and Montenegro

80. Notwithstanding the fact that in this case the stage of oral proceedings on the merits has been reached, and the fact that in 1996 the Court gave a judgment on preliminary objections to its jurisdiction (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 595, hereinafter “the 1996 Judgment”), an important issue of a jurisdictional character has
argument to the Court on that question. It has however at the same
time been argued by the Applicant that the Court may not deal with the ques-
tion of jurisdiction at this stage of the proceedings. These contentions will be examined below.

83. Subsequently, on 15 December 2004, the Court delivered judgment in eight cases brought by the Applicant against citizens of the former Yugoslavia (hereinafter "the former Yugoslavia") against the Applicant, as well as one case brought by the Applicant against the Republic of Serbia on 28 March 2005, in each of these cases, the Court held that the Applicant had no jurisdiction over the case. In substance, the central question now raised by the Respondent is whether at the time of the filing of the Application instituting the present proceedings the Respondent was or was not the continuator of the former Yugoslavia. The Respondent now contends that it was not a continuator State, and that therefore not only was it not a party to the Genocide Convention, but it was not then a party to the Statute of the Court by virtue of membership in the United Nations ; and that, not being such a party, it did not have access to the Court, with the consequence that the Court had no jurisdiction over it.

84. Both Parties recognize that each of these Judgments has the force of res judicata in the specific case for the purposes of the present proceedings. In the circumstances, the Court is bound to apply them, in light of the legal consequences of the new development since 1 November 2000, that "Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Genocide Convention at the relevant time."

85. The Respondent accordingly raised, as an "issue of procedure", the question whether the Respondent had access to the Court at the date the proceedings were instituted ; and because the questions raised by the Respondent had already been resolved by the 1990 Judgment, with the authority of res judicata.
66. As a result of the Initiative of the Respondent (paragraph 81 above), and its subsequent argument on what it has referred to as an “issue of procedure”, the Court has before it what is essentially an objection by the Respondent to its jurisdiction, which is preliminary in the sense that, if it is upheld, the Court will not proceed to determine the merits. The Applicant objects in turn to the Court examining further the Respondent’s jurisdictional objection. These matters evidently require to be examined as preliminary points, and it was for this reason that the Court instructed the Registrar to write to the Parties the letter of 12 June 2003, referred to in paragraph 82 above. The letter was intended to convey that the Court would listen to any argument raised by the Initiative which might be put to it, but not as an indication of what its ruling might be on any such arguments.

67. In order to make clear the background to these issues, the Court will first briefly review the history of the relationship between the Respondent and the United Nations during the period from the break-up of the SFRY in 1992 to the admission of Serbia and Montenegro (then called the Federal Republic of Yugoslavia) to the United Nations on 1 November 2000. The previous decisions of the Court in this case, and in the Application for Revision case, have been briefly recalled above (paragraphs 4, 8, 12 and 31). They will be referred to more fully below (paragraphs 105-113) for the purpose of (in particular) an examination of the contentions of Bosnia and Herzegovina on the question of res judicata.

* * *

1. The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally,

    Remaining bound by all obligations to international organizations and institutions whose member it is . . . .” (United Nations doc. A/46/915, Ann. II).

90. An official Note dated 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General of the United Nations, stated inter alia that:


Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfill all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia.” (United Nations doc. A/46/915, Ann. I.)

91. On 30 May 1992, the Security Council adopted resolution 757 (1992), in which, inter alia, it noted that “the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted”.  

92. On 19 September 1992, the Security Council adopted resolution 777 (1992) which read as follows:

“The Security Council,

Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,
Considering that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,

Recalling in particular resolution 757 (1992) which notes that the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted,

1. Considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. Decides to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly.

The resolution was adopted by 12 votes in favour, none against, and 3 abstentions.

93. On 22 September 1992 the General Assembly adopted resolution 47/1, according to which:

“While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer participate in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.

On the other hand, the resolution neither terminates nor suspends Yugoslavia’s membership in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign ‘Yugoslavia’. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1.” (United Nations doc. A/47/485; emphasis in the original.)

General Assembly resolution 47/1, they stated their understanding as follows: “At this moment, there is no doubt that the Socialist Federal Republic of Yugoslavia is not a member of the United Nations any more. At the same time, the Federal Republic of Yugoslavia is clearly not yet a member.” They concluded that “[t]he flag flying in front of the United Nations and the name-plaque bearing the name ‘Yugoslavia’ do not represent anything or anybody any more” and “kindly request[ed] that [the Secretary-General] provide a legal explanatory statement concerning the questions raised” (United Nations doc. A/47/474).
96. On 29 April 1993, the General Assembly, upon the recommendation contained in Security Council resolution 821 (1993) (couched in terms similar to those of Security Council resolution 777 (1992)), adopted resolution 47/229 in which it decided that “the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council”.

97. In its Judgments in the cases concerning the Legality of Use of Force (paragraph 83 above), the Court commented on this sequence of events by observing that “all these events testify to the rather confused and complex state of affairs that obtained within the United Nations surrounding the issue of the legal status of the Federal Republic of Yugoslavia in the Organization during this period” (Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 308, para. 73), and earlier the Court, in another context, had referred to the “sui generis position which the FRY found itself in” during the period between 1992 to 2000 (loc. cit., citing I.C.J. Reports 2003, p. 31, para. 71).

98. This situation, however, came to an end with a new development in 2000. On 24 September 2000, Mr. Koštunica was elected President of the FRY. In that capacity, on 27 October 2000 he sent a letter to the Secretary-General requesting admission of the FRY to membership in the United Nations, in the following terms:

“In the wake of fundamental democratic changes that took place in the Federal Republic of Yugoslavia, in the capacity of President, I have the honour to request the admission of the Federal Republic of Yugoslavia to the United Nations in light of the implementation of the Security Council resolution 777 (1992).” (United Nations doc. A/55/528-S/2000/1043; emphasis added.)


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(3) The Response of Bosnia and Herzegovina

100. The Court will now consider the Applicant’s response to the jurisdictional objection raised by the Respondent, that is to say the contention of Bosnia and Herzegovina that the Court should not examine the question, raised by the Respondent in its Initiative (paragraph 81 above), of the status of the Respondent at the date of the filing of the Application instituting proceedings. It is first submitted by Bosnia and Herzegovina that the Respondent was under a duty to raise the issue of whether the FRY (Serbia and Montenegro) was a Member of the United Nations at the time of the proceedings on the preliminary objections, in 1996, and that since it did not do so, the principle of res judicata, attaching to the Court’s 1996 Judgment on those objections, prevents it from reopening the issue. Secondly, the Applicant argues that the Court itself, having decided in 1996 that it had jurisdiction in the case, would be in breach of the principle of res judicata if it were now to decide otherwise, and that the Court cannot call in question the authority of its decisions as res judicata.

101. The first contention, as to the alleged consequences of the fact that Serbia did not raise the question of access to the Court under Article 35 at the preliminary objection stage, can be dealt with succinctly. Bosnia and Herzegovina has argued that to uphold the Respondent’s objection “would mean that a respondent, after having asserted one or more preliminary objections, could still raise others, to the detriment of the effective administration of justice, the smooth conduct of proceedings, and, in the present case, the doctrine of res judicata”. It should however be noted that if a party to proceedings before the Court chooses not to raise an issue of jurisdiction by way of the preliminary objection procedure under Article 79 of the Rules, that party is not necessarily thereby debarred from raising such issue during the proceedings on the merits of the case. As the Court stated in the case of Avena and Other Mexican Nationals (Mexico v. United States of America),

“There are of course circumstances in which the party failing to put forward an objection to jurisdiction might be held to have acquiesced in jurisdiction (Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 52, para. 13). However, apart from such circumstances, a party failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but can still argue the objection along with the merits.” (Judgment, I.C.J. Reports 2004, p. 29, para. 24).

This first contention of Bosnia and Herzegovina must thus be understood as a claim that the Respondent, by its conduct in relation to the case, including the failure to raise the issue of the application of Article 35 of the Statute, by way of preliminary objection or otherwise, at an earlier stage of the proceedings, should be held to have acquiesced in jurisdiction. This contention is thus parallel to the argument mentioned above (paragraph 85), also advanced by Bosnia and Herzegovina, that the Respondent is debarred from asking the Court to examine that issue for
reasons of good faith, including estoppel and the principle *allegans contraria nemo audietur*.

102. The Court does not however find it necessary to consider here whether the conduct of the Respondent could be held to constitute an acquiescence in the jurisdiction of the Court. Such acquiescence, if established, might be relevant to questions of consensual jurisdiction, and in particular jurisdiction *ratione materiae* under Article IX of the Genocide Convention, but not to the question whether a State has the capacity under the Statute to be a party to proceedings before the Court.

The latter question may be regarded as an issue prior to that of jurisdiction *ratione personae*, or as one constitutive element within the concept of jurisdiction *ratione personae*. Either way, unlike the majority of questions of jurisdiction, it is not a matter of the consent of the parties. As the Court observed in the cases concerning the *Legality of Use of Force*,

“a distinction has to be made between a question of jurisdiction that relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent. The question is whether as a *matter of law* Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time when it instituted proceedings in these cases. Since that question is independent of the views or wishes of the Parties, even if they were now to have arrived at a shared view on the point, the Court would not have to accept that view as necessarily the correct one. The function of the Court to enquire into the matter and reach its own conclusion is thus mandatory upon the Court irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court depends on consent.” (*Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 295, para. 36; emphasis in the original.)

103. It follows that, whether or not the Respondent should be held to have acquiesced in the jurisdiction of the Court in this case, such acquiescence would in no way debar the Court from examining and ruling upon the question stated above. The same reasoning applies to the argument that the Respondent is estopped from raising the matter at this stage, or debarred from doing so by considerations of good faith. All such considerations can, at the end of the day, only amount to attributing to the Respondent an implied acceptance, or deemed consent, in relation to the jurisdiction of the Court; but, as explained above, *ad hoc* consent of a party is distinct from the question of its capacity to be a party to proceedings before the Court.

104. However Bosnia and Herzegovina’s second contention is that, objectively and apart from any effect of the conduct of the Respondent, the question of the application of Article 35 of the Statute in this case has already been resolved as a matter of *res judicata*, and that if the Court were to go back on its 1996 decision on jurisdiction, it would disregard fundamental rules of law. In order to assess the validity of this contention, the Court will first review its previous decisions in the present case in which its jurisdiction, or specifically the question whether Serbia and Montenegro could properly appear before the Court, has been in issue.

* * *

(4) Relevant Past Decisions of the Court

105. On 8 April 1993, the Court made an Order in this case indicating certain provisional measures. In that Order the Court briefly examined the circumstances of the break-up of the SFRY, and the claim of the Respondent (then known as “Yugoslavia (Serbia and Montenegro)”) to continuity with that State, and consequent entitlement to continued membership in the United Nations. It noted that “the solution adopted within the United Nations was “not free from legal difficulties”, but concluded that “the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14 para. 18). This conclusion was based in part on a provisional view taken by the Court as to the effect of the proviso to Article 35, paragraph 2, of the Statute (*ibid.*, para. 19). The Order contained the reservation, normally included in orders on requests for provisional measures, that “the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case . . . and leaves unaffected the right of the Governments of Bosnia-Herzegovina and Yugoslavia to submit arguments in respect of [that question]” (*ibid.*, p. 23, para. 51). It is therefore evident that no question of *res judicata* arises in connection with the Order of 8 April 1993. A further Order on provisional measures was made on 13 September 1993, but contained nothing material to the question now being considered.

106. In 1995 the Respondent raised seven preliminary objections (one of which was later withdrawn), three of which invited the Court to find that it had no jurisdiction in the case. None of these objections were however founded on a contention that the FRY was not a party to the Statute at the relevant time; that was not a contention specifically advanced in the proceedings on the preliminary objections. At the time of those
proceedings, the FRY was persisting in the claim, that it was continuing the membership of the former SFRY in the United Nations; and while the FRY was itself a Member of the United Nations on 1 November 2000, it had not been admitted to membership within the United Nations before 27 April 1992, contrary to the preliminary objections of the Federal Republic of Yugoslavia in the case concerning the legality of the Use of Force in 1999 (Belgium v. Federal Republic of Yugoslavia, Preliminary Objections, Judgment, I.C.J. Reports 2001, p. 299, para. 73). Neither party raised the matter before the Court:

107. By the 1996 Judgment, the Court rejected the preliminary objections of the Respondent, and found that the Application was admissible, and stated that the FRY could not be a Member of the United Nations until it had been admitted to membership within the United Nations. The FRY was not a party to the 1945 United Nations Charter at the time of the 1996 Judgment, and the Court did not consider that the admission of the FRY to membership in the United Nations as a new Member on 1 November 2000 necessarily implied that it was not a Member of the United Nations in 1996. In reality, it bases its Application for revision on the Court's decision that it was not a Member of the United Nations in 1996. Essentially the contention of the FRY was that its admission to membership in 1996 did not imply that it was not a Member of the United Nations in 1996. The FRY therefore found the Application for revision inadmissible. However, as the Court has observed in the cases concerning Legality of the Use of Force in 1999 (Belgium v. Federal Republic of Yugoslavia, Preliminary Objections, Judgment, I.C.J. Reports 2001, p. 299, para. 73).

108. However, on 24 April 2001 Serbia and Montenegro (then known as the Federal Republic of Yugoslavia) filed an Application instituting proceedings seeking revision of the 1996 Judgment on the ground that the FRY was a Member of the United Nations in 1996. In reality, it bases its Application for revision on the Court's decision that it was not a Member of the United Nations in 1996. Essentially the contention of the FRY was that its admission to membership in 1996 did not imply that it was not a Member of the United Nations in 1996. The FRY therefore found the Application for revision inadmissible. However, as the Court has observed in the cases concerning Legality of the Use of Force in 1999 (Belgium v. Federal Republic of Yugoslavia, Preliminary Objections, Judgment, I.C.J. Reports 2001, p. 299, para. 73).
under the Genocide Convention, if it did not, in its Judgment on the Application for revision, regard the alleged decisive facts specified by Serbia and Montenegro as ‘regard the alleged “decisive facts” specified by Serbia and Montenegro as “facts that existed in 1996’ for the purpose of Article 61. The Applicant submits that, like its judgments on the merits, “the Court’s decisions on jurisdiction are res judicata”. It further observes that, pursuant to Article 60 of the Statute, the Court’s request for interpretation of the Charter of the United Nations, the underlying character and purposes of the principle of res judicata is to examine its jurisdiction, according to Article 38 of its Statute. That principle signifies that the decisions of the Court are not only binding between the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose. Article 61 provides close limits of time and substance on the ability of the parties to seek the revision of the judgment. The Court stressed those limits in 2003 when it found inadmissible the Application made by Serbia and Montenegro for revision of the 1996 Judgment in the Application for revision of the 1996 Judgment, whereby the Court found that it had jurisdiction over the 1996 Judgment.

115. There is no dispute between the Parties as to the existence of the principle of res judicata even if they interpret it differently as regards the applicability, in this case, of Articles 59, 60 and 61 of the Statute. The Applicant submits that its Judgment of 3 February 2003. The Respondent contends that Serbia and Montenegro had not been a party to the Statute or to the Genocide Convention in 1996. „(v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 313, para. 87.) It follows from the foregoing that it has not been established that the parties were bound by the decisions of the Court, in the revision proceedings, as to what that situation actually was. (Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 314, para. 89.)

116. Two purposes, one general, the other specific, underlie the principle of res judicata, internationally as nationally. First, the stability of legal relations requires that litigation come to an end. The Court’s function, according to Article 38 of its Statute, is to “decide” that is, to bring to an end “such disputes as are submitted to it” (Article 61, p. 1, para. 1).
lates this finality of judgments. Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.

117. It has however been suggested by the Respondent that a distinction may be drawn between the application of the principle of res judicata to judgments given on the merits of a case, and judgments determining the Court’s jurisdiction, in response to preliminary objections; specifically, the Respondent contends that “decisions on preliminary objections do not and cannot have the same consequences as decisions on the merits”. The Court will however observe that the decision on questions of jurisdiction, pursuant to Article 36, paragraph 6, of the Statute, is given by a judgment, and Article 60 of the Statute provides that “[t]he judgment is final and without appeal”, without distinguishing between judgments on jurisdiction and admissibility, and judgments on the merits. In its Judgment of 25 March 1999 on the request for interpretation of the Judgment of 11 June 1998 in the case of the Land and Maritime Boundary between Cameroon and Nigeria, the Court expressly recognized that the 1998 Judgment, given on a number of preliminary objections to jurisdiction and admissibility, constituted res judicata, so that the Court could not consider a submission inconsistent with that judgment (Judgment, I.C.J. Reports 1999 (I), p. 39, para. 16). Similarly, in its Judgment of 3 February 2003 in the Application for Revision case, the Court, when it began by examining whether the conditions for the opening of the revision procedure, laid down by Article 61 of the Statute, were satisfied, undoubtedly recognized that an application could be made for revision of a judgment on preliminary objections; this could in turn only derive from a recognition that such a judgment is “final and without appeal”. Furthermore, the contention put forward by the Respondent would signify that the principle of res judicata would not prevent a judgment dismissing a preliminary objection from remaining open to further challenge indefinitely, while a judgment upholding such an objection, and putting an end to the case, would in the nature of things be final and determinative as regards that specific case.

118. The Court recalls that, as it has stated in the case of the Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), it “must however always be satisfied that it has jurisdiction, and must if necessary go into that matter proprio motu” (Judgment, I.C.J. Reports 1972, p. 52, para. 13). That decision in its context (in a case in which there was no question of reopening a previous decision of the Court) does not support the Respondent’s contention. It does not signify that jurisdictional decisions remain reviewable indefinitely, nor that the Court may, proprio motu or otherwise, reopen matters already decided with the force of res judicata. The Respondent has argued that there is a principle that “an international court may consider or reconsider the issue of juris-

diction at any stage of the proceedings”. It has referred in this connection both to the dictum just cited from the Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), and to the Corfu Channel (United Kingdom v. Albania) case. It is correct that the Court, having in the first phase of that case rejected Albania’s preliminary objection to jurisdiction, and having decided that proceedings on the merits were to continue (Preliminary Objection, Judgment, I.C.J. Reports 1947-1948, p. 15), did at the merits stage consider and rule on a challenge to its jurisdiction, in particular whether it had jurisdiction to assess compensation (I.C.J. Reports 1949, pp. 23-26; 171). But no reconsideration at all by the Court of its earlier Judgment was entailed in this because, following that earlier Judgment, the Parties had concluded a special agreement submitting to the Court, inter alia, the question of compensation. The later challenge to jurisdiction concerned only the scope of the jurisdiction conferred by that subsequent agreement.

119. The Respondent also invokes certain international conventions and the rules of other international tribunals. It is true that the European Court of Human Rights may reject, at any stage of the proceedings, an application which it considers inadmissible; and the International Criminal Court may, in exceptional circumstances, permit the admissibility of a case or the jurisdiction of the Court to be challenged after the commencement of the trial. However, these specific authorizations in the instruments governing certain other tribunals reflect their particular admissibility procedures, which are not identical with the procedures of the Court in the field of jurisdiction. They thus do not support the view that there exists a general principle which would apply to the Court, whose Statute not merely contains no such provision, but declares, in Article 60, the res judicata principle without exception. The Respondent has also cited certain jurisprudence of the European Court of Human Rights, and an arbitral decision of the German-Polish Mixed Arbitral Tribunal (von Tiedemann case); but, in the view of the Court, these too, being based on their particular facts, and the nature of the jurisdictions involved, do not indicate the existence of a principle of sufficient generality and weight to override the clear provisions of the Court’s Statute, and the principle of res judicata.

120. This does not however mean that, should a party to a case believe that elements have come to light subsequent to the decision of the Court which tend to show that the Court’s conclusions may have been based on incorrect or insufficient facts, the decision must remain final, even if it is in apparent contradiction to reality. The Statute provides for only one procedure in such an event: the procedure under Article 61, which offers the possibility for the revision of judgments, subject to the restrictions stated in that Article. In the interests of the stability of legal relations, those restrictions must be rigorously applied. As noted above (para-
122. Nothing was stated in the 1996 Judgment about the status of the FRY in relation to the United Nations, or the question whether it could participate in proceedings before the Court; for the reasons already mentioned above (paragraph 106), both Parties had chosen to refrain from asking for a decision on these matters. The Court however considers it necessary to emphasize that the question whether a State may properly come before the Court, on the basis of the provisions of the Statute, whether it be classified as a matter of capacity to be a party to the proceedings or as an aspect of jurisdiction ratione personae, is a matter which precedes that of jurisdiction ratione materiae, that is, whether that State has consented to the settlement by the Court of the specific dispute brought before it. The question is in fact one which the Court is bound to raise and examine, if necessary, ex officio, and if appropriate after notification to the parties. Thus if the Court considers that, in a particular case, the conditions concerning the capacity of the parties to appear before it are not satisfied, while the conditions of its jurisdiction ratione materiae are, it should, even if the question has not been raised by the parties, find that the former conditions are not met, and conclude that, for that reason, it could not have jurisdiction to decide the merits.

123. The operative part of a judgment of the Court possesses the force of res judicata. The operative part of the 1996 Judgment stated, in paragraph 47 (2) (a), that the Court found “that, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to decide upon the dispute”. That jurisdiction is thus established with the full weight of the Court's judicial authority. For a party to assert today that, at the date the 1996 Judgment was given, the Court had no power to give it, because one of the parties can now be seen to have been unable to come before the Court is, for the reason given in the preceding paragraph, to call in question the force as res judicata of the operative clause of the Judgment. At first sight, therefore, the Court need not examine the Respondent’s objection to jurisdiction based on its contention as to its lack of status in 1993.

124. The Respondent has however advanced a number of arguments tending to show that the 1996 Judgment is not conclusive on the matter, and the Court will now examine these. The passage just quoted from the 1996 Judgment is of course not the sole provision of the operative clause of that Judgment; as the Applicant has noted, the Court first dismissed seriatiun the specific preliminary objections raised (and not withdrawn) by the Respondent; it then made the finding quoted in paragraph 123 above; and finally it dismissed certain additional bases of jurisdiction invoked by the Applicant. The Respondent suggests that, for the purposes of applying the principle of res judicata to a judgment of this kind on preliminary objections, the operative clause (dispositif) to be taken into account and given the force of res judicata is the decision rejecting specified preliminary objections, rather than “the broad ascertainment...
upholding jurisdiction”. The Respondent has drawn attention to the provisions of Article 79, paragraph 7, of the 1978 Rules of Court, which provides that the judgment on preliminary objections shall, in respect of each objection “either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character”. The Respondent suggests therefore that only the clauses of a judgment on preliminary objections that are directed to these ends have the force of res judicata, which is, it contends, consistent with the view that new objections may be raised subsequently.

125. The Court does not however consider that it was the purpose of Article 79 of the Rules of Court to limit the extent of the force of res judicata attaching to a judgment on preliminary objections, nor that, in the case of such judgment, such force is necessarily limited to the clauses of the dispositif specifically rejecting particular objections. There are many examples in the Court’s jurisprudence of decisions on preliminary objections which contain a general finding that the Court has jurisdiction, or that the application is admissible, as the case may be; and it would be going too far to suppose that all of these are necessarily superfluous conclusions. In the view of the Court, if any question arises as to the scope of res judicata attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given (cf. Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985, pp. 218-219, para. 48).

126. For this purpose, in respect of a particular judgment it may be necessary to distinguish between, first, the issues which have been decided with the force of res judicata, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or obiter dicta; and finally matters which have not been ruled upon at all. Thus an application for interpretation of a judgment under Article 60 of the Statute may well require the Court to settle “a difference of opinion between the parties as to whether a particular point has or has not been decided with binding force” (Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J. Series A, No. 13, pp. 11-12). If a matter has not in fact been determined, expressly or by necessary implication, then no force of res judicata attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it.

127. In particular, the fact that a judgment may, in addition to rejecting specific preliminary objections, contain a finding that “the Court has jurisdiction” in the case does not necessarily prevent subsequent examination of any jurisdictional issues later arising that have not been resolved, with the force of res judicata, by such judgment. The Parties have each referred in this connection to the successive decisions in the Corfu Channel case, which the Court has already considered above (paragraph 118). Mention may also be made of the judgments on the merits in the two cases concerning Fisheries Jurisdiction (United Kingdom v. Iceland) (Federal Republic of Germany v. Iceland) (I.C.J. Reports 1974, p. 20, para. 42; pp. 203-204, para. 74), which dealt with minor issues of jurisdiction despite an express finding of jurisdiction in previous judgments (I.C.J. Reports 1973, p. 22, para. 46; p. 66, para. 46). Even where the Court has, in a preliminary judgment, specifically reserved certain matters of jurisdiction for later decision, the judgment may nevertheless contain a finding that “the Court has jurisdiction” in the case, this being understood as being subject to the matters reserved (see Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 442, para. 113 (1) (c), and pp. 425-426, para. 76; cf. also, in connection with an objection to admissibility, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Libyan Arab Jamahiriya v. United States of America), I.C.J. Reports 1998, p. 29, para. 51, and pp. 30-31, paras. 53 (2) (b) and 53 (3); p. 134, para. 50, and p. 156, paras. 53 (2) (b) and 53 (3)).

128. On the other hand, the fact that the Court has in these past cases dealt with jurisdictional issues after having delivered a judgment on jurisdiction does not support the contention that such a judgment can be reopened at any time, so as to permit reconsideration of issues already settled with the force of res judicata. The essential difference between the cases mentioned in the previous paragraph and the present case is this: the jurisdictional issues examined at a late stage in those cases were such that the decision on them would not contradict the finding of jurisdiction made in the earlier judgment. In the Fisheries Jurisdiction cases, the issues raised related to the extent of the jurisdiction already established in principle with the force of res judicata; in the Military and Paramilitary Activities case, the Court had clearly indicated in the 1984 Judgment that its finding in favour of jurisdiction did not extend to a definitive ruling on the interpretation of the United States reservation to its optional clause declaration. By contrast, the contentions of the Respondent in the present case would, if upheld, effectively reverse the 1996 Judgment; that indeed is their purpose.

129. The Respondent has contended that the issue whether the FRY had access to the Court under Article 35 of the Statute has in fact never been decided in the present case, so that no barrier of res judicata would prevent the Court from examining that issue at the present stage of the
proceedings. It has drawn attention to the fact that when commenting on the 1996 Judgment, in its 2004 Judgments in the cases concerning the *Legality of Use of Force*, the Court observed that “[t]he question of the status of the Federal Republic of Yugoslavia in relation to Article 35 of the Statute was not raised and the Court saw no reason to examine it” (see, for example, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, I.C.J. Reports 2004, p. 311, para. 82), and that “in its pronouncements in incidental proceedings” in the present case, the Court “did not commit itself to a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and the Statute” (ibid., pp. 308-309, para. 74).

130. That does not however signify that in 1996 the Court was unaware of the fact that the solution adopted in the United Nations to the question of continuation of the membership of the SFRY “[was] not free from legal difficulties”, as the Court had noted in its Order of 8 April 1993 indicating provisional measures in the case (*I.C.J. Reports* 1993, p. 14, para. 18; above, paragraph 105). The FRy was, at the time of the proceedings on its preliminary objections culminating in the 1996 Judgment, maintaining that it was the continuator State of the SFRY. As the Court indicated in its Judgments in the cases concerning the *Legality of Use of Force*,

“No specific assertion was made in the Application [of 1993, in the present case] that the Court was open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute of the Court, but it was later made clear that the Applicant claimed to be a Member of the United Nations and thus a party to the Statute of the Court, by virtue of Article 93, paragraph 1, of the Charter, at the time of filing of the Application. . . . [T]his position was expressly stated in the Memorial filed by Serbia and Montenegro on 4 January 2000 . . . ” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 299, para. 47.)

The question whether the FRY was a continuator or a successor State of the SFRY was mentioned in the Memorial of Bosnia and Herzegovina. The view of Bosnia and Herzegovina was that, while the FRY was not a Member of the United Nations, as a successor State of the SFRY which had expressly declared that it would abide by the international commitments of the SFRY, it was nevertheless a party to the Statute. It is also essential, when examining the text of the 1996 Judgment, to take note of the context in which it was delivered, in particular as regards the contemporary state of relations between the Respondent and the United Nations, as recounted in paragraphs 88 to 99 above.

131. The “legal difficulties” referred to were finally dissipated when in 2000 the FRY abandoned its former insistence that it was the continuator of the SFRY, and applied for membership in the United Nations (paragraph 98 above). As the Court observed in its 2004 Judgments in the cases concerning the *Legality of Use of Force*,

“the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. It is in that sense that the situation that the Court now faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. If, at that time, the Court had had to determine definitively the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status. However, from the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999.” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, pp. 310-311, para. 79.)

As the Court here recognized, in 1999 — and even more so in 1996 — it was by no means so clear as the Court found it to be in 2004 that the Respondent was not a Member of the United Nations at the relevant time. The inconsistencies of approach expressed by the various United Nations organs are apparent from the passages quoted in paragraphs 91 to 96 above.

132. As already noted, the legal complications of the position of the Respondent in relation to the United Nations were not specifically mentioned in the 1996 Judgment. The Court stated, as mentioned in paragraph 121 above, that “Yugoslavia was bound by the provisions of the [Genocide] Convention on the date of the filing of the Application in the present case” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 610, para. 17), and found that “on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute” (ibid., p. 623, para. 47 (2) (a)). Since, as observed above, the question of a State’s capacity to be a party to proceedings is a matter which precedes that of jurisdiction *ratio materiae*, and one which the Court must, if necessary, raise ex officio (see
According to paragraph 122 above, the finding made in the 1996 Judgment, which can be referred to as a finding of jurisdiction, is not subject to review. The Court did not commit itself to a definitive position on the issue of the FRY's legal status before it had been notified of the declaration made by the FR Yugoslavia concerning the capacity of the FRY under the Statute. The judgment on access is thus to be interpreted as incorporating a determination that all the conditions relating to the capacity of the Parties to appear before the Court had been met.

The Respondent had argued that the Court's finding of jurisdiction in the 1996 Judgment was based merely upon an assumption of continuity between the SFR Yugoslavia and the FRY. However, it has been suggested that the Court did not proceed to determine the merits unless the FRY had had the capacity under the Statute to be a party to proceedings before the Court.

The Court did not need, for the purpose of the present proceedings, to go behind that finding, whether it be regarded as one of jurisdiction or of res judicata, on the basis of which the Court could not have proceeded to determine the merits unless the FRY had had the capacity under the Statute to be a party to proceedings before the Court.

A similar argument advanced by the Respondent is based on the principle that the jurisdiction of the Court derives from a treaty, namely the Statute of the Court. The Respondent questions whether the Statute could have endowed the FRY with the capacity to appear before the Court under the Statute.

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not represent a binding treaty provision providing a possible basis for deciding on jurisdiction with res judicata effects.

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The further question whether the 1996 Judgment was, as a matter of law, no possibility of reopening of the decision embodied in the 196 Judgment. The Respondent has however also argued that the 1996 Judgment is not res judicata as to jurisdiction, that determination is definitive both for the parties to the case, in respect of the case (Article 59 of the Statute), and for the Court itself in the context of that case. However, fundamental to the question of jurisdiction at the time of filing of the Application, it remains a question to be determined by the Court, in accordance with Article 36, paragraph 6, of the Statute, and once a finding in favour of jurisdiction has been pronounced with the force of res judicata, it is not open to question or re-examination, except by way of revision under Article 61 of the Statute. There is thus, as a matter of law, no possibility of the Court to the question whether Article 35, paragraphs 1 and 2, of the Statute apply equally to applicants and to respondents. This matter, being one of interpretation of the Statute, would justify the Court's exercise of its judicial functions to determine. However, in the light of the conclusion that the Court has already expressed its view on this point, the Court's decision cannot be said to have been ultra vires. For the Court, the principle on which the nature of the decision must be determined, is subject only to the provision in the Statute for revision of judgments. This result is required by the nature of the judicial function, and the universally recognized need for stability of legal relations within the context of a case is as the Court has determined it, subject only to the provision in the Statute for revision of judgments. This result is required by the nature of the judicial function, and the universally recognized need for stability of legal relations.

**Conclusion: Jurisdiction Affirmed**

140. The Court accordingly concludes that, in respect of the contention that the Respondent was not, on the date of filing of the Application, a State having the capacity to come before the Court under the Statute, the principle of res judicata precludes any reopening of the decision embodied in the 1996 Judgment. The Respondent has however also argued that the 1996 Judgment is not res judicata as to jurisdiction, that determination is definitive both for the parties to the case, in respect of the case (Article 59 of the Statute), and for the Court itself in the context of that case. However, fundamental to the question of jurisdiction at the time of filing of the Application, it remains a question to be determined by the Court, in accordance with Article 36, paragraph 6, of the Statute, and once a finding in favour of jurisdiction has been pronounced with the force of res judicata, it is not open to question, or re-examination, except by way of revision under Article 61 of the Statute. There is thus, as a matter of law, no possibility of the Court to the question whether Article 35, paragraphs 1 and 2, of the Statute apply equally to applicants and to respondents. This matter, being one of interpretation of the Statute, would justify the Court's exercise of its judicial functions to determine. However, in the light of the conclusion that the Court has already expressed its view on this point, the Court's decision cannot be said to have been ultra vires. For the Court, the principle on which the nature of the decision must be determined, is subject only to the provision in the Statute for revision of judgments. This result is required by the nature of the judicial function, and the universally recognized need for stability of legal relations within the context of a case is as the Court has determined it, subject only to the provision in the Statute for revision of judgments. This result is required by the nature of the judicial function, and the universally recognized need for stability of legal relations.
to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided . . .”

143. Under Article I “[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”. Article II defines genocide in these terms:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.”

Article III provides as follows:

“The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.”

144. According to Article IV, persons committing any of those acts shall be punished whether they are constitutionally responsible rulers, public officials or private individuals. Article V requires the parties to enact the necessary legislation to give effect to the Convention, and, in particular, to provide effective penalties for persons guilty of genocide or other acts enumerated in Article III. Article VI provides that

“[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.

Article VII provides for extradition.

145. Under Article VIII

“All Contracting Parties may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.”

146. Article IX provides for certain disputes to be submitted to the Court:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

The remaining ten Articles are final clauses dealing with such matters as parties to the Convention and its entry into force.

147. The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction (I.C.J. Reports 1996 (II), pp. 617-621, paras. 35-41). It follows that the Court may rule only on the disputes between the Parties to which that provision refers. The Parties disagree on whether the Court finally decided the scope and meaning of that provision in its 1996 Judgment and, if it did not, on the matters over which the Court has jurisdiction under that provision. The Court rules on those two matters in following sections of this Judgment. It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed erga omnes.

148. As it has in other cases, the Court recalls the fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them (e.g. case concerning Armed Activities on the Territory of the Congo (New Appli-
149. The jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those “relating to the interpretation, application or fulfilment” of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts.

* * *

(2) The Court’s 1996 Decision about the Scope and Meaning of Article IX

150. According to the Applicant, the Court in 1996 at the preliminary objections stage decided that it had jurisdiction under Article IX of the Convention to adjudicate upon the responsibility of the respondent State, as indicated in that Article, “for genocide or any of the other acts enumerated in article III”, and that that reference “does not exclude any form of State responsibility”. The issue, it says, is res judicata. The Respondent supports a narrower interpretation of the Convention: the Court’s jurisdiction is confined to giving a declaratory judgment relating to breaches of the duties to prevent and punish the commission of genocide by individuals.

151. The Respondent accepts that the first, wider, interpretation “was preferred by the majority of the Court in the preliminary objections phase” and quotes the following passage in the Judgment:

“The Court now comes to the second proposition advanced by Yugoslavia [in support of one of its preliminary objections], regarding the type of State responsibility envisaged in Article IX of the Convention. According to Yugoslavia, that Article would only cover the responsibility flowing from the failure of a State to fulfil its obligations of prevention and punishment as contemplated by Articles V, VI and VII; on the other hand, the responsibility of a State for an act of genocide perpetrated by the State itself would be excluded from the scope of the Convention.

The Court would observe that the reference to Article IX to ‘the responsibility of a State for genocide or for any of the other acts enumerated in Article III’, does not exclude any form of State responsibility. Nor is the responsibility of a State for acts of its organs excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by ‘rulers’ or ‘public officials’.

In the light of the foregoing, the Court considers that it must reject the fifth preliminary objection of Yugoslavia. It would moreover observe that it is sufficiently apparent from the very terms of that objection that the Parties not only differ with respect to the facts of the case, their imputability and the applicability to them of the provisions of the Genocide Convention, but are moreover in disagreement with respect to the meaning and legal scope of several of those provisions, including Article IX. For the Court, there is accordingly no doubt that there exists a dispute between them relating to ‘the interpretation, application or fulfilment of the . . . Convention, including . . . the responsibility of a State for genocide . . .’, according to the form of words employed by that latter provision (cf. Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988, pp. 27-32).” (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), pp. 616-617, paras. 32-33; emphasis now added to 1996 text.)

The Applicant relies in particular on the sentences in paragraph 32 which have been emphasized in the above quotation. The Respondent submits that “this expression of opinion is of marked brevity and is contingent upon the dismissal of the preliminary objection based upon the existence or otherwise of a dispute relating to the interpretation of the Genocide Convention. The interpretation adopted in this provisional mode by the Court is not buttressed by any reference to the substantial preparatory work of the Convention.

In the circumstances, there is no reason of principle or consideration of common sense indicating that the issue of interpretation is no longer open.”

While submitting that the Court determined the issue and spoke emphatically on the matter in 1996 the Applicant also says that this present phase of the case “will provide an additional opportunity for this Court to rule on [the] important matter, not only for the guidance of the Parties here before you, but for the benefit of future generations that should not have to fear the immunity of States from responsibility for their genocidal acts”.

152. The Court has already examined above the question of the authority of res judicata attaching to the 1996 Judgment, and indicated that it cannot reopen issues decided with that authority. Whether or not the issue now raised by the Respondent falls in that category, the Court
observes that the final part of paragraph 33 of that Judgment, quoted above, must be taken as indicating that “the meaning and legal scope” of Article IX and of other provisions of the Convention remain in dispute. In particular a dispute “exists” about whether the only obligations of the Contracting Parties for the breach of which they may be held responsible under the Convention are to legislate, and to prosecute or extradite, or whether the obligations extend to the obligation not to commit genocide and the other acts enumerated in Article III. That dispute “exists” and was left by the Court for resolution at the merits stage. In these circumstances, and taking into account the positions of the Parties, the Court will determine at this stage whether the obligations of the Parties under the Convention do so extend. That is to say, the Court will decide “the meaning and legal scope” of several provisions of the Convention, including Article IX with its reference to “the responsibility of a State for genocide or any of the other acts enumerated in Article III”.

(3) The Court’s 1996 Decision about the Territorial Scope of the Convention

153. A second issue about the res judicata effect of the 1996 Judgment concerns the territorial limits, if any, on the obligations of the States parties to prevent and punish genocide. In support of one of its preliminary objections the Respondent argued that it did not exercise jurisdiction over the Applicant’s territory at the relevant time. In the final sentence of its reasons for rejecting this argument the Court said this: “[t]he Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention” (I.C.J. Reports 1996 (II), p. 616, para. 31).

154. The Applicant suggests that the Court in that sentence ruled that the obligation extends without territorial limit. The Court does not state the obligation in that positive way. The Court does not say that the obligation is “territorially unlimited by the Convention”. Further, earlier in the paragraph, it had quoted from Article VI (about the obligation of any State in the territory of which the act was committed to prosecute) as “the only provision relevant to” territorial “problems” related to the application of the Convention. The quoted sentence is therefore to be understood as relating to the undertaking stated in Article I. The Court did not in 1996 rule on the territorial scope of each particular obligation arising under the Convention. Accordingly the Court has still to rule on that matter. It is not res judicata.

(4) The Obligations Imposed by the Convention on the Contracting Parties

155. The Applicant, in the words of its Agent, contends that “[t]his case is about State responsibility and seeks to establish the responsibilities of a State which, through its leadership, through its organs, committed the most brutal violations of one of the most sacred instruments of international law”. The Applicant has emphasized that in its view, the Genocide Convention “created a universal, treaty-based concept of State responsibility”, and that “[i]t is State responsibility for genocide that this legal proceeding is all about”. It relies in this respect on Article IX of the Convention, which, it argues, “quite explicitly impose[s] on States a direct responsibility themselves not to commit genocide or to aid in the commission of genocide”. As to the obligation of prevention under Article I, a breach of that obligation, according to the Applicant, “is established — it might be said is ‘eclipsed’ — by the fact that [the Respondent] is itself responsible for the genocide committed; . . . a State which commits genocide has not fulfilled its commitment to prevent it” (emphasis in the original). The argument moves on from alleged breaches of Article I to “violations [by the Respondent] of its obligations under Article III . . . to which express reference is made in Article IX, violations which stand at the heart of our case. This fundamental provision establishes the obligations whose violation engages the responsibility of States parties.” It follows that, in the contention of the Applicant, the Court has jurisdiction under Article IX over alleged violations by a Contracting Party of those obligations.

156. The Respondent contends to the contrary that “the Genocide Convention does not provide for the responsibility of States for acts of genocide as such. The duties prescribed by the Convention relate to ‘the prevention and punishment of the crime of genocide’ when this crime is committed by individuals: and the provisions of Articles V and VI [about enforcement and prescription] . . . make this abundantly clear.”

It argues that the Court therefore does not have jurisdiction ratione materiae under Article IX; and continues:

“[t]hese provisions [Articles I, V, VI and IX] do not extend to the responsibility of a Contracting Party as such for acts of genocide but [only] to responsibility for failure to prevent or to punish acts of genocide committed by individuals within its territory or . . . its control”.

The sole remedy in respect of that failure would, in the Respondent’s view, be a declaratory judgment.
157. As a subsidiary argument, the Respondent also contended that “for a State to be responsible under the Genocide Convention, the facts must first be established. As genocide is a crime, it can only be established in accordance with the rules of criminal law, under which the first requirement to be met is that of individual responsibility. The State can incur responsibility only when the existence of genocide has been established beyond all reasonable doubt. In addition, it must then be shown that the person who committed the genocide can engage the responsibility of the State . . .”

(This contention went on to mention responsibility based on breach of the obligation to prevent and punish, matters considered later in this Judgment.)

158. The Respondent has in addition presented what it refers to as “alternative arguments concerning solely State responsibility for breaches of Articles II and III”. Those arguments addressed the necessary conditions, especially of intent, as well as of attribution. When presenting those alternative arguments, counsel for the Respondent repeated the principal submission set out above that “the Convention does not suggest in any way that States themselves can commit genocide”.

159. The Court notes that there is no disagreement between the Parties that the reference in Article IX to disputes about “the responsibility of a State” as being among the disputes relating to the interpretation, application or fulfilment of the Convention which come within the Court’s jurisdiction, indicates that provisions of the Convention do impose obligations on States in respect of which they may, in the event of breach, incur responsibility. Articles V, VI and VII requiring legislation, in particular providing effective penalties for persons guilty of genocide and the other acts enumerated in Article III, and for the prosecution and extradition of alleged offenders are plainly among them. Because those provisions regulating punishment also have a deterrent and therefore a preventive effect or purpose, they could be regarded as meeting and indeed exhausting the undertaking to prevent the crime of genocide stated in Article I and mentioned in the title. On that basis, in support of the Respondent’s principal position, that Article would rank as merely hortatory, introductory or purposive and as preambular to those specific obligations. The remaining specific provision, Article VIII about competent organs of the United Nations taking action, may be seen as completing the system by supporting both prevention and suppression, in this case at the political level rather than as a matter of legal responsibility.

160. The Court observes that what obligations the Convention imposes upon the parties to it depends on the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose. To confirm the meaning resulting from that process or to remove ambiguity or obscurity or a manifestly absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion. Those propositions, reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, are well recognized as part of customary international law: see Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 174, para. 94; case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004, p. 48, para. 83; LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 501, para. 99; and Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002, p. 645, para. 37, and the other cases referred to in those decisions.

161. To determine what are the obligations of the Contracting Parties under the Genocide Convention, the Court will begin with the terms of its Article I. It contains two propositions. The first is the affirmation that genocide is a crime under international law. That affirmation is to be read in conjunction with the declaration that genocide is a crime under international law, unanimously adopted by the General Assembly two years earlier in its resolution 96 (I), and referred to in the Preamble to the Convention (paragraph 142, above). The affirmation recognizes the existing requirements of customary international law, a matter emphasized by the Court in 1951:

“The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention) . . .

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human
groups and on the other to confirm and endorse the most elementary principles of morality.” (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23.)

Later in that Opinion, the Court referred to “the moral and humanitarian principles which are its basis” (ibid., p. 24). In earlier phases of the present case the Court has also recalled resolution 96 (I) (I.C.J. Reports 1993, p. 23; see also pp. 348 and 440) and has quoted the 1951 statement (I.C.J. Reports 1996 (II), p. 616). The Court reaffirmed the 1951 and 1996 statements in its Judgment of 3 February 2006 in the case concerning Armed Activities on the Territory of the Congo (New Application) (Democratic Republic of the Congo v. Rwanda), paragraph 64, when it added that the norm prohibiting genocide was assuredly a peremptory norm of international law (jus cogens).

164. The second feature of the drafting history emphasizes the operative and non-preambular character of Article I. The Preamble to the draft Convention, prepared by the Ad Hoc Committee on Genocide for the Third Session of the General Assembly and considered by its Sixth Committee, read in part as follows:

“The High Contracting Parties

Being convinced that the prevention and punishment of genocide requires international co-operation,

Hereby agree to prevent and punish the crime as hereinafter provided.”

The first Article would have provided “[g]enocide is a crime under international law whether committed in time of peace or in time of war” (report of the Ad Hoc Committee on Genocide, 5 April to 10 May 1948, United Nations, Official Records of the Economic and Social Council, Seventh Session, Supplement No. 6, doc. E/794, pp. 2, 18).

Belgium was of the view that the undertaking to prevent and punish should be made more effective by being contained in the operative part of the Convention rather than in the Preamble and proposed the following Article I to the Sixth Committee of the General Assembly: “The High Contracting Parties undertake to prevent and punish the crime of genocide.” (United Nations doc. A/C.6/217.) The Netherlands then proposed a new text of Article I combining the Ad Hoc Committee draft and the Belgian proposal with some changes: “The High Contracting Parties reaffirm that genocide is a crime under international law, which they undertake to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention.

165. The conclusion is confirmed by two aspects of the preparatory work of the Convention and the circumstances of its conclusion as referred to in Article 32 of the Vienna Convention. In 1947 the United Nations General Assembly, in requesting the Economic and Social Council to submit a report and a draft convention on genocide to the Third Session of the Assembly, declared “that genocide is an international crime entailing national and international responsibility on the part of individuals and States” (A/RES/180 (II)). That duality of responsibilities is also to be seen in two other associated resolutions adopted on the same day, both directed to the newly established International Law Commission (hereinafter “the ILC”): the first on the formulation of the Nuremberg principles, concerned with the rights (Principle V) and duties of individuals, and the second on the draft declaration on the rights and duties of States (A/RES/177 and A/RES/178 (II)). The duality of responsibilities is further considered later in this Judgment (paragraphs 173-174).
war” was inserted by 30 votes to 7 with 6 abstentions, the amended text of Article I was adopted by 37 votes to 3 with 2 abstentions (ibid., pp. 51 and 53).

165. For the Court both changes — the movement of the undertaking from the Preamble to the first operative Article and the removal of the linking clause (“in accordance with the following articles”) — confirm that Article I does impose distinct obligations over and above those imposed by other Articles of the Convention. In particular, the Contracting Parties have a direct obligation to prevent genocide.

166. The Court next considers whether the Parties are also under an obligation, by virtue of the Convention, not to commit genocide themselves. It must be observed at the outset that such an obligation is not expressly imposed by the actual terms of the Convention. The Applicant has however advanced as its main argument that such an obligation is imposed by Article IX, which confers on the Court jurisdiction over disputes “including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III”. Since Article IX is essentially a jurisdictional provision, the Court considers that it should first ascertain whether the substantive obligation on States not to commit genocide may flow from the other provisions of the Convention. Under Article I the States parties are bound to prevent such an act, which it describes as “a crime under international law”, being committed. The Article does not expressis verbis require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as “a crime under international law”: by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, inter alia, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.

167. The Court accordingly concludes that Contracting Parties to the Convention are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them. That conclusion must also apply to the other acts enumerated in Article III. Those acts are forbidden along with genocide itself in the list included in Article III. They are referred to equally with genocide in Article IX and without being characterized as “punishable”; and the “purely humanitarian and civilizing purpose” of the Convention may be seen as being promoted by the fact that States are subject to that full set of obligations, supporting their undertaking to prevent genocide. It is true that the concepts used in paragraphs (b) to (e) of Article III, and particularly that of “complicity”, refer to well known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanctions against individuals. It would however not be in keeping with the object and purpose of the Convention to deny that the international responsibility of a State — even though quite different in nature from criminal responsibility — can be engaged through one of the acts, other than genocide itself, enumerated in Article III.

168. The conclusion that the Contracting Parties are bound in this way by the Convention not to commit genocide and the other acts enumerated in Article III is confirmed by one unusual feature of the wording of Article IX. But for that unusual feature and the addition of the word “fulfilment” to the provision conferring on the Court jurisdiction over disputes as to the “interpretation and application” of the Convention (an addition which does not appear to be significant in this case), Article IX would be a standard dispute settlement provision.

169. The unusual feature of Article IX is the phrase “including those disputes relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III”. The word “including” tends to confirm that disputes relating to the responsibility of Contracting Parties for genocide, and the other acts enumerated in Article III to which it refers, are comprised within a broader group of disputes relating to the interpretation, application or fulfilment of the Convention. The responsibility of a party for genocide and the other acts enumerated in Article III arises from its failure to comply with the obligations imposed by the other provisions of the Convention, and in particular, in the present context, with Article III read with Articles I and II. According to the English text of the Convention, the responsibility contemplated is responsibility “for genocide” (in French, “responsabilité . . . en matière de génocide”), not merely responsibility “for failing to prevent or punish genocide”. The particular terms of the phrase as a whole confirm that Contracting Parties may be responsible for genocide and the other acts enumerated in Article III of the Convention.
170. The Court now considers three arguments, advanced by the Respondent which may be seen as contradicting the proposition that the Convention imposes a duty on the Contracting Parties not to commit genocide and the other acts enumerated in Article III. The first is that, as a matter of general principle, international law does not recognize the criminal responsibility of the State, and the Genocide Convention does not provide a vehicle for the imposition of such criminal responsibility. On the matter of principle the Respondent calls attention to the rejection by the ILC of the concept of international crimes when it prepared the final draft of its Articles on State Responsibility, a decision reflecting the strongly negative reactions of a number of States to any such concept. The Applicant accepts that general international law does not recognize the criminal responsibility of States. It contends, on the specific issue, that the obligation for which the Respondent may be held responsible, in the event of breach, in proceedings under Article IX, is simply an obligation arising under international law, in this case the provisions of the Convention. The Court observes that the obligations in question in this case, arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature. This argument accordingly cannot be accepted.

171. The second argument of the Respondent is that the nature of the Convention is such as to exclude from its scope State responsibility for genocide and the other enumerated acts. The Convention, it is said, is a standard international criminal law convention focused essentially on the criminal prosecution and punishment of individuals and not on the responsibility of States. The emphasis of the Convention on the obligations and responsibility of individuals excludes any possibility of States being liable and responsible in the event of breach of the obligations reflected in Article III. In particular, it is said, that possibility cannot stand in the face of the references, in Article III to punishment (of individuals), and in Article IV to individuals being punished, and the requirement, in Article V for legislation in particular for effective penalties for persons guilty of genocide, the provision in Article VI for the prosecution of persons charged with genocide, and requirement in Article VII for extradition.

172. The Court is mindful of the fact that the famous sentence in the Nuremberg Judgment that “[c]rimes against international law are committed by men, not by abstract entities . . .” (Judgment of the International Military Tribunal, Trial of the Major War Criminals, 1947, Official Documents, Vol. 1, p. 223) might be invoked in support of the proposition that only individuals can breach the obligations set out in Article III. But the Court notes that that Tribunal was answering the argument that “international law is concerned with the actions of sovereign States, and provides no punishment for individuals” (Judgment of the International Military Tribunal, op. cit., p. 222), and that thus States alone were responsible under international law. The Tribunal rejected that argument in the following terms: “[t]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized” (ibid., p. 223; the phrase “as well as upon States” is missing in the French text of the Judgment).

173. The Court observes that that duality of responsibility continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court, now accepted by 104 States: “No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” The Court notes also that the ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly resolution 56/83, 12 December 2001), to be referred to hereinafter as “the ILC Articles on State Responsibility”, affirm in Article 58 the other side of the coin: “These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.” In its Commentary on this provision, the Commission said:

“Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.” (ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on Article 58, para. 3.)

The Commission quoted Article 25, paragraph 4, of the Rome Statute, and concluded as follows:

“Article 58 . . . [makes] it clear that the Articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term ‘individual responsibility’ has acquired an accepted meaning in light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.”
174. The Court sees nothing in the wording or the structure of the provisions of the Convention relating to individual criminal liability which would displace the meaning of Article I, read with paragraphs (a) to (e) of Article III, so far as these provisions impose obligations on States distinct from the obligations which the Convention requires them to place on individuals. Furthermore, the fact that Articles V, VI and VII focus on individuals cannot itself establish that the Contracting Parties may not be subject to obligations not to commit genocide and the other acts enumerated in Article III.

175. The third and final argument of the Respondent against the proposition that the Contracting Parties are bound by the Convention not to commit genocide is based on the preparatory work of the Convention and particularly of Article IX. The Court has already used part of that work to confirm the operative significance of the undertaking in Article I (see paragraphs 164 and 165 above), an interpretation already determined from the terms of the Convention, its context and purpose.

176. The Respondent, claiming that the Convention and in particular Article IX is ambiguous, submits that the drafting history of the Convention, in the Sixth Committee of the General Assembly, shows that "there was no question of direct responsibility of the State for acts of genocide". It claims that the responsibility of the State was related to the "key provisions" of Articles IV-VI: the Convention is about the criminal responsibility of individuals supported by the civil responsibility of States to prevent and punish. This argument against any wider responsibility for the Contracting Parties is based on the records of the discussion in the Sixth Committee, and is, it is contended, supported by the rejection of United Kingdom amendments to what became Articles IV and VI. Had the first amendment been adopted, Article IV, concerning the punishment of individuals committing genocide or any of the acts enumerated in Article III, would have been extended by the following additional sentence: "[Acts of genocide] committed by or on behalf of States or governments constitute a breach of the present Convention." (A/C.6/236 and Corr. 1.) That amendment was defeated (United Nations, Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 96th Meeting, p. 355). What became Article VI would have been replaced by a provision conferring jurisdiction on the Court if an act of genocide is or is alleged to be the act of a State or government or its organs. The United Kingdom in response to objections that the proposal was out of order (because it meant going back on a decision already taken) withdrew the amendment in favour of the joint amendment to what became Article IX, submitted by the United Kingdom and Belgium (ibid., 100th Meeting, p. 394). In speaking to that joint amendment the United Kingdom delegate acknowledged that the debate had clearly shown the Committee's decision to confine what is now Article VI to the responsibility of individuals (ibid., 100th Meeting, p. 430). The United Kingdom/Belgium amendment would have added the words "including disputes relating to the responsibility of a State for any of the acts enumerated in Articles II and IV [as the Convention was then drafted]". The United Kingdom delegate explained that what was involved was civil responsibility, not criminal responsibility (United Nations, Official Records of the General Assembly, op. cit., 103rd Meeting, p. 440). A proposal to delete those words failed and the provision was adopted (ibid., 104th Meeting, p. 447), with style changes being made by the Drafting Committee.

177. At a later stage a Belgium/United Kingdom/United States proposal which would have replaced the disputed phrase by including "disputes arising from a charge by a Contracting Party that the crime of genocide or any of the acts enumerated in article III has been committed within the jurisdiction of another Contracting Party" was ruled by the Chairman of the Sixth Committee as a change of substance and the Committee did not adopt the motion (which required a two-thirds majority) for reconsideration (A/C.6/305). The Chairman gave the following reason for his ruling which was not challenged:

"it was provided in article IX that those disputes, among others, which concerned the responsibility of a State for genocide or for any of the acts enumerated in article III, should be submitted to the International Court of Justice. According to the joint amendment, on the other hand, the disputes would not be those which concerned the responsibility of the State but those which resulted from an accusation to the effect that the crime had been committed in the territory of one of the contracting parties." (United Nations, Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 131st Meeting, p. 690.)

By that time in the deliberations of the Sixth Committee it was clear that only individuals could be held criminally responsible under the draft Convention for genocide. The Chairman was plainly of the view that the Article IX, as it had been modified, provided for State responsibility for genocide.

178. In the view of the Court, two points may be drawn from the drafting history just reviewed. The first is that much of it was concerned with proposals supporting the criminal responsibility of States; but those proposals were not adopted. The second is that the amendment which was adopted — to Article IX — is about jurisdiction in respect of the responsibility of States simpliciter. Consequently, the drafting history may be seen as supporting the conclusion reached by the Court in paragraph 167 above.

179. Accordingly, having considered the various arguments, the Court
affirms that the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.

* * *

(5) Question Whether the Court May Make a Finding of Genocide by a State in the Absence of a Prior Conviction of an Individual for Genocide by a Competent Court

180. The Court observes that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed. That will also be the case with conspiracy under Article III, paragraph (b), and complicity under Article III, paragraph (e); and, as explained below (paragraph 431) for purposes of the obligation to prevent genocide. The Respondent has raised the question whether it is necessary, as a matter of law, for the Court to be able to uphold a claim of the responsibility of a State for an act of genocide, or any other act enumerated in Article III, that there should have been a finding of genocide by a court or tribunal exercising criminal jurisdiction. According to the Respondent, the condition sine qua non for establishing State responsibility is the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the State’s responsibility.

181. The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed. Under its Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity (paragraphs 209-210 below). Turning to the terms of the Convention itself, the Court has already held that it has jurisdiction under Article IX to find a State responsible if genocide or other acts enumerated in Article III are committed by its organs, or persons or groups whose acts are attributable to it.

182. Any other interpretation could entail that there would be no legal recourse available under the Convention in some readily conceivable circumstances: genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes; or the responsible State may have acknowledged the breach. The Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.

* * *

(6) The Possible Territorial Limits of the Obligations

183. The substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question. The extent of that ability in law and fact is considered, so far as the obligation to prevent the crime of genocide is concerned, in the section of the Judgment concerned with that obligation (cf. paragraph 430 below). The significant relevant condition concerning the obligation not to commit genocide and the other acts enumerated in Article III is provided by the rules on attribution (paragraphs 379 ff. below).

184. The obligation to prosecute imposed by Article VI is by contrast subject to an express territorial limit. The trial of persons charged with genocide is to be in a competent tribunal of the State in the territory of which the act was committed (cf. paragraph 442 below), or by an international penal tribunal with jurisdiction (paragraphs 443 ff. below).

* * *

(7) The Applicant’s Claims in Respect of Alleged Genocide Committed Outside Its Territory against Non-Nationals

185. In its final submissions the Applicant requests the Court to make rulings about acts of genocide and other unlawful acts allegedly committed against “non-Serbs” outside its own territory (as well as within it) by the Respondent. Insofar as that request might relate to non-Bosnian victims, it could raise questions about the legal interest or standing of the Applicant in respect of such matters and the significance of the jus cogens character of the relevant norms, and the erga omnes character of the relevant obligations. For the reasons explained in paragraphs 368 and 369 below, the Court will not however need to address those questions of law.
(8) The Question of Intent to Commit Genocide

186. The Court notes that genocide as defined in Article II of the Convention comprises “acts” and an “intent”. It is well established that the acts —

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group; and
(e) Forcibly transferring children of the group to another group

themselves include mental elements. “Killing” must be intentional, as must “causing serious bodily or mental harm”. Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words “deliberately” and “intended”, quite apart from the implications of the words “inflicting” and “imposing”; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts (Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, Yearbook of the International Law Commission, 1996, Vol. II, Part Two, p. 44, para. 5).

187. In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the “intent to destroy, in whole or in part, . . . [the protected] group, as such”. It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or dolus specialis; in the present Judgment it will usually be referred to as the “specific intent (dolus specialis)”. It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words “as such” emphasize that intent to destroy the protected group.

188. The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution, as the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter “ICTY” or “the Tribunal”) did in the Kupreškić et al. case:

“the mens rea requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same genus as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of mens rea, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.” (IT-95-16-T, Judgment, 14 January 2000, para. 636.)

189. The specific intent is also to be distinguished from other reasons or motives the perpetrator may have. Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent.

* * *

(9) Intent and “Ethnic Cleansing”

190. The term “ethnic cleansing” has frequently been employed to refer to the events in Bosnia and Herzegovina which are the subject of this case; see, for example, Security Council resolution 787 (1992), para. 2; resolution 827 (1993), Preamble; and the Report with that title attached as Annex IV to the Final Report of the United Nations Commission of Experts (S/1994/674/Add.2) (hereinafter “Report of the Commission of Experts”). General Assembly resolution 47/121 referred in its Preamble to “the abhorrent policy of ‘ethnic cleansing’, which is a form of genocide, as being carried on in Bosnia and Herzegovina. It will be convenient at this point to consider what legal significance the expression may have. It is in practice used, by reference to a specific region or area, to mean “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area” (S/35374 (1993), para. 55, Interim Report by the Commission of Experts). It does not appear in the Genocide Convention; indeed, a proposal
during the drafting of the Convention to include in the definition “measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment” was not accepted (A/C.6/234). It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area “ethnically homogeneous”, nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is “to destroy, in whole or in part” a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as “ethnic cleansing” may never constitute genocide, if they are such as to be characterized as, for example, “deliberately inflict[ing] on the group conditions of life calculated to bring about its physical destruction in whole or in part”, contrary to Article II, paragraph (c), of the Convention, provided such action is carried out with the necessary specific intent (dolus specialis), that is to say with a view to the destruction of the group, as distinct from its removal from the region. As the ICTY has observed, while “there are obvious similarities between a genocidal policy and the policy commonly known as ‘ethnic cleansing’” (Krstić, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet “[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.” (Stakić, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) In other words, whether a particular operation described as “ethnic cleansing” amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term “ethnic cleansing” has no legal significance of its own. That said, it is clear that acts of “ethnic cleansing” may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (dolus specialis) inspiring those acts.

First, the group targeted is not sufficiently well defined as such, since, according to the Applicant’s allegation, that group consists of the non-Serbs, thus an admixture of all the individuals living in Bosnia and Herzegovina except the Serbs, but more particularly the Muslim population, which accounts for only a part of the non-Serb population. Second, the intent to destroy concerned only a part of the non-Serb population, but the Applicant failed to specify which part of the group was targeted.”

In addition to those issues of the negative definition of the group and its geographic limits (or their lack), the Parties also discussed the choice between subjective and objective approaches to the definition. The Parties essentially agree that international jurisprudence accepts a combined subjective-objective approach. The issue is not in any event significant on the facts of this case and the Court takes it no further.

While the Applicant has employed the negative approach to the definition of a protected group, it places major, for the most part exclusive, emphasis on the Bosnian Muslims as the group being targeted. The Respondent, for instance, makes the point that the Applicant did not mention the Croats in its oral arguments relating to sexual violence, Srebrenica and Sarajevo, and that other groups including “the Jews, Roma and Yugoslavs” were not mentioned. The Applicant does however maintain the negative approach to the definition of the group in its final submissions and the Court accordingly needs to consider it.

The Court recalls first that the essence of the intent is to destroy the protected group, in whole or in part, as such. It is a group which must have particular positive characteristics — national, ethnic, racial or religious — and not the lack of them. The intent must also relate to the group “as such”. That means that the crime requires an intent to destroy
a collection of people who have a particular group identity. It is a matter of who those people are, not who they are not. The etymology of the word — killing a group — also indicates a positive definition: and Raphael Lemkin has explained that he created the word from the Greek *genos*, meaning race or tribe, and the termination “-cide”, from the Latin *caedere*, to kill (*Axis Rule in Occupied Europe* (1944), p. 79). In 1945 the word was used in the Nuremberg indictment which stated that the defendants “conducted deliberate and systematic genocide, viz., the extermination of racial and national groups . . . in order to destroy particular races and classes of people and national, racial or religious groups . . .” (Indictment, Trial of the Major War Criminals before the International Military Tribunal, *Official Documents*, Vol. 1, pp. 43 and 44). As the Court explains below (paragraph 198), when part of the group is targeted, that part must be significant enough for its destruction to have an impact on the group as a whole. Further, each of the acts listed in Article II require that the proscribed action be against members of the “group”.

194. The drafting history of the Convention confirms that a positive definition must be used. Genocide as “the denial of the existence of entire human groups” was contrasted with homicide, “the denial of the right to live of individual human beings” by the General Assembly in its 1946 resolution 96 (I) cited in the Preamble to the Convention. The drafters of the Convention also gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude. The Court spoke to the same effect in 1951 in declaring as an object of the Convention the safeguarding of “the very existence of certain human groups” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23). Such an understanding of genocide requires a positive identification of the group. The rejection of proposals to include within the Convention political groups and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics. A negatively defined group cannot be seen in that way.

195. The Court observes that the ICTY Appeals Chamber in the *Stašić* case (IT-97-24-A, Judgment, 22 March 2006, paras. 20-28) also came to the conclusion that the group must be defined positively, essentially for the same reasons as the Court has given.

196. Accordingly, the Court concludes that it should deal with the matter on the basis that the targeted group must in law be defined posi-

197. The Parties also addressed a specific question relating to the impact of geographic criteria on the group as identified positively. The question concerns in particular the atrocities committed in and around Srebrenica in July 1995, and the question whether in the circumstances of that situation the definition of genocide in Article II was satisfied so far as the intent of destruction of the “group” “in whole or in part” requirement is concerned. This question arises because of a critical finding in the *Krstić* case. In that case the Trial Chamber was “ultimately satisfied that murders and infliction of serious bodily or mental harm were committed with the intent to kill all the Bosnian Muslim men of military age at Srebrenica” (*IT-98-33, Judgment, 2 August 2001*, para. 546). Those men were systematically targeted whether they were civilians or soldiers (*ibid.*). The Court addresses the facts of that particular situation later (paragraphs 278-297). For the moment, it considers how as a matter of law the “group” is to be defined, in territorial and other respects.

198. In terms of that question of law, the Court refers to three matters relevant to the determination of “part” of the “group” for the purposes of Article II. In the first place, the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind (e.g. *Krstić*, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 8-11 and the cases of *Kayishema*, *Byilishema*, and *Semanza* there referred to; and *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 45, para. 8 of the Commentary to Article 17).

199. Second, the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, “it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe” (*ibid.*). The area of the perpetrator’s activity and control are to be considered. As the ICTY Appeals
Chamber has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant (Krstić, IT-98-33-A, Judgment, 19 April 2004, para. 13). This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indeed indicated the need for caution, lest this approach might distort the definition of genocide (Stakić, IT-97-24-T, Judgment, 31 July 2003, para. 523). The Respondent, while not challenging this criterion, does contend that the limit militates against the existence of the specific intent (dolus specialis) at the national or State level as opposed to the local level — a submission which, in the view of the Court, relates to attribution rather than to the “group” requirement.

200. A third suggested criterion is qualitative rather than quantitative. The Appeals Chamber in the Krstić case put the matter in these carefully measured terms:

“The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the Statute which exactly reproduces Article II of the Convention].” (IT-98-33-A, Judgment, 19 April 2004, para. 12; footnote omitted.)

Establishing the “group” requirement will not always depend on the substantiality requirement alone although it is an essential starting point. It follows in the Court’s opinion that the qualitative approach cannot stand alone. The Appeals Chamber in Krstić also expresses that view.

201. The above list of criteria is not exhaustive, but, as just indicated, the substantiality criterion is critical. They are essentially those stated by the Appeals Chamber in the Krstić case, although the Court does give this first criterion priority. Much will depend on the Court’s assessment of those and all other relevant factors in any particular case.

* * *

V. QUESTIONS OF PROOF: BURDEN OF PROOF, THE STANDARD OF PROOF, METHODS OF PROOF

202. When turning to the facts of the dispute, the Court must note that many allegations of fact made by the Applicant are disputed by the Respondent. That is so notwithstanding increasing agreement between the Parties on certain matters through the course of the proceedings. The disputes relate to issues about the facts, for instance the number of rapes committed by Serbs against Bosnian Muslims, and the day-to-day relationships between the authorities in Belgrade and the authorities in Pale, and the inferences to be drawn from, or the evaluations to be made of, facts, for instance about the existence or otherwise of the necessary specific intent (dolus specialis) and about the attributability of the acts of the organs of Republika Srpska and various paramilitary groups to the Respondent. The allegations also cover a very wide range of activity affecting many communities and individuals over an extensive area and over a long period. They have already been the subject of many accounts, official and non-official, by many individuals and bodies. The Parties drew on many of those accounts in their pleadings and oral argument.

203. Accordingly, before proceeding to an examination of the alleged facts underlying the claim in this case, the Court first considers, in this section of the Judgment, in turn the burden or onus of proof, the standard of proof, and the methods of proof.

204. On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), “it is the litigant seeking to establish a fact who bears the burden of proving it” (Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 437, para. 101). While the Applicant accepts that approach as a general proposition, it contends that in certain respects the onus should be reversed, especially in respect of the attributability of alleged acts of genocide to the Respondent, given the refusal of the Respondent to produce the full text of certain documents.

205. The particular issue concerns the “redacted” sections of documents of the Supreme Defence Council of the Respondent, i.e. sections in which parts of the text had been blacked out so as to be illegible. The documents had been classified, according to the Co-Agent of the Respondent, by decision of the Council as a military secret, and by a confidential decision of the Council of Ministers of Serbia and Montenegro as a matter of national security interest. The Applicant contends that the Court should draw its own conclusions from the failure of the Respondent to produce complete copies of the documents. It refers to the power of the Court, which it had invoked earlier (paragraph 44 above), to call for documents under Article 49 of the Statute, which provides that “[j]ournal note shall be taken of any refusal”. In the second round of oral argument the Applicant’s Deputy Agent submitted that

“Serbia and Montenegro should not be allowed to respond to our quoting the redacted SDC reports if it does not provide at the very same time the Applicant and the Court with copies of entirely
unredacted versions of all the SDC shorthand records and of all of the minutes of the same. Otherwise, Serbia and Montenegro would have an overriding advantage over Bosnia and Herzegovina with respect to documents, which are apparently, and not in the last place in the Respondent’s eyes, of direct relevance to winning or losing the present case. We explicitly, Madam President, request the Court to instruct the Respondent accordingly.” (Emphasis in the original.)

206. On this matter, the Court observes that the Applicant has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records. It has made very ample use of it, in the month before the hearings it submitted what must be taken to have been a careful selection of documents from the very many available from the ICTY. The Applicant called General Sir Richard Dannatt, who, drawing on a number of those documents, gave evidence on the relationship between the authorities in the Federal Republic of Yugoslavia and those in the Republika Srpska and on the matter of control and instruction. Although the Court has not agreed to either of the Applicant’s requests to be provided with unedited copies of the documents, it has not failed to note the Applicant’s suggestion that the Court may be free to draw its own conclusions.

207. On a final matter relating to the burden of proof, the Applicant contends that the Court should draw inferences, notably about specific intent (dolus specialis), from established facts, i.e., from what the Applicant refers to as a “pattern of acts” that “speaks for itself”. The Court considers that matter later in the Judgment (paragraphs 370-376 below).

208. The Parties also differ on the second matter, the standard of proof. The Applicant, emphasizing that the matter is not one of criminal law, says that the standard is the balance of evidence or the balance of probabilities, inasmuch as what is alleged is breach of treaty obligations. Accordingly, the proceedings “concern the most serious issues of State responsibility and... a charge of such exceptional gravity against a State requires a proper degree of certainty. The proofs should be such as to leave no room for reasonable doubt.”

209. The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. Corfu Channel (United Kingdom v. Albania), Judgment, I.C.J. Reports 1949, p. 17). The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.

210. In respect of the Applicant’s claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.

211. The Court now turns to the third matter — the method of proof. The Parties submitted a vast array of material, from different sources, to the Court. It included reports, resolutions and findings by various United Nations organs, including the Secretary-General, the General Assembly, the Security Council and its Commission of Experts, and the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Special Rapporteur on Human Rights in the former Yugoslavia; documents from other inter-governmental organizations such as the Conference for Security and Co-operation in Europe; documents, evidence and decisions from the ICTY; publications from governments; documents from non-governmental organizations; media reports, articles and books. They also called witnesses, experts and witness-experts (paragraphs 57-58 above).

212. The Court must itself make its own determination of the facts which are relevant to the law which the Applicant claims the Respondent has breached. This case does however have an unusual feature. Many of the allegations before this Court have already been the subject of the processes and decisions of the ICTY. The Court considers their significance in this section of the Judgment.

213. The assessment made by the Court of the weight to be given to a particular item of evidence may lead to the Court rejecting the item as unreliable, or finding it probative, as appears from the practice followed for instance in the case concerning United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, pp. 9-10, paras. 11-13; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 39-41, paras. 59-73; and Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, pp. 200-201, paras. 57-61. In the most recent case the Court said this:

“The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (Military and Paramilitary Activi-
ties in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 41, para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention. The Court thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner. The Court further notes that, since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties.” (Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 35, para. 61. See also paras. 78-79, 114 and 237-242.)

214. The fact-finding process of the ICTY falls within this formulation, as “evidence obtained by examination of persons directly involved”, tested by cross-examination, the credibility of which has not been challenged subsequently. The Court has been referred to extensive documentation arising from the Tribunal’s processes, including indictments by the Prosecutor, various interlocutory decisions by judges and Trial Chambers, oral and written evidence, decisions of the Trial Chambers on guilt or innocence, sentencing judgments following a plea agreement and decisions of the Appeals Chamber.

215. By the end of the oral proceedings the Parties were in a broad measure of agreement on the significance of the ICTY material. The Applicant throughout has given and gives major weight to that material. At the written stage the Respondent had challenged the reliability of the Tribunal’s findings, the adequacy of the legal framework under which it operates, the adequacy of its procedures and its neutrality. At the stage of the oral proceedings, its position had changed in a major way. In its Agent’s words, the Respondent now based itself on the jurisprudence of the Tribunal and had “in effect” distanced itself from the opinions about the Tribunal expressed in its Rejoinder. The Agent was however careful to distinguish between different categories of material:

“[W]e do not regard all the material of the Tribunal for the former Yugoslavia as having the same relevance or probative value. We have primarily based ourselves upon the judgments of the Tribunal’s Trial and Appeals Chambers, given that only the judgments can be regarded as establishing the facts about the crimes in a credible way.”

And he went on to point out that the Tribunal has not so far, with the exception of Srebrenica, held that genocide was committed in any of the situations cited by the Applicant. He also called attention to the criticisms already made by Respondent’s counsel of the relevant judgment concerning General Krstić who was found guilty of aiding and abetting genocide at Srebrenica.

216. The Court was referred to actions and decisions taken at various stages of the ICTY processes:

(1) The Prosecutor’s decision to include or not certain changes in an indictment;
(2) The decision of a judge on reviewing the indictment to confirm it and issue an arrest warrant or not;
(3) If such warrant is not executed, a decision of a Trial Chamber (of three judges) to issue an international arrest warrant, provided the Chamber is satisfied that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged;
(4) The decision of a Trial Chamber on the accused’s motion for acquittal at the end of the prosecution case;
(5) The judgment of a Trial Chamber following the full hearings;
(6) The sentencing judgment of a Trial Chamber following a guilty plea.

The Court was also referred to certain decisions of the Appeals Chamber.

217. The Court will consider these stages in turn. The Applicant placed some weight on indictments filed by the Prosecutor. But the claims made by the Prosecutor in the indictments are just that — allegations made by one party. They have still to proceed through the various phases outlined earlier. The Prosecutor may, instead, decide to withdraw charges of genocide or they may be dismissed at trial. Accordingly, as a general proposition the inclusion of charges in an indictment cannot be given weight. What may however be significant is the decision of the Prosecutor, either initially or in an amendment to an indictment, not to include or to exclude a charge of genocide.

218. The second and third stages, relating to the confirmation of the indictment, issues of arrest warrants and charges, are the responsibility of the judges (one in the second stage and three in the third) rather than the Prosecutor, and witnesses may also be called in the third, but the accused is generally not involved. Moreover, the grounds for a judge to act are, at the second stage, that a prima facie case has been established, and at the
third, that reasonable grounds exist for belief that the accused has committed crimes charged.

219. The accused does have a role at the fourth stage — motions for acquittal made by the defence at the end of the prosecution’s case and after the defence has had the opportunity to cross-examine the prosecution’s witnesses, on the basis that “there is no evidence capable of supporting a conviction”. This stage is understood to require a decision, not that the Chamber trying the facts would be satisfied beyond reasonable doubt by the prosecution’s evidence (if accepted), but rather that it could be so satisfied (Jelisić, IT-95-10-A, Appeals Chamber Judgment, 5 July 2001, para. 37). The significance of that lesser standard for present purposes appears from one case on which the Applicant relied. The Trial Chamber in August 2005 in Krajišnik dismissed the defence motion that the accused who was charged with genocide and other crimes had no case to answer (IT-00-39-T, transcript of 19 August 2005, pp. 17112-17132). But following the full hearing the accused was found not guilty of genocide nor of complicity in genocide. While the actus reus of genocide was established, the specific intent (dolus specialis) was not (Trial Chamber Judgment, 27 September 2006, paras. 867-869). Because the judge or the Chamber does not make definitive findings at any of the four stages described, the Court does not consider that it can give weight to those rulings. The standard of proof which the Court requires in this case would not be met.

220. The processes of the Tribunal at the fifth stage, leading to a judgment of the Trial Chamber following the full hearing are to be contrasted with those earlier stages. The processes of the Tribunal leading to final findings are rigorous. Accused are presumed innocent until proved guilty beyond reasonable doubt. They are entitled to listed minimum guarantees (taken from the International Covenant on Civil and Political Rights), including the right to counsel, to examine witness against them, to obtain the examination of witness on their behalf, and not to be compelled to testify against themselves or to confess guilt. The Tribunal has powers to require Member States of the United Nations to co-operate with it, among other things, in the taking of testimony and the production of evidence. Accused are provided with extensive pre-trial disclosure including materials gathered by the prosecution and supporting the indictment, relevant witness statements and the pre-trial brief summarizing the evidence against them. The prosecutor is also to disclose exculpatory material to the accused and to make available in electronic form the collections of relevant material which the prosecution holds.

221. In practice, now extending over ten years, the trials, many of important military or political figures for alleged crimes committed over long periods and involving complex allegations, usually last for months, even years, and can involve thousands of documents and numerous witnesses. The Trial Chamber may admit any relevant evidence which has probative value. The Chamber is to give its reasons in writing and separate and dissenting opinions may be appended.

222. Each party has a right of appeal from the judgment of the Trial Chamber to the Appeals Chamber on the grounds of error of law invalidating the decision or error of fact occasioning a miscarriage of justice. The Appeals Chamber of five judges does not re hear the evidence, but it does have power to hear additional evidence if it finds that it was not available at trial, is relevant and credible and could have been a decisive factor in the trial. It too is to give a reasoned opinion in writing to which separate or dissenting opinions may be appended.

223. In view of the above, the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight.

224. There remains for consideration the sixth stage, that of sentencing judgments given following a guilty plea. The process involves a statement of agreed facts and a sentencing judgment. Notwithstanding the guilty plea the Trial Chamber must be satisfied that there is sufficient factual basis for the crime and the accused’s participation in it. It must also be satisfied that the guilty plea has been made voluntarily, is informed and is not equivocal. Accordingly the agreed statement and the sentencing judgment may when relevant be given a certain weight.

* * *

225. The Court will now comment in a general way on some of the other evidence submitted to it. Some of that evidence has been produced to prove that a particular statement was made so that the Party may make use of its content. In many of these cases the accuracy of the document as a record is not in doubt; rather its significance is. That is often the case for instance with official documents, such as the record of parliamentary bodies and budget and financial statements. Another instance is when the statement was recorded contemporaneously on audio or videotape. Yet another is the evidence recorded by the ICTY.
226. In some cases the account represents the speaker's own knowledge of the fact to be determined or evaluated. In other cases the account may set out the speaker's opinion or understanding of events after they have occurred and in some cases the account will not be based on direct observation but may be hearsay. In fact the Parties rarely disagreed about the authenticity of such material but rather about whether it was being accurately presented (for instance with contention that passages were being taken out of context) and what weight or significance should be given to it.

227. The Court was also referred to a number of reports from official or independent bodies, giving accounts of relevant events. Their value depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).

228. One particular instance is the comprehensive report, “The Fall of Srebrenica”, which the United Nations Secretary-General submitted in November 1999 to the General Assembly (United Nations doc. A/54/549). It was prepared at the request of the General Assembly, and covered the events from the establishing by the Security Council of the “safe area” on 16 April 1993 (Security Council resolution 819 (1993)) until the endorsement by the Security Council on 15 December 1995 of the Dayton Agreement. Member States and others concerned had been encouraged to provide relevant information. The Secretary-General was in a very good position to prepare a comprehensive report, some years after the events, as appears in part from this description of the method of preparation:

“This report has been prepared on the basis of archival research within the United Nations system, as well as on the basis of interviews with individuals who, in one capacity or another, participated in or had knowledge of the events in question. In the interest of gaining a clearer understanding of these events, I have taken the exceptional step of entering into the public record information from the classified files of the United Nations. In addition, I would like to record my thanks to those Member States, organizations and individuals who provided information for this report. A list of persons interviewed in this connection is attached as annex 1. While that list is fairly extensive, time, as well as budgetary and other constraints, precluded interviewing many other individuals who would be in a position to offer important perspectives on the subject at hand. In most cases, the interviews were conducted on a non-attribution basis to encourage as candid a disclosure as possible. I have also honoured the request of those individuals who provided information for this report on the condition that they not be identified.” (A/54/549, para. 8.)

229. The chapter, “Fall of Srebrenica: 6-11 July 1995”, is preceded by this note:

“The United Nations has hitherto not publicly disclosed the full details of the attack carried out on Srebrenica from 6 to 11 July 1995. The account which follows has now been reconstructed mainly from reports filed at that time by Dutchbat and the United Nations military observers. The accounts provided have also been supplemented with information contained in the Netherlands report on the debriefing of Dutchbat, completed in October 1995, and by information provided by Bosniac, Bosnian Serb and international sources. In order to independently examine the information contained in various secondary sources published over the past four years, as well to corroborate key information contained in the Netherlands debriefing report, interviews were conducted during the preparation of this report with a number of key personnel who were either in Srebrenica at the time, or who were involved in decision-making at higher levels in the United Nations chain of command.” (A/54/549, Chap. VII, p. 57.)

The introductory note to the next chapter, “The Aftermath of the fall of Srebrenica: 12-20 July 1995”, contains this description of the sources:

“The following section attempts to describe in a coherent narrative how thousands of men and boys were summarily executed and buried in mass graves within a matter of days while the international community attempted to negotiate access to them. It details how evidence of atrocities taking place gradually came to light, but too late to prevent the tragedy which was unfolding. In 1995, the details of the tragedy were told in piecemeal fashion, as survivors of the mass executions began to provide accounts of the horrors they had witnessed; satellite photos later gave credence to their accounts.

The first official United Nations report which signalled the possibility of mass executions having taken place was the report of the Special Rapporteur of the Commission on Human Rights, dated 22 August 1995 (E/CN.4/1996/9). It was followed by the Secretary-General’s reports to the Security Council, pursuant to resolution 1010 (1995), of 30 August (S/1995/755) and 27 November 1995 (S/1995/988). Those reports included information obtained from governmental and non-governmental organizations, as well as information that had appeared in the international and local press. By the end of 1995, however, the International Tribunal for the Former
Yugoslavia had still not been granted access to the area to corroborate the allegations of mass executions with forensic evidence.

The Tribunal first gained access to the crime scenes in January 1996. The details of many of their findings were made public in July 1996, during testimony under rule 60 of the Tribunal’s rules of procedure, in the case against Ratko Mladić and Radovan Karadžić. Between that time and the present, the Tribunal has been able to conduct further investigations in the areas where the executions were reported to have taken place and where the primary and secondary mass graves were reported to have been located. On the basis of the forensic evidence obtained during those investigations, the Tribunal has now been able to further corroborate much of the testimony of the survivors of the massacres. On 30 October 1998, the Tribunal indicted Radislav Krstić, Commander of the BSA’s Drina Corps, for his alleged involvement in those massacres. The text of the indictment provides a succinct summary of the information obtained to date on where and when the mass executions took place.

The aforementioned sources of information, coupled with certain additional confidential information that was obtained during the preparation of this report, form the basis of the account which follows. Sources are purposely not cited in those instances where such disclosure could potentially compromise the Tribunal’s ongoing work.” (A/54/549, Chap. VIII, p. 77.)

VI. THE FACTS INVOKED BY THE APPLICANT, IN RELATION TO ARTICLE II

(1) The Background

231. In this case the Court is seised of a dispute between two sovereign States, each of which is established in part of the territory of the former State known as the Socialist Federal Republic of Yugoslavia, concerning the application and fulfillment of an international convention to which they are parties, the Convention on the Prevention and Punishment of the Crime of Genocide. The task of the Court is to deal with the legal claims and factual allegations advanced by Bosnia and Herzegovina against Serbia and Montenegro; the counter-claim advanced earlier in the proceedings by Serbia and Montenegro against Bosnia and Herzegovina has been withdrawn.

232. Following the death on 4 May 1980 of President Tito, a rotating presidency was implemented in accordance with the 1974 Constitution of the SFRY. After almost ten years of economic crisis and the rise of nationalism within the republics and growing tension between different ethnic and national groups, the SFRY began to break up. On 25 June 1991, Slovenia and Croatia declared independence, followed by Macedonia on 17 September 1991. (Slovenia and Macedonia are not concerned in the present proceedings; Croatia has brought a separate case against Serbia and Montenegro, which is still pending on the General List.) On the eve of the war in Bosnia and Herzegovina which then broke out, according to the last census (31 March 1991), some 44 per cent of the population of the country described themselves as Muslims, some 31 per cent as Serbs and some 17 per cent as Croats (Krajšnik, IT-00-39-T and 40-T, Trial Chamber Judgment, 27 September 2006, para. 15).

233. By a “sovereignty” resolution adopted on 14 October 1991, the Parliament of Bosnia and Herzegovina declared the independence of the Republic. The validity of this resolution was contested at the time by the Serbian community of Bosnia and Herzegovina (Opinion No. 1 of the Arbitration Commission of the Conference on Yugoslavia (the Badinter Commission), p. 3). On 24 October 1991, the Serb Members of the Bosnian Parliament proclaimed a separate Assembly of the Serb Nation/Assembly of the Serb People of Bosnia and Herzegovina. On 9 January 1992, the Republic of the Serb People of Bosnia and Herzegovina (subsequently renamed the Republika Srpska on 12 August 1992) was declared with the proviso that the declaration would come into force upon international recognition of the Republic of Bosnia and Herzegovina. On 28 February 1992, the Constitution of the Republic of the Serb People of Bosnia and Herzegovina was adopted. The Republic of the Serb People of Bosnia and Herzegovina (and subsequently the Republika Srpska) was not and has not been recognized internationally as a State; it has however enjoyed some de facto independence.

234. On 29 February and 1 March 1992, a referendum was held on the question of independence in Bosnia and Herzegovina. On 6 March 1992, Bosnia and Herzegovina officially declared its independence. With effect from 7 April 1992, Bosnia and Herzegovina was recognized by the European Community. On 7 April 1992, Bosnia and Herzegovina was recognized by the United States. On 27 April 1992, the Constitution of the Federal Republic of Yugoslavia was adopted consisting of the Republic of Serbia and the Republic of Montenegro. As explained above (paragraph 67), Montenegro declared its independence on 3 June 2006. All three States have been admitted to membership of the United Nations: Bosnia and Herzegovina on 22 May 1992; Serbia and Montenegro, under the name of the Federal Republic of Yugoslavia on 1 November 2000; and the Republic of Montenegro on 28 June 2006.

* * *
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25. It will be convenient next to define the institutional organizations or groups that were the actors in the events complained of. The Applicants have identified two of the greatest actors in the events: the army of the Republika Srpska and the Yugoslav People’s Army (JNA). The Applicants have also identified two other entities: the Republic of Bosnian Serbs (the Republic of Bosnia and Herzegovina) and the Republic of Serbia.

26. The Parties both recognize that there were a number of entities at the lower level the activities of which have formed part of the factual issues in the case, though they disagree as to the significance of these activities. The Court notes that on 8 May 1992, all JNA troops who were not of Bosnian origin were withdrawn from Bosnia-Herzegovina. However, JNA troops of Bosnian Serb origin who were serving in Bosnia and Herzegovina were transferred to Bosnia and Herzegovina and subsequently joined the VRS. Of the military and paramilitary units active in the hostilities, there were in April 1992 five types of armed formations involved in Bosnia: first, the Yugoslav People’s Army (JNA), subsequently the Yugoslav Army (VJ); second, volunteer units supported by the JNA and later by the VJ, and organised into, or joined, the army of the Republika Srpska (the VRS); third, municipal Bosnian Serb Territorial Defence (TO) detachments; and, fourth, police forces of the Bosnian Serb Ministry of the Interior. The MUP of the Republika Srpska controlled the police and the security services, and operated, in the territory, and the loyalty of large numbers of Bosnian Serbs.

27. The Applicant has asserted the existence of close ties between the army of the Republika Srpska (VRS) and the Yugoslav People’s Army (JNA) both before and after the break-up of the SFRY, arrangements were being made to transform the JNA into an effectively Serb army. The Court notes that on 16 May 1992, all JNA troops were withdrawn from Bosnia-Herzegovina. However, JNA troops of Bosnian Serb origin who were serving in Bosnia and Herzegovina were transferred to Bosnia and Herzegovina and subsequently joined the VRS. Moreover, Bosnian Serb soldiers serving in the JNA units elsewhere were transferred to Bosnia and Herzegovina and became the army of the Federal Republic of Yugoslavia. On 15 May 1992 the JNA in Bosnia and Herzegovina was officially withdrawn and disbanded. On 19 May 1992, the Yugoslav army was officially withdrawn and disbanded. The Court observes that this is the political sympathy of the Respondent lay with the Bosnian Serbs, in pursuit of which it gave its support to those persons and groups responsible for the activities which allegedly constitute the genocidal acts complained of. The Applicant bases this contention first on the “Strategic Goals” articulated by President Karadžić at the 16th Session of the FRY Assembly on 12 May 1992, and subsequently published in the Official Gazette of the Republic of Bosnia and Herzegovina. At the time when the latter State declared its independence (15 October 1991), the independence of two other entities had already been declared: in Croatia, the Republic of the Serb People of Croatia, and in the former Socialist Republic of Slovenia, the Republic of Slovenia. The Republic of Croatia had already declared its independence, but the latter fact was not recognized by the Republika Srpska, the Yugoslav Peoples’ Army (JNA) of the SFRY, and Montenegro, which was composed of the two constituent republics of Montenegro and Serbia, and the latter fact was not recognized by the Republika Srpska, the Yugoslav Peoples’ Army (JNA) of the SFRY, or by the Republic of Serbia. The Republic of Montenegro, which was composed of the two constituent republics of Montenegro and Serbia, and the former Socialist Republic of Macedonia, which was composed of the two constituent republics of Macedonia and Serbia, was also not recognized by the Republika Srpska, the Yugoslav Peoples’ Army (JNA) of the SFRY, or by the Republic of Serbia. However, the Respondent contends that matters like their payment, promotions, pensions, etc., were handled, not by the Republika Srpska, but by the army of the Respondent. According to the Respondent, the importance of this fact was greatly exaggerated by the Applicant; the importance of this fact was greatly exaggerated by the Applicant. The Court notes that the Applicant has asserted the existence of close ties between the army of the Republika Srpska and the author of the military wing of the Muslim Party of Democratic Action. The Court observes that this is the political sympathy of the Respondent lay with the Bosnian Serbs, in pursuit of which it gave its support to those persons and groups responsible for the activities which allegedly constitute the genocidal acts complained of. The Applicant bases this contention first on the “Strategic Goals” articulated by President Karadžić at the 16th Session of the FRY Assembly on 12 May 1992, and subsequently published in the Official Gazette of the Republic of Bosnia and Herzegovina. The Applicant bases this contention first on the “Strategic Goals” articulated by President Karadžić at the 16th Session of the FRY Assembly on 12 May 1992, and subsequently published in the Official Gazette of the Republic of Bosnia and Herzegovina. The Applicant bases this contention first on the “Strategic Goals” articulated by President Karadžić at the 16th Session of the FRY Assembly on 12 May 1992, and subsequently published in the Official Gazette of the Republic of Bosnia and Herzegovina.
FRY army — only the label changed; according to the Respondent, there is no evidence for this last allegation. The Court takes note, however, of the statements of the Chamber in the 7th/17 case (IT-94-1-T) quoted by the Applicant which do not specify the extent of this. The National Bank of Yugoslavia was not so described as to the budget for the use of the JNA. The same was the case for the budgets of the Republic of Bosnia and Herzegovina which were said to be entirely under governmental control. It is clear that any financing supplied was simply on the basis of credits, to be repaid, and was therefore quite normal, particularly in view of the economic isolation of the FRY, the Republic Srpska and the Republic Srpska Krajina; the Republic Srpska and the Republic Srpska Krajina were normal reactions to the threat of civil war, and there was no premeditated plan behind them.

29. The Court further notes the submission of the Applicant that the VRS was armed and equipped by the JNA, which was subsequently taken over by the VRS. Moreover, the VRS was supported by the Secretary-General’s report of 17 June 1995. The VRS was in fact supported by arms and equipment until the late 1990s. The Applicant contends that the VRS was supplied with NATO-standard equipment from the former JNA and that up to 90 per cent of the VRS’s arms were supplied by the former JNA. The VRS forces, the Applicant argues, were provided with a wide range of arms and equipment, including tanks, helicopters, and artillery. The VRS was also provided with training, and the Applicant notes that the VRS was trained by former JNA officers.

30. As regards effective links between the two Governments in the economic sphere, the Applicant maintains that the economies of the FRY, the Republic Srpska, and the Republic Srpska Krajina were integrated through the creation of a single economic entity, thus enabling the FRY Government to finance the armies of the two other bodies in addition to its own. The Applicant argued that the National Banks of the FR Yugoslavia, the Republic of Bosnia and Herzegovina, and the Republic of Srpska were controlled by the FRY Government. The Applicant also argued that the budget of the Republic Srpska was to a large extent financed through the creation of money by providing credit to the FRY budget for the use of the JNA. It is clear that any financing supplied was simply on the basis of credits, to be repaid, and was therefore quite normal, particularly in view of the economic isolation of the FRY, the Republic Srpska and the Republic Srpska Krajina; also, it is clear that any funds received would have been under the sole control of the recipient, the Republic Srpska or the Republic Srpska Krajina.

241. The Court finds it established that the Respondent, in order to satisfy itself, first, whether the alleged atrocities occurred; secondly, whether such atrocities, if established, fall within the scope of the Acts of War. It is established, full within the scope of the Acts of War, which is a matter of evidence produced before the ICTY, the Applicant contended that up to 90 per cent of the material needs of the VRS were supplied by the FRY Government, while Mr. Vladimir Lukić, who was the Prime Minister of the Republic Srpska from 20 January 1993 to 18 August 1994, testified that the armaments of Bosnia and Herzegovina were not limited to military matériel obtained from the Republic Srpska, but also included matériel received as a result of the military assistance furnished by the Republic Srpska to the VRS. The Respondent, however, does not deny the fact of these developments, it insists that they were normal reactions to the threat of civil war, and there was no premeditated plan behind them.
group. The Court will also consider the facts alleged in the light of the question whether there is persuasive and consistent evidence for a pattern of atrocities, as alleged by the Applicant, which would constitute evidence of dolus specialis on the part of the Respondent. For this purpose it is not necessary to examine every single incident reported by the Applicant, nor is it necessary to make an exhaustive list of the allegations. The Court finds it sufficient to examine those facts that would illuminate the question of intent, or illustrate the claim by the Applicant of a pattern of acts committed against members of the group, such as to lead to an inference from such pattern of the existence of a specific intent (dolus specialis).

243. The Court will examine the evidence following the categories of prohibited acts to be found in Article II of the Genocide Convention. The nature of the events to be described is however such that there is considerable overlap between these categories: thus, for example, the conditions of life in the camps to which members of the protected group were confined have been presented by the Applicant as violations of Article II, paragraph (c), of the Convention (the deliberate infliction of destructive conditions of life), but since numerous inmates of the camps died, allegedly as a result of those conditions, or were killed there, the camps fall to be mentioned also under paragraph (a), killing of members of the protected group.

244. In the evidentiary material submitted to the Court, and that referred to by the ICTY, frequent reference is made to the actions of “Serbs” or “Serb forces”, and it is not always clear what relationship, if any, the participants are alleged to have had with the Respondent. In some cases it is contended, for example, that the JNA, as an organ de jure of the Respondent, was involved; in other cases it seems clear that the participants were Bosnian Serbs, with no de jure link with the Respondent, but persons whose actions are, it is argued, attributable to the Respondent on other grounds. Furthermore, as noted in paragraph 238 above, it appears that JNA troops of Bosnian Serb origin were transformed into, or joined the VRS. At this stage of the present Judgment, the Court is not yet concerned with the question of the attributability to the Respondent of the atrocities described; it will therefore use the terms “Serb” and “Serb forces” purely descriptively, without prejudice to the status they may later, in relation to each incident, be shown to have had. When referring to documents of the ICTY, or to the Applicant’s pleadings or oral argument, the Court will use the terminology of the original.

245. Article II (a) of the Convention deals with acts of killing members of the protected group. The Court will first examine the evidence of killings of members of the protected group in the principal areas of Bosnia and in the various detention camps, and ascertain whether there is evidence of a specific intent (dolus specialis) in one or more of them. The Court will then consider under this heading the evidence of the massacres reported to have occurred in July 1995 at Srebrenica.

Sarajevo

246. The Court notes that the Applicant refers repeatedly to killings, by shelling and sniping, perpetrated in Sarajevo. The Fifth Periodic Report of the United Nations Special Rapporteur is presented by the Applicant in support of the allegation that between 1992 and 1993 killings of Muslim civilians were perpetrated in Sarajevo, partly as a result of continuous shelling by Bosnian Serb forces. The Special Rapporteur stated that on 9 and 10 November 1993 mortar attacks killed 12 people (E/CH.4/1994/47, 17 November 1992, p. 4, para. 14). In his periodic Report of 5 July 1995, the Special Rapporteur observed that as from late February 1995 numerous civilians were killed by sniping activities of Bosnian Serb forces and that “one local source reported that a total of 41 civilians were killed . . . in Sarajevo during the month of May 1995” (Report of 5 July 1995, para. 69). The Report also noted that, in late June and early July 1995, there was further indiscriminate shelling and rocket attacks on Sarajevo by Bosnian Serb forces as a result of which many civilian deaths were reported (Report of 5 July 1995, para. 70).

247. The Report of the Commission of Experts gives a detailed account of the battle and siege of Sarajevo. The Commission estimated that over the course of the siege nearly 10,000 persons had been killed or were missing in the city of Sarajevo (Report of the Commission of Experts, Vol. II, Ann. VI, p. 8). According to the estimates made in a report presented by the Prosecution before the ICTY in the Galic case (IT-98-29-T, Trial Chamber Judgment, 5 December 2003, paras. 578 and 579), the monthly average of civilians killed fell from 105 in September to December 1992, to around 64 in 1993 and to around 28 in the first six months of 1994.

248. The Trial Chamber of the ICTY, in its Judgment of 5 December 2003 in the Galic case examined specific incidents in the area of Sarajevo, for instance the shelling of the Markale market on 5 February 1994 which resulted in the killing of 60 persons. The majority of the Trial
Chamber found that “civilians in ARBiH-held areas of Sarajevo were
directly or indiscriminately attacked from SRK-controlled territory
during the Indictment Period, and that as a result and as a minimum,
hundreds of civilians were killed and thousands others were injured.”
(Galić, IT-98-29-T, Judgment, 5 December 2003, para. 591), the Trial
Chamber further concluded that “[i]n sum, the Majority of the Trial
Chamber finds that each of the crimes alleged in the Indictment —
crime of terror, attacks on civilians, murder and inhumane acts —
were committed by SRK forces during the Indictment Period” (ibid.,
para. 600).

249. In this connection, the Respondent makes the general point that
in a civil war it is not always possible to differentiate between military
personnel and civilians. It does not deny that crimes were committed
during the siege of Sarajevo, crimes that “could certainly be characterized
as war crimes and certain even as crimes against humanity”, but it does
not accept that there was a strategy of targeting civilians.

Drina River Valley
(a) Zvornik

250. The Applicant made a number of allegations with regard to kill-
nings that occurred in the area of Drina River Valley. The Applicant, relying
on the Report of the Commission of Experts, claims that at least
2,500 Muslims died in Zvornik from April to May 1992. The Court notes
that the findings of the Report of the Commission of Experts are based
on individual witness statements and one declassified United States State
Department document No. 94-11 (Vol. V, Ann. X, para. 387; Vol. IV,
a video reporting on massacres in Zvornik was shown during the oral
proceedings (excerpts from “The Death of Yugoslavia”, BBC documen-
tary). With regard to specific incidents, the Applicant alleges that Serb
soldiers shot 36 Muslims and mistreated 27 Muslim children in the local
hospital of Zvornik in the second half of May 1992.

251. The Respondent contests those allegations and contends that all
three sources used by the Applicant are based solely on the account of
one witness. It considers that the three reports cited by the Applicant
cannot be used as evidence before the Court. The Respondent produced
the statement of a witness made before an investigating judge in Zvornik
which claimed that the alleged massacre in the local hospital of Zvornik
had never taken place. The Court notes that the Office of the Prosecutor
of the ICTY had never indicted any of the accused for the alleged
massacres in the hospital.

(b) Camps

(i) Sušica camp

252. The Applicant further presents claims with regard to killings per-
petrated in detention camps in the area of Drina River Valley. The
Report of the Commission of Experts includes the statement of an ex-
guard at the Sušica camp who personally witnessed 3,000 Muslims being
killed (Vol. IV, Ann. VIII, p. 334) and the execution of the last 200 sur-
viving detainees (Vol. I, Ann. IV, pp. 31-32). In proceedings before the
ICTY, the Commander of that camp, Dragan Nikolić, pleaded guilty to
mURINE FROM OTHER NON-SERB DETAINEES. DRAGAN
Nikolić, IT-94-2-S, para. 67).

(ii) Foća Kazneno-Popravni Dom camp

253. The Report of the Commission of Experts further mentions
numerous killings at the camp of Foća Kazneno-Popravni Dom (Foća
KP Dom). The Experts estimated that the number of prisoners at the
camp fell from 570 to 130 over two months (Vol. IV, Ann. VIII, p. 129). The United States State Department reported one eye-witness statement
of regular executions in July 1992 and mass graves at the camp.

254. The Trial Chamber of the ICTY made the following findings on
several killings at this camp in its Judgment in the Krnojelac case:

“The Trial Chamber is satisfied beyond reasonable doubt that all
but three of the persons listed in Schedule C to the Indictment were
killed at the KP Dom. The Trial Chamber is satisfied that these per-
sions fell within the pattern of events that occurred at the KP Dom
during the months of June and July 1992, and that the only reason-
able explanation for the disappearance of these persons since that
time is that they died as a result of acts or omissions, with the rele-
vant state of mind [sc. that required to establish murder], at the KP

(iii) Batković camp

255. As regards the detention camp of Batković, the Applicant claims
that many prisoners died at this camp as a result of mistreatment by the
Serb guards. The Report of the Commission of Experts reports one wit-
ness statement according to which there was a mass grave located next to
the Batković prison camp. At least 15 bodies were buried next to a cow
stable, and the prisoners neither knew the identity of those buried at the
stable nor the circumstances of their deaths (Report of the Commission

“[b]ecause of the level of mistreatment, many prisoners died. One man stated that during his stay, mid-July to mid-August, 13 prisoners were beaten to death. Another prisoner died because he had gangrene which went untreated. Five more may have died from hunger. Allegedly, 20 prisoners died prior to September.” (Vol. IV, Ann. VIII, p. 63.)

Killings at the Batković camp are also mentioned in the Dispatch of the United States State Department of 19 April 1993. According to a witness, several men died as a result of bad conditions and beatings at the camp (United States Dispatch, 19 April 1993, Vol. 4, No. 30, p. 538).

256. On the other hand, the Respondent stressed that, when the United Nations Special Rapporteur visited the Batković prison camp, he found that: “The prisoners did not complain of ill-treatment and, in general appeared to be in good health.” (Report of 17 November 1992, para. 29) However, the Applicant contends that “it is without any doubt that Mazowiecki was shown a ‘model’ camp”.

Prijedor

(a) Kozarac and Hambarine

257. With regard to the area of the municipality of Prijedor, the Applicant has placed particular emphasis on the shelling and attacks on Kozarac, 20 km east of Prijedor, and on Hambarine in May 1992. The Applicant contends that after the shelling, Serb forces shot people in their homes and that those who surrendered were taken to a soccer stadium in Kozarac where some men were randomly shot. The Report of the Commission of Experts (Vol. I, Ann. III, pp. 154-155) states that:

“The attack on Kozarac lasted three days and caused many villagers to flee to the forest while the soldiers were shooting at ‘every moving thing’. Survivors calculated that at least 2,000 villagers were killed in that period. The villagers’ defence fell on 26 May . . .

Serbs then reportedly announced that the villagers had 10 minutes to reach the town’s soccer stadium. However, many people were shot in their homes before given a chance to leave. One witness reported that several thousand people tried to surrender by carrying white flags, but three Serb tanks opened fire on them, killing many.”

The Respondent submits that the number of killings is exaggerated and that “there was severe fighting in Kozarac, which took place on 25 and 26 May, and naturally, it should be concluded that a certain number of the victims were Muslim combatants”.

258. As regards Hambarine, the Report of the Commission of Experts (Vol. I, p. 39) states that:

“Following an incident in which less than a handful of Serb[ian] soldiers were shot dead under unclear circumstances, the village of Hambarine was given an ultimatum to hand over a policeman who lived where the shooting had occurred. As it was not met, Hambarine was subjected to several hours of artillery bombardment on 23 May 1992.

The shells were fired from the aerodrome Urije just outside Prijedor town. When the bombardment stopped, the village was stormed by infantry, including paramilitary units, which sought out the inhabitants in every home. Hambarine had a population of 2,499 in 1991.”

259. The Report of the Special Rapporteur of 17 November 1992, states that:

“Between 23 and 25 May, the Muslim village of Hambarine, 5 km south of Prijedor, received an ultimatum: all weapons must be surrendered by 11 a.m. Then, alleging that a shot was fired at a Serbian patrol, heavy artillery began to shell the village and tanks appeared, firing at homes. The villagers fled to Prijedor. Witnesses reported many deaths, probably as many as 1,000.” (Periodic Report of 17 November 1992, p. 8, para. 17 (c).)

The Respondent says, citing the indictment in the Stakic case, that “merely 11 names of the victims are known” and that it is therefore impossible that the total number of victims in Hambarine was “as many as 1,000”.

260. The Applicant also claimed that killings of members of the protected group were perpetrated in Prijedor itself. The Report of the Commission of Experts, as well as the United Nations Special Rapporteur collected individual witness statements on several incidents of killing in the town of Prijedor (Report of the Commission of Experts, Vol. I, Ann. V, pp. 54 et seq.). In particular, the Special Rapporteur received
testimony “from a number of reliable sources” that 200 people were killed in Prijedor on 29 May 1992 (Report of 17 November 1992, para. 17).

261. In the Stakic case, the ICTY Trial Chamber found that “many people were killed during the attacks by the Bosnian Serb army on predominantly Bosnian Muslim villages and towns throughout the Prijedor municipality and several massacres of Muslims took place”, and that “a comprehensive pattern of atrocities against Muslims in Prijedor municipality in 1992 had been proved beyond reasonable doubt” (IT-97-24-T, Judgment, 31 July 2003, paras. 544 and 546). Further, in the Brdanin case, the Trial Chamber was satisfied that “at least 80 Bosnian Muslim civilians were killed when Bosnian Serb soldiers and police entered the villages of the Kozarac area” (IT-99-36, Judgment, 1 September 2004, para. 403).

(b) Camps
(ii) Omarska camp

262. With respect to the detention camps in the area of Prijedor, the Applicant has stressed that the camp of Omarska was “arguably the cruellest camp in Bosnia and Herzegovina”. The Report of the Commission of Experts gives an account of seven witness statements reporting between 1,000 to 3,000 killings (Vol. IV, Ann. VIII, p. 222). The Report noted that

“[s]ome prisoners estimate that on an average there may have been 10 to 15 bodies displayed on the grass each morning, when the first prisoners went to receive their daily food rations. But there were also other dead bodies observed in other places at other times. Some prisoners died from their wounds or other causes in the rooms where they were detained. Constantly being exposed to the death and suffering of fellow prisoners made it impossible for anyone over any period of time to forget in what setting he or she was. Given the length of time Logor Omarska was used, the numbers of prisoners detained in the open, and the allegations that dead bodies were exhibited there almost every morning.”

The Report of the Commission of Experts concludes that “all information available . . . seems to indicate that Omarska was more than anything else a death camp” (Vol. I, Ann. V, p. 80). The United Nations Secretary-General also received submissions from Canada, Austria and the United States, containing witness statements about the killings at Omarska.

263. In the Opinion and Judgment of the Trial Chamber in the Tadić case, the ICTY made the following findings on Omarska: “Perhaps the most notorious of the camps, where the most horrific conditions existed, was the Omarska camp.” (IT-94-1-T, Judgment, 7 May 1997, para. 155.) “The Trial Chamber heard from 30 witnesses who survived the brutality to which they were systematically subjected at Omarska. By all accounts, the conditions at the camp were horrendous; killings and torture were frequent.” (Ibid., para. 157.) The Trial Chamber in the Stakić Judgment found that “over a hundred people were killed in late July 1992 in the Omarska camp” and that

“[a]round late July 1992, 44 people were taken out of Omarska and put in a bus. They were told that they would be exchanged in the direction of Bosanska Krupa; they were never seen again. During the exhumation in Jama Lisac, 56 bodies were found: most of them had died from gunshot injuries.” (IT-97-24-T, Judgment, 31 July 2003, paras. 208 and 210).

At least 120 people detained at Omarska were killed after having been taken away by bus.

“The corpses of some of those taken away on the buses were later found in Hrastova Glavica and identified. A large number of bodies, 126, were found in this area, which is about 30 kilometres away from Prijedor. In 121 of the cases, the forensic experts determined that the cause of death was gunshot wounds.” (Ibid., para. 212.)

264. In the Brdanin case, the Trial Chamber, in its Judgment of 1 September 2004 held that between 28 May and 6 August, a massive number of people were killed at Omarska camp. The Trial Chamber went on to say specifically that “[a]s of late May 1992, a camp was set up at Omarska, where evidence shows that several hundred Bosnian Muslim and Bosnian Croat civilians from the Prijedor area were detained, and where killings occurred on a massive scale” (IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 441). “The Trial Chamber is unable to precisely identify all detainees that were killed at Omarska camp. It is satisfied beyond reasonable doubt however that, at a minimum, 94 persons were killed, including those who disappeared.” (Ibid., para. 448.)

(ii) Keraterm camp

265. A second detention camp in the area of Prijedor was the Keraterm camp where, according to the Applicant, killings of members of the protected group were also perpetrated. Several corroborating accounts of a mass execution on the morning of 25 July 1992 in Room 3 at Keraterm camp were presented to the Court. This included the United States Dispatch of the State Department and a letter from the Permanent Repre-
sentative of Austria to the United Nations dated 5 March 1993, addressed
to the Secretary-General. The Report of the Commission of Experts cites
three separate witness statements to the effect that ten prisoners were
killed per day at Keraterm over three months (Vol. IV, para. 1932; see

266. The Trial Chamber of the ICTY, in the Sikirica et al. case, concern-
ning the Commander of Keraterm camp, found that 160 to 200 men
were killed or wounded in the so-called Room 3 massacre (IT-95-8-S,
Sentencing Judgment, 13 November 2001, para. 103). According to the
Judgment, Sikirica himself admitted that there was considerable evidence
“concerning the murder and killing of other named individuals at Kera-
term during the period of his duties”. There was also evidence that
“others were killed because of their rank and position in society and their
membership of a particular ethnic group or nationality” (ibid., para. 122).
In the Stakić case, the Trial Chamber found that “from 30 April 1992 to
30 September 1992 . . . killings occurred frequently in the Omarska,
Keraterm and Trnopolje camps” (IT-97-24-T, Judgment, 31 July 2003,
para. 544).

(iii) Trnopolje camp

267. The Applicant further contends that there is persuasive evidence of
killing at Trnopolje camp, with individual eye-witnesses corroborating
each other. The Report of the Commission of Experts found that “[i]n
Trnopolje, the regime was far better than in Omarska and Keraterm.
Nonetheless, harassment and malnutrition was a problem for all the
inmates. Rapes, beatings and other kinds of torture, and even killings,
were not rare.” (Report of the Commission of Experts, Vol. IV, Ann. V,
p. 10.)

“The first period was allegedly the worst in Trnopolje, with the
highest numbers of inmates killed, raped, and otherwise mistreated and
tortured . . .

The people killed in the camp were usually removed soon after by
some camp inmates who were ordered by the Serbs to take them
away and bury them . . .

Albeit Logor Trnopolje was not a death camp like Logor Omarska
or Logor Keraterm, the label ‘concentration camp’ is none the
less justified for Logor Trnopolje due to the regime prevailing in the

268. With regard to the number of killings at Trnopolje, the ICTY
considered the period between 25 May and 30 September 1992, the rele-
vant period in the Stakić case (IT-97-24-T, Trial Chamber Judgment,
31 July 2003, paras. 226-227). The Trial Chamber came to the conclusion
that “killings occurred frequently in the Omarska, Keraterm and Trno-
polje camps and other detention centres” (IT-97-24-T, para. 544). In the
Judgment in the Brđamin case, the Trial Chamber found that in the
period from 28 May to October 1992,

“numerous killings occurred in Trnopolje camp. A number of
detainees died as a result of the beatings received by the guards.
Others were killed by camp guards with rifles. The Trial Chamber
also [found] that at least 20 inmates were taken outside the
camp and killed there.” (IT-99-36-T, Judgment, 1 September 2004,
para. 450.)

269. In response to the allegations of killings at the detention camps in
the area of Prijedor, the Respondent questions the number of victims, but
not the fact that killings occurred. It contends that killings in Prijedor
“were committed sporadically and against individuals who were not a
significant part of the group”. It further observed that the ICTY had not
characterized the acts committed in the Prijedor region as genocide.

Banja Luka

Manjača camp

270. The Applicant further contends that killings were also frequent at
Manjača camp in Banja Luka. The Court notes that multiple witness
accounts of killings are contained in the Report of the Commission of
Experts (Vol. IV, paras. 370-376) and a mass grave of 540 bodies, “pre-
sumably” from prisoners at Manjača, is mentioned in a report on missing
persons submitted by Manfred Nowak, the United Nations Expert on
Missing Persons:

“In September 1995, mass graves were discovered near Krasulje in
northwest Bosnia and Herzegovina. The Government has exhumed
540 bodies of persons who were presumably detained at Manjača
concentration camp in 1992. In January 1996, a mass grave contain-
ing 27 bodies of Bosnian Muslims was discovered near Sanski Most;
the victims were reportedly killed in July 1992 during their transfer
from Sanski Most to Manjača concentration camp (near Banja

Brčko

Luka camp

271. The Applicant claims that killings of members of the protected
group were also perpetrated at Luka camp and Brčko. The Report of
the Commission of Experts confirms these allegations. One witness reported
that “[s]hootings often occurred at 4.00 a.m. The witness estimates that
during his first week at Luka more than 2,000 men were killed and
thrown into the Sava River.” (Report of the Commission of Experts Vol. IV, Ann. VIII, p. 93.) The Report further affirms that “[a]pparently, murder and torture were a daily occurrence” (ibid., p. 96), and that it was reported that

“[t]he bodies of the dead or dying internees were often taken to the camp dump or moved behind the prisoner hangars. Other internees were required to move the bodies. Sometimes the prisoners who carried the dead were killed while carrying such bodies to the dump. The dead were also taken and dumped outside the Serbian Police Station located on Majevička Brigada Road in Brčko.” (Ibid)

These findings are corroborated by evidence of a mass grave being found near the site (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 101, and United States State Department Dispatch).

272. In the Jelisic case, eight of the 13 murders to which the accused pleaded guilty were perpetrated at Luka camp and five were perpetrated at the Brčko police station (IT-95-10-T, Trial Chamber Judgment, 14 December 1999, paras. 37-38). The Trial Chamber further held that “although the Trial Chamber is not in a position to establish the precise number of victims ascribable to Goran Jelisic for the period in the indictment, it notes that, in this instance, the material element of the crime of genocide has been satisfied” (ibid., para. 65).

273. In the Milošević Decision on Motion for Judgment of Acquittal, the Trial Chamber found that many Muslims were detained in Luka camp in May and June 1992 and that many killings were observed by witnesses (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paras. 159, 160-168), it held that “[t]he conditions and treatment to which the detainees at Luka Camp were subjected were terrible and included regular beatings, rapes, and killings” (ibid., para. 159).

“[U]nfortunately, the Trial Chamber was not in a position to determine the number of killings” (ibid., para. 161.)

274. The Court notes that the Brdanin Trial Chamber Judgment of 1 September 2004 made a general finding as to killings of civilians in camps and municipalities at Banja Luka, Prijedor, Sanski Most, Ključ, Kotor Varoš and Bosanski Novi. It held that:

“In sum, the Trial Chamber is satisfied beyond reasonable doubt that, considering all the incidents described in this section of the judgment, at least 1,669 Bosnian Muslims and Bosnian Croats were killed by Bosnian Serb forces, all of whom were non-combatants.” (IT-99-36-T, Judgment, 1 September 2004, para. 465.)

There are contemporaneous Security Council and General Assembly resolutions condemning the killing of civilians in connection with ethnic cleansing, or expressing alarm at reports of mass killings (Security Council resolution 819 (1993), Preamble, paras. 6 and 7; General Assembly resolution 48/153 (1993), paras. 5 and 6; General Assembly resolution 49/196 (1994), para. 6).

275. The Court further notes that several resolutions condemn specific incidents. These resolutions, inter alia, condemn “the Bosnian Serb forces for their continued offensive against the safe area of Goražde, which has resulted in the death of numerous civilians” (Security Council resolution 913 (1994), Preamble, para. 5); condemn ethnic cleansing “perpetrated in Banja Luka, Bijeljina and other areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces” (Security Council resolution 941 (1994), para. 2); express concern at “grave violations of international humanitarian law and of human rights in and around Srebrenica, and in the areas of Banja Luka and Sanski Most, including reports of mass murder” (Security Council resolution 1019 (1995), Preamble, para. 2); and condemn “the indiscriminate shelling of civilians in the safe areas of Sarajevo, Tuzla, Bihać and Goražde and the use of cluster bombs on civilian targets by Bosnian Serb and Croatian Serb forces” (General Assembly resolution 50/193 (1995) para. 5).
277. The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent \textit{(dolus specialis)} on the part of the perpetrators to destroy, in whole or in part, the group as such. The Court has carefully examined the criminal proceedings of the ICTY and the findings of its Chambers, cited above, and observes that none of those convicted were found to have acted with specific intent \textit{(dolus specialis)}. The killings outlined above may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so. In the exercise of its jurisdiction under the Genocide Convention, the Court finds that it has not been established by the Applicant that the killings amounted to acts of genocide prohibited by the Convention. As to the Applicant’s contention that the specific intent \textit{(dolus specialis)} can be inferred from the overall pattern of acts perpetrated throughout the conflict, examination of this must be reserved until the Court has considered all the other alleged acts of genocide prohibited by the Convention. As to the Applicant’s contention that the specific intent \textit{(dolus specialis)} can be inferred from the overall pattern of acts perpetrated throughout the conflict, examination of this must be reserved until the Court has considered all the other alleged acts of genocide prohibited by the Convention. As to the Applicant’s contention that the specific intent \textit{(dolus specialis)} can be inferred from the overall pattern of acts perpetrated throughout the conflict, examination of this must be reserved until the Court has considered all the other alleged acts of genocide prohibited by the Convention.

278. The Applicant contends that the planning for the final attack on Srebrenica must have been prepared quite some time before July 1995. It refers to a report of 4 July 1994 by the commandant of the Bratunac Brigade. He outlined the “final goal” of the VRS: “an entirely Serbian Podrinje. The enclaves of Srebrenica, Žepa and Goražde must be militarily defeated.” The report continued:

“We must continue to arm, train, discipline, and prepare the RS Army for the execution of this crucial task — the expulsion of Muslims from the Srebrenica enclave. There will be no retreat when it comes to the Srebrenica enclave, we must advance. The enemy’s life has to be made unbearable and their temporary stay in the enclave impossible so that they leave en masse as soon as possible, realising that they cannot survive there.”

The Chamber in the Bližnjec case mentioned testimony showing that some “members of the Bratunac Brigade . . . did not consider this report to be an order. Testimony of other witnesses and documentary evidence show that the strategy was in fact implemented.” (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 104; footnotes omitted.)

The Chamber did not give the report any particular significance.

279. The Applicant, like the Chamber, refers to a meeting on 7 March 1995 between the Commander of the United Nations Protection Force (UNPROFOR) and General Mladić, at which the latter expressed dissatisfaction with the safe area régime and indicated that he might take military action against the eastern enclaves. He gave assurances however for the safety of the Bosnian Muslim population of those enclaves. On the following day, 8 March 1995, President Karadžić issued the Directive for Further Operations 7, also quoted by the Chamber and the Applicant: “Planned and well-thought-out combat operations” were
to create ‘an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of both enclaves’.” The *Blagojević* case continues as follows:

“The separation of the Srebrenica and Žepa enclaves became the task of the Drina Corps. As a result of this directive, General Ratko Mladić on 31 March 1995 issued Directive for Further Operations, Operative No. 7/1, which further directive specified the Drina Corps’ tasks.” (IT-02-60-T, pp. 38-39, para. 106.)

281. Counsel for the Applicant asked in respect of the first of those directives “[w]hat could be a more clear-cut definition of the genocidal intent to destroy on the part of the authorities in Pale?” As with the July 1994 report, the Court observes that the expulsion of the inhabitants would achieve the purpose of the operation. That observation is supported by the ruling of the Appeals Chamber in the *Krstić* case that the directives were “insufficiently clear” to establish specific intent (dolus specialis) on the part of the members of the Main Staff who issued them. “Indeed, the Trial Chamber did not even find that those who issued Directives 7 and 7.1 had genocidal intent, concluding instead that the genocidal plan crystallized at a later stage.” (IT-98-33-A, Judgment, 19 April 2004, para. 90.)

282. A Netherlands Battalion (Dutchbat) was deployed in the Srebrenica safe area. Within that area in January 1995 it had about 600 personnel. By February and through the spring the VRS was refusing to allow the return of Dutch soldiers who had gone on leave, causing their numbers to drop by at least 150, and were restricting the movement of international convoys of aid and supplies to Srebrenica and to other enclaves. It was estimated that without new supplies about half of the population of Srebrenica would be without food after mid-June.

283. On 2 July the Commander of the Drina Corps issued an order for active combat operations; its stated objective on the Srebrenica enclave was to reduce “the enclave to its urban area”. The attack began on 6 July with rockets exploding near the Dutchbat headquarters in Potočari; 7 and 8 July were relatively quiet because of poor weather, but the shelling intensified around 9 July. Srebrenica remained under fire until 11 July when it fell, with the Dutchbat observation posts having been taken by the VRS. Contrary to the expectations of the VRS, the Bosnia and Herzegovina army showed very little resistance (*Blagojević*, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 125). The United Nations Secretary-General’s report quotes an assessment made by United Nations military observers on the afternoon of 9 July which concluded as follows:

“... the BSA offensive will continue until they achieve their aims. These aims may even be widening since the United Nations response has been almost non-existent and the BSA are now in a position to overrun the enclave if they wish.” Documents later obtained from Serb sources appear to suggest that this assessment was correct. Those documents indicate that the Serb attack on Srebrenica initially had limited objectives. Only after having advanced with unexpected ease did the Serbs decide to overrun the entire enclave. Serb civilian and military officials from the Srebrenica area have stated the same thing, adding, in the course of discussions with a United Nations official, that they decided to advance all the way to Srebrenica town when they assessed that UNPROFOR was not willing or able to stop them.” (A/54/549, para. 264.)

Consistently with that conclusion, the Chamber in the *Blagojević* case says this:

“As the operation progressed its military object changed from ‘reducing the enclave to the urban area’ [the objective stated in a Drina Corps order of 2 July] to the taking-over of Srebrenica town and the enclave as a whole. The Trial Chamber has heard no direct evidence as to the exact moment the military objective changed. The evidence does show that President Karadžić was ‘informed of successful combat operations around Srebrenica ... which enable them to occupy the very town of Srebrenica’ on 9 July. According to Miroslav Deronjić, the President of the Executive Board of the Bratunac Municipality, President Karadžić told him on 9 July that there were two options in relation to the operation, one of which was the complete take-over of Srebrenica. Later on 9 July, President Karadžić ‘agreed with continuation of operations for the takeover of Srebrenica’. By the morning of 11 July the change of objective of the ‘Krivaja 95’ operation had reached the units in the field; and by the middle of the afternoon, the order to enter Srebrenica had reached the Bratunac Brigade’s IKM in Pribićevac and Colonel Blagojević. Miroslav Deronjić visited the Bratunac Brigade IKM in Pribićevac on 11 July. He briefly spoke with Colonel Blagojević about the Srebrenica operation. According to Miroslav Deronjić, the VRS had just received the order to enter Srebrenica town.” (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 130.)

284. The Chamber then begins an account of the dreadful aftermath of the fall of Srebrenica. A Dutchbat Company on 11 July started directing the refugees to the UNPROFOR headquarters in Potočari which was...
considered to be the only safe place for them. Not all the refugees went towards Potočari; many of the Bosnian Muslim men took to the woods. Refugees were soon shelled and shot at by the VRS despite attempts to find a safe route to Potočari, where, to quote the ICTY, chaos reigned:

“The crowd outside the UNPROFOR compound grew by the thousands during the course of 11 July. By the end of the day, an estimated 20,000 to 30,000 Bosnian Muslims were in the surrounding area and some 4,000 to 5,000 refugees were in the UNPROFOR compound.

(b) Conditions in Potočari

The standards of hygiene within Potočari had completely deteriorated. Many of the refugees seeking shelter in the UNPROFOR headquarters were injured. Medical assistance was given to the extent possible; however, there was a dramatic shortage of medical supplies. As a result of the VRS having prevented aid convoys from getting through during the previous months, there was hardly any fresh food in the DutchBat headquarters. There was some running water available outside the compound. From 11 to 13 July 1995 the temperature was very high, reaching 35 degrees centigrade and this small water supply was insufficient for the 20,000 to 30,000 refugees who were outside the UNPROFOR compound.” (IT-02-60-T, paras. 146-147.)

The Tribunal elaborates on those matters and some efforts made by Bosnian Serb and Serbian authorities, i.e., the local Municipal Assembly, the Bratunac Brigade and the Drina Corps, as well as UNHCR, to assist the Bosnian Muslim refugees (Ibid., para. 148).

285. On 10 July at 10.45 p.m., according to the Secretary-General’s 1999 Report, the delegate in Belgrade of the Secretary-General’s Special Representative telephoned the Representative to say that he had seen President Milošević who had responded that not much should be expected of him because “the Bosnian Serbs did not listen to him” (A/54/549, para. 292). At 3 p.m. the next day, the President rang the Special Representative and, according to the same report, “stated that the Dutchbat soldiers in Serb-held areas had retained their weapons and equipment, and were free to move about. This was not true.” (Ibid., para. 307.) About 20 minutes earlier two NATO aircraft had dropped two bombs on what were thought to be Serb vehicles advancing towards the town from the south. The Secretary-General’s report gives the VRS reaction:

“Immediately following this first deployment of NATO close air support, the BSA radioed a message to Dutchbat. They threatened to shell the town and the compound where thousands of inhabitants had begun to gather, and to kill the Dutchbat soldiers being held hostage, if NATO continued with its use of air power. The Special Representative of the Secretary-General recalled having received a telephone call from the Netherlands Minister of Defence at this time, requesting that the close air support action be discontinued, because Serb soldiers on the scene were too close to Netherlands troops, and their safety would be jeopardized. The Special Representative considered that he had no choice but to comply with this request.” (A/54/549, para. 306.)

286. The Trial Chamber in the Blagojević case recorded that on 11 July at 8 p.m. there was a meeting between a Dutch colonel and General Mladić and others. The former said that he had come to negotiate the withdrawal of the refugees and to ask for food and medicine for them. He sought assurances that the Bosnian Muslim population and Dutchbat would be allowed to withdraw from the area. General Mladić said that the civilian population was not the target of his actions and the goal of the meeting was to work out an arrangement. He then said “you can all leave, all stay, or all die here’ . . . ’we can work out an agreement for all this to stop and for the issues of the civilian population, your soldiers and the Muslim military to be resolved in a peaceful way’” (Blagojević, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, paras. 150-152). Later that night at a meeting beginning at 11 p.m., attended by a representative of the Bosnian Muslim community, General Mladić said:

“‘Number one, you need to lay down your weapons and I guarantee that all those who lay down their weapon will live. I give you my word, as a man and a General, that I will use my influence to help the innocent Muslim population which is not the target of the combat operations carried out by the VRS . . . In order to make a decision as a man and a Commander, I need to have a clear position of the representatives of your people on whether you want to survive . . . stay or vanish. I am prepared to receive here tomorrow at 10 a.m. hrs. a delegation of officials from the Muslim side with whom I can discuss the salvation of your people from . . . the former enclave of Srebrenica . . . Nesib [a Muslim representative], the future of your people is in your hands, not only in this territory . . . Bring the people who can secure the surrender of weapons and save your people from destruction.’

The Trial Chamber finds, based on General Mladić’s comments, that he was unaware that the Bosnian Muslim men had left the Srebrenica enclave in the column.

General Mladić also stated that he would provide the vehicles to transport the Bosnian Muslims out of Potočari. The Bosnian
Muslim and Bosnian Serb sides were not on equal terms and Nesib Mandžić felt his presence was only required to put up a front for the international public. Nesib Mandžić felt intimidated by General Mladić. There was no indication that anything would happen the next day. (IT-02-60-T, paras. 156-158.)

287. A third meeting was held the next morning, 12 July. The Tribunal in the Blagojević case gives this account:

"After the Bosnian Muslim representatives had introduced themselves, General Mladić stated:

'I want to help you, but I want absolute co-operation from the civilian population because your army has been defeated. There is no need for your people to get killed, your husband, your brothers or your neighbours . . . . As I told this gentleman last night, you can either survive or disappear. For your survival, I demand that all your armed men, even those who committed crimes, and many did, against our people, surrender their weapons to the VRS . . . . You can choose to stay or you can choose to leave. If you wish to leave, you can go anywhere you like. When the weapons have been surrendered every individual will go where they say they want to go. The only thing is to provide the needed gasoline. You can pay for it if you have the means. If you can’t pay for it, UNPROFOR should bring four or five tanker trucks to fill up trucks . . . ."

Čamilia Omanović [one of the Muslim representatives] interpreted this to mean that if the Bosnian Muslim population left they would be saved, but if they stayed they would die. General Mladić did not give a clear answer in relation to whether a safe transport of the civilian population out of the enclave would be carried out. General Mladić stated that the male Bosnian Muslim population from the age of 16 to 65 would be screened for the presence of war criminals. He indicated that after this screening, the men would be returned to the enclave. This was the first time that the separation of men from the rest of the population was mentioned. The Bosnian Muslim representatives had the impression that ‘everything had been prepared in advance, that there was a team of people working together in an organized manner’ and that ‘Mladić was the chief organizer.’

The third Hotel Fontana meeting ended with an agreement that the VRS would transport the Bosnian Muslim civilian population out of the enclave to ARBiH-held territory, with the assistance of UNPROFOR to ensure that the transportation was carried out in a humane manner.” (Ibid., paras. 160-161.)

The Court notes that the accounts of the statements made at the meetings come from transcripts of contemporary video recordings.

288. The VRS and MUP of the Republika Srpska from 12 July separated men aged 16 to approximately 60 or 70 from their families. The Bosnian Muslim men were directed to various locations but most were sent to a particular house (“The White House”) near the UNPROFOR headquarters in Potočari, where they were interrogated. During the afternoon of 12 July a large number of buses and other vehicles arrived in Potočari including some from Serbia. Only women, children and the elderly were allowed to board the buses bound for territory held by the Bosnia and Herzegovina military. Dutchbat vehicles escorted convoys to begin with, but the VRS stopped that and soon after stole 16-18 Dutchbat jeeps, as well as around 100 small arms, making further escorts impossible. Many of the Bosnian Muslim men from Srebrenica and its surroundings including those who had attempted to flee through the woods were detained and killed.

289. Mention should also be made of the activities of certain paramilitary units, the “Red Berets” and the “Scorpions”, who are alleged by the Applicant to have participated in the events in and around Srebrenica. The Court was presented with certain documents by the Applicant, which were said to show that the “Scorpions” were indeed sent to the Trnovo area near Srebrenica and remained there through the relevant time period. The Respondent cast some doubt on the authenticity of these documents (which were copies of intercepts, but not originals) without ever formally denying their authenticity. There was no denial of the fact of the relocation of the “Scorpions” to Trnovo. The Applicant during the oral proceedings presented video material showing the execution by paramilitaries of six Bosnian Muslims, in Trnovo, in July 1995.

290. The Trial Chambers in the Krstić and Blagojević cases both found that Bosnian Serb forces killed over 7,000 Bosnian Muslim men following the takeover of Srebrenica in July 1995 (Krstić, IT-98-33-T, Judgment, 2 August 2001, paras. 426-427 and Blagojević, IT-02-60-T, Judgment, 17 January 2005, para. 643). Accordingly they found that the actus reus of killings in Article II (a) of the Convention was satisfied. Both also found that actions of Bosnian Serb forces also satisfied the actus reus of causing serious bodily or mental harm, as defined in Article II (b) of the Convention — both to those who where about to be executed, and to the others who were separated from them in respect of their forced displacement and the loss suffered by survivors among them (Krstić, ibid., para. 543, and Blagojević, ibid., paras. 644-654).

291. The Court is fully persuaded that both killings within the terms of Article II (a) of the Convention, and acts causing serious bodily or men-
tal harm within the terms of Article II (b) thereof occurred during the Srebrenica massacre. Three further aspects of the ICTY decisions relating to Srebrenica require closer examination — the specific intent (dolus specialis), the date by which the intent was formed, and the definition of the “group” in terms of Article II. A fourth issue which was not directly before the ICTY but which this Court must address is the involvement, if any, of the Respondent in the actions.

292. The issue of intent has been illuminated by the Krstić Trial Chamber. In its findings, it was convinced of the existence of intent by the evidence placed before it. Under the heading “A Plan to Execute the Bosnian Muslim Men of Srebrenica”, the Chamber “finds that, following the takeover of Srebrenica in July 1995, the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave” (IT-98-33-T, Judgment, 2 August 2001, para. 87). All the executions, the Chamber decided, “systematically targeted Bosnian Muslim men of military age, regardless of whether they were civilians or soldiers” (ibid., para. 546). While “[t]he VRS may have initially considered only targeting military men for execution, . . . [t]he evidence shows, however, that a decision was taken, at some point, to capture and kill all the Bosnian Muslim men indiscriminately. No effort was made to distinguish the soldiers from the civilians.” (Ibid., para. 547.) Under the heading “Intent to Destroy”, the Chamber reviewed the Parties’ submissions and the documents, concluding that it would “adhere to the characterization of genocide which encompass[es] only acts committed with the goal of destroying all or part of a group” (ibid., para. 571; original emphasis). The acts of genocide need not be premeditated and the intent may become the goal later in an operation (ibid., para. 572).

“Evidence presented in this case has shown that the killings were planned: the number and nature of the forces involved, the standardized coded language used by the units in communicating information about the killings, the scale of the executions, the invariability of the killing methods applied, indicate that a decision was made to kill all the Bosnian Muslim military aged men.

The Trial Chamber is unable to determine the precise date on which the decision to kill all the military aged men was taken. Hence, it cannot find that the killings committed in Potočari on 12 and 13 July 1995 formed part of the plan to kill all the military aged men. Nevertheless, the Trial Chamber is confident that the mass executions and other killings committed from 13 July onwards were part of this plan.” (Ibid., paras. 572-573; see also paras. 591-598.)

293. The Court has already quoted (paragraph 281) the passage from the Judgment of the Appeals Chamber in the Krstić case rejecting the Prosecutor’s attempted reliance on the Directives given earlier in July, and it would recall the evidence about the VRS’s change of plan in the course of the operation in relation to the complete takeover of the enclave. The Appeals Chamber also rejected the appeal by General Krstić against the finding that genocide occurred in Srebrenica. It held that the Trial Chamber was entitled to conclude that the destruction of such a sizeable number of men, one fifth of the overall Srebrenica community, “would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica” (IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 28-33); and the Trial Chamber, as the best assessor of the evidence presented at trial, was entitled to conclude that the evidence of the transfer of the women and children supported its finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica. The Appeals Chamber concluded this part of its Judgment as follows:

“The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements — the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part — guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name. By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.

In concluding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims of Srebrenica, the Trial Chamber
did not depart from the legal requirements for genocide. The Defence appeal on this issue is dismissed.” (Ibid., paras. 37-38.)

294. On one view, taken by the Applicant, the Blagojević Trial Chamber decided that the specific intent (dolus specialis) was formed earlier than 12 or 13 July, the time chosen by the Krstić Chamber. The Court has already called attention to that Chamber’s statement that at some point (it could not determine “the exact moment”) the military objective in Srebrenica changed, from “reducing the enclave to the urban area” (stated in a Drina Corps order of 2 July 1995 referred to at times as the “Krivaja 95 operation”) to taking over Srebrenica town and the enclave as a whole. Later in the Judgment, under the heading “Findings: was genocide committed?”, the Chamber refers to the 2 July document:

“The Trial Chamber is convinced that the criminal acts committed by the Bosnian Serb forces were all parts of one single scheme to commit genocide of the Bosnian Muslims of Srebrenica, as reflected in the ‘Krivaja 95 operation’, the ultimate objective of which was to eliminate the enclave and, therefore, the Bosnian Muslim community living there.” (Blagojević, IT-02-60-T, Judgment, 17 January 2005, para. 674.)

The Chamber immediately goes on to refer only to the events — the massacres and the forcible transfer of the women and children — after the fall of Srebrenica, that is sometime after the change of military objective on 9 or 10 July. The conclusion on intent is similarly focused:

“The Trial Chamber has no doubt that all these acts constituted a single operation executed with the intent to destroy the Bosnian Muslim population of Srebrenica. The Trial Chamber finds that the Bosnian Serb forces not only knew that the combination of the killings of the men with the forcible transfer of the women, children and elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica, but clearly intended through these acts to physically destroy this group.” (Ibid., para. 677.) (See similarly all but the first item in the list in paragraph 786.)

295. The Court’s conclusion, fortified by the Judgments of the Trial Chambers in the Krstić and Blagojević cases, is that the necessary intent was not established until after the change in the military objective and after the takeover of Srebrenica, on about 12 or 13 July. This may be significant for the application of the obligations of the Respondent under the Convention (paragraph 423 below). The Court has no reason to depart from the Tribunal’s determination that the necessary specific intent (dolus specialis) was established and that it was not established until that time.

296. The Court now turns to the requirement of Article II that there must be the intent to destroy a protected “group” in whole or in part. It recalls its earlier statement of the law and in particular the three elements there discussed: substantiality (the primary requirement), relevant geographic factors and the associated opportunity available to the perpetrators, and emblematic or qualitative factors (paragraphs 197-201). Next, the Court recalls the assessment it made earlier in the Judgment of the persuasiveness of the ICTY’s findings of facts and its evaluation of them (paragraph 223). Against that background it turns to the findings in the Krstić case (IT-98-33-T, Trial Chamber Judgment, 2 August 2001, paras. 551-599 and IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 6-22), in which the Appeals Chamber endorsed the findings of the Trial Chamber in the following terms:

“In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia. This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people. This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region. Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size.” (IT-98-33-A, Judgment, 19 April 2004, para. 15; footnotes omitted.)

The Court sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber.

297. The Court concludes that the acts committed at Srebrenica falling within Article II (a) and (b) of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.

...
(6) Article II (b): Causing Serious Bodily or Mental Harm to Members of the Protected Group

298. The Applicant contends that besides the massive killings, systematic serious harm was caused to the non-Serb population of Bosnia and Herzegovina. The Applicant includes the practice of terrorizing the non-Serb population, the infliction of pain and the administration of torture as well as the practice of systematic humiliation into this category of acts of genocide. Further, the Applicant puts a particular emphasis on the issue of systematic rapes of Muslim women, perpetrated as part of genocide against the Muslims in Bosnia during the conflict.

299. The Respondent does not dispute that, as a matter of legal qualification, the crime of rape may constitute an act of genocide, causing serious bodily or mental harm. It disputes, however, that the rapes in the territory of Bosnia and Herzegovina were part of a genocide perpetrated therein. The Respondent, relying on the Report of the Commission of Experts, maintains that the rapes and acts of sexual violence committed during the conflict, were not part of genocide, but were committed on all sides of the conflict, without any specific intent (dolus specialis).

300. The Court notes that there is no dispute between the Parties that rapes and sexual violence could constitute acts of genocide, if accompanied by a specific intent to destroy the protected group. It notes also that the ICTR, in its Judgment of 2 September 1998 in the Akayesu case, addressed the issue of acts of rape and sexual violence as acts of genocide in the following terms:

"Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm." (ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 731.)

The ICTY, in its Judgment of 31 July 2003 in the Stakić case, recognized that:

"'Causing serious bodily and mental harm' in subparagraph (b) [of Article 4 (2) of the Statute of the ICTY] is understood to mean, inter alia, acts of torture, inhuman or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury. The harm inflicted need not be permanent and irremediable." (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 516.)

301. The Court notes furthermore that Security Council and General Assembly resolutions contemporary with the facts are explicit in referring to sexual violence. These resolutions were in turn based on reports before the General Assembly and the Security Council, such as the Reports of the Secretary-General, the Commission of Experts, the Special Rapporteur for Human Rights, Tadeusz Mazowiecki, and various United Nations agencies in the field. The General Assembly stressed the "extraordinary suffering of the victims of rape and sexual violence" (General Assembly resolution 48/143 (1993), Preamble; General Assembly resolution 50/192 (1995), para. 8). In resolution 48/143 (1993), the General Assembly declared it was:

"Appalled" at the recurring and substantiated reports of widespread rape and abuse of women and children in the areas of armed conflict in the former Yugoslavia, in particular its systematic use against the Muslim women and children in Bosnia and Herzegovina by Serbian forces" (Preamble, para. 4).

302. Several Security Council resolutions expressed alarm at the "massive, organised and systematic detention and rape of women”, in particular Muslim women in Bosnia and Herzegovina (Security Council resolutions 798 (1992), Preamble, para. 2; resolution 820 (1993), para. 6; 827 (1993), Preamble, para. 3). In terms of other kinds of serious harm, Security Council resolution 1034 (1995) condemned

"in the strongest possible terms the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces in the areas of Srebrenica, Žepa, Banja Luka and Sanski Most as described in the report of the Secretary-General of 27 November 1995 and showing a consistent pattern of summary executions, rape, mass expulsions, arbitrary detentions, forced labour and large-scale disappearances” (para. 2).

The Security Council further referred to a “persistent and systematic campaign of terror” in Banja Luka, Bijeljina and other areas under the control of Bosnian Serb forces (Security Council resolution 941 (1994), Preamble, para. 4). It also expressed concern at reports of mass murder, unlawful detention and forced labour, rape and deportation of civilians in Banja Luka and Sanski Most (Security Council resolution 1019 (1995), Preamble, para. 2).

303. The General Assembly also condemned specific violations including torture, beatings, rape, disappearances, destruction of houses, and other acts or threats of violence aimed at forcing individuals to leave their homes (General Assembly resolution 47/147 (1992), para. 4; see also General Assembly resolution 49/10 (1994), Preamble, para. 14, and General Assembly resolution 50/193 (1995), para. 2).
304. The Court will now examine the specific allegations of the Applicant under this heading, in relation to the various areas and camps identified as having been the scene of acts causing "bodily or mental harm" within the meaning of the Convention. As regards the events of Srebrenica, the Court has already found it to be established that such acts were committed (paragraph 291 above).

Drina River Valley

(a) Zvornik

305. As regards the area of the Drina River Valley, the Applicant has stressed the perpetration of acts and abuses causing serious bodily or mental harm in the events at Zvornik. In particular, the Court has been presented with a report on events at Zvornik which is based on eye-witness accounts and extensive research (Hannes Tretter et al., “‘Ethnic cleansing’ Operations in the Northeast Bosnian-City of Zvornik from April through June 1992”, Ludwig Boltzmann Institute of Human Rights (1994), p. 48). The report of the Ludwig Boltzmann Institute gives account of a policy of terrorization, forced relocation, torture, rape during the takeover of Zvornik in April-June 1992. The Report of the Commission of Experts received 35 reports of rape in the area of Zvornik in May 1992 (Vol. V, Ann. IX, p. 54).

(b) Foća

306. Further acts causing serious bodily and mental harm were perpetrated in the municipality of Foća. The Applicant, relying on the Judgment in the Kunarac et al. case (IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001, paras. 574 and 592), claims, in particular, that many women were raped repeatedly by Bosnian Serb soldiers or policemen in the city of Foća.

(c) Camps

(i) Batkovic ´ camp

307. The Applicant further claims that in Batkovic ´ camp, prisoners were frequently beaten and mistreated. The Report of the Commission of Experts gives an account of a witness statement according to which "prisoners were forced to perform sexual acts with each other, and sometimes with guards". The Report continues: "Reports of the frequency of beatings vary from daily beatings to beatings 10 times each day." (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 62, para. 469.) Individual witness accounts reported by the Commission of Experts (Report of the Commission of Experts, Vol. IV, Ann. VIII, pp. 62-63, and Ann. X, p. 9) provide second-hand testimony that beatings occurred and prisoners lived in terrible conditions. As already noted above (paragraph 256), however, the periodic Report of Special Rapporteur Mazowiecki of 17 November 1992 stated that “[t]he prisoners . . . appeared to be in good health” (p. 13); but according to the Applicant, Mazowiecki was shown a “model” camp and therefore his impression was inaccurate. The United States Department of State Dispatch of 19 April 1993 (Vol. 4, No. 16), alleges that in Batkovic ´ camp, prisoners were frequently beaten and mistreated. In particular, the Dispatch records two witness statements according to which “[o]n several occasions, they and other prisoners were forced to remove their clothes and perform sex acts on each other and on some guards”.

(ii) Sušica camp

308. According to the Applicant, rapes and physical assaults were also perpetrated at Sušica camp; it pointed out that in the proceedings before the ICTY, in the “Rule 61 Review of the Indictment” and the Sentencing Judgment, in the Nikolić case, the accused admitted that many Muslim women were raped and subjected to degrading physical and verbal abuse in the camp and at locations outside of it (Nikolić, IT-94-2-T, Sentencing Judgment, 18 December 2003, paras. 87-90), and that several men were tortured in that same camp.

(iii) Foća Kazneno-Popravní Dom camp

309. With regard to the Foća Kazneno-Popravní Dom camp, the Applicant asserts that beatings, rapes of women and torture were perpetrated. The Applicant bases these allegations mainly on the Report of the Commission of Experts and the United States State Department Dispatch. The Commission of Experts based its findings on information provided by a Helsinki Watch Report. A witness claimed that some prisoners were beaten in Foća KP Dom (Report of the Commission of Experts, Vol. IV, pp. 128-132); similar accounts are contained in the United States State Department Dispatch. One witness stated that

“Those running the center instilled fear in the Muslim prisoners by selecting certain prisoners for beatings. From his window in Room 13, the witness saw prisoners regularly being taken to a building where beatings were conducted. This building was close enough for him to hear the screams of those who were being beaten.” (Dispatch of the United States Department of State, 19 April 1993, No. 16, p. 262.)

310. The ICTY Trial Chamber in its Kunarac Judgment of 22 February 2001, described the statements of several witnesses as to the poor and brutal living conditions in Foća KP Dom. These seem to confirm that the Muslim men and women from Foća, Gacko and Kalinovik municipalities were arrested, rounded up, separated from each other, and imprisoned or detained at several detention centres like the Foća KP
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132. As noted above in connection with the killings (paragraph 262), the Applicant has been able to present abundant and persuasive evidence regarding the "white house," used for physical abuses in Omarska camp. The Commission of Experts contains witness accounts regarding the "red house," used for killings. These accounts, submitted to the ICTY, include statements of 30 witnesses on the torture and killing of Muslims held in the Omarska camp. The testimony of these witnesses was corroborated by the ICTY. The ICTY, in the Tadić case, found that several victims were mistreated and beaten by Tadić, and suffered physical abuse. The ICTY also found that Tadić sexually abused and tortured prisoners, as well asraping and torturing prisoners in Omarska camp. The findings of the ICTY in other cases, in particular, the 21 July 2003 trial judgment in the Starić case (IT-95-2-T), and the 31 July 2003 trial judgment in the Stakić case (IT-97-24-T), also document the severe physical abuses at Omarska camp. The attention of the Court has been drawn to several judgments of the ICTY which also document the severe physical abuses, rapes, and sexual violence that occurred at this camp. The Trial Judgment of 1 September 2004 in the Brđanin case (IT-99-36-T) also documents the severe physical abuses, rapes, and sexual violence that occurred at this camp.

133. The Applicant also pointed to evidence of beatings and rapes at Keraterm camp. Several witness accounts are reported in the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 225, 231). The Permanent Mission of Austria to the United Nations and Helsinki Watch also documented the severe physical abuses at Keraterm camp. The attention of the Court has also been drawn to several judgments of the ICTY which also document the severe physical abuses, rapes, and sexual violence that occurred at this camp. The Trial Judgment of 1 September 2004 in the Brđanin case found that:

On 14 June 1992 both villages were attacked. In the morning the sound of shells was heard by the inhabitants of the village of Svice. Thereafter, without any warning, Serb tanks and Serb soldiers entered the village of Svice and ordered the inhabitants to evacuate their homes. On the way, they were made to lie face down and be beaten. On arrival at the collecting point, beaten and in many cases covered with blood, some were called out and questioned about others. Some were made to lie face down and be beaten again. They were then taken to the Keraterm camp. In the evening, a number of villagers, including some children, were taken to the Keraterm camp.

On 14 June 1992, many of the inhabitants of the village of Jazik, who had received permission to stay in the village, were ordered by the Serb soldiers to evacuate their homes. On the way, they were made to lie face down and be beaten. On arrival at the collecting point, one soldier struck a man in the head with the butt of his rifle. Three men were then taken to the Keraterm camp, where they were treated in this way.
In some cases the beatings were so severe as to result in serious injury and death. Beatings and humiliation were often administered in front of other detainees. Female detainees were raped in Keraterm camp. (IT-99-36-T, Trial Chamber Judgment, paras. 851-852.)

The Trial Chamber in its Judgment of 31 July 2003 in the Stakic case found that "the detainees at the Keraterm camp were subjected to terrible abuse. The evidence demonstrates that many of the detainees at the Keraterm camp were beaten on a daily basis. Up until the middle of July, most of the beatings happened at night. After the detainees from Brdo arrived, around 20 July 1992, there were 'no rules', with beatings committed both day and night. Guards and others who entered the camp, including some in military uniforms carried out the beatings. There were no beatings in the rooms since the guards did not enter the rooms - people were generally called out day and night for beatings." (IT-97-24-T, Trial Chamber Judgment, para. 237.)

The Chamber also found that there was convincing evidence of further beatings and rape perpetrated in Keraterm camp (ibid., paras. 238-241).

In the Trial Judgment in the Kvocak et al. case, the Chamber held that, in addition to the "dreadful" general conditions of life, detainees at Keraterm camp were "mercilessly beaten" and "women were raped" (IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, para. 114).

(iii) Trnopolje camp

314. The Court has furthermore been presented with evidence that beatings and rapes occurred at Trnopolje camp. The evidence, which concerns about 3,000 prisoners, the Convention, was presented by the Registry of the ICTY following the opening of the case in 1997. The evidence consisted of both the report of the Commission of Experts and the report of the ICTY's Office of the Prosecutor. Both reports contained specific allegations of beatings and rapes.

315. With regard to the Manjaca camp in Banja Luka, the Applicant relied mainly on the witnesses cited in the Report of the Commission of Experts. After the arrival of the 527th Military Police Battalion on 2 July 1992, the conditions at the camp deteriorated significantly. The evidence, which concerns about 3,000 prisoners, was presented by the Registry of the ICTY following the opening of the case in 1997. The evidence consisted of both the report of the Commission of Experts and the report of the ICTY's Office of the Prosecutor. Both reports contained specific allegations of beatings and rapes.

316. The Applicant refers to the Report of the Commission of Experts, which concerns about 3,000 prisoners at the Manjaca camp. The evidence, which concerns about 3,000 prisoners, was presented by the Registry of the ICTY following the opening of the case in 1997. The evidence consisted of both the report of the Commission of Experts and the report of the ICTY's Office of the Prosecutor. Both reports contained specific allegations of beatings and rapes.

317. Although the scale of the abuse at the Trnopolje camp was less than that in the Omarska camp, the treatment of detainees at both camps was characterised by brutality and inhumanity. The treatment was often carried out in a public manner, and detainees were subjected to repeated beatings and rapes.
317. The Applicant alleges that torture, rape and beatings occurred at Luka camp (Brčko). The Report of the Commission of Experts contains multiple witness accounts, including the evidence of a local guard forced into committing rape (Vol. IV, Ann. VIII, pp. 93-97). The account of the rapes is corroborated by multiple sources (United States Department Dispatch, 19 April 1993). The Court notes in particular the findings of the ICTY Trial Chamber in the Češić case, with regard to acts perpetrated in the Luka camp. In his plea agreement the accused admitted several grave incidents, such as beatings and compelling two Muslim brothers to perform sexual acts with each other (IT-95-10/1-S, Sentencing Judgment, 11 March 2004, paras. 8-17). These findings are corroborated by witness statements and the guilty plea in the Jelisic case.

318. The Respondent does not deny that the camps in Bosnia and Herzegovina were “in breach of humanitarian law and, in most cases, in breach of the law of war”, but argues that the conditions in all the camps were not of the kind described by the Applicant. It stated that all that had been demonstrated was “the existence of serious crimes, committed in a particularly complex situation, in a civil and fratricidal war”, but not the requisite specific intent (dolus specialis).

319. Having carefully examined the evidence presented before it, and taken note of that presented to the ICTY, the Court considers that it has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps. The requirements of the material element, as defined by Article II (b) of the Convention are thus fulfilled. The Court finds, however, on the basis of the evidence before it, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent (dolus specialis) to destroy the protected group, in whole or in part, required for a finding that genocide has been perpetrated.

* * *

320. Article II (c) of the Genocide Convention concerns the deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part. Under this heading, the Applicant first points to an alleged policy by the Bosnian Serb forces to encircle civilians of the protected group in villages, towns or entire regions and to subsequently shell those areas and cut off all supplies in order to starve the population. Secondly, the Applicant claims that Bosnian Serb forces attempted to deport and expel the protected group from the areas which those forces occupied. Finally, the Applicant alleges that Bosnian Serb forces attempted to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property.

321. The Respondent argues that the events referred to by the Applicant took place in a context of war which affected the entire population, whatever its origin. In its view, “it is obvious that in any armed conflict the conditions of life of the civilian population deteriorate”. The Respondent considers that, taking into account the civil war in Bosnia and Herzegovina which generated inhuman conditions of life for the entire population in the territory of that State, “it is impossible to speak of the deliberate infliction on the Muslim group alone or the non-Serb group alone of conditions of life calculated to bring about its destruction”.

322. The Court will examine in turn the evidence concerning the three sets of claims made by the Applicant: encirclement, shelling and starvation; deportation and expulsion; destruction of historical, religious and cultural property. It will also go on to consider the evidence presented regarding the conditions of life in the detention camps already extensively referred to above (paragraphs 252-256, 262-273, 307-310 and 312-318).

Alleged encirclement, shelling and starvation

323. The principal incident referred to by the Applicant in this regard is the siege of Sarajevo by Bosnian Serb forces. Armed conflict broke out in Sarajevo at the beginning of April 1992 following the recognition by the European Community of Bosnia and Herzegovina as an independent State. The Commission of Experts estimated that, between the beginning of April 1992 and 26 February 1994, in addition to those killed or missing in the city (paragraph 247 above), 56,000 persons had been wounded (Report of the Commission of Experts, Vol. II, Ann. VI, p. 8). It was further estimated that, “over the course of the siege, the city was hit by an average of approximately 329 shell impacts per day, with a high of 3,777 shell impacts on 22 July 1993” (ibid.). In his report of 28 August 1992, the Special Rapporteur observed that:
The city is shelled on a regular basis. Snipers shoot innocent civilians.

The civilian population lives in a constant state of anxiety, leaving their homes or shelters only when necessary. The public systems for distribution of electrical power and water no longer function. Food and other basic necessities are scarce, and depend on the airlift organized by UNHCR and protected by UNPROFOR.” (Report of 28 August 1992, paras. 17-18.)

324. The Court notes that, in resolutions adopted on 16 April and 6 May 1993, the Security Council declared Sarajevo, together with Tuzla, Žepa, Gorazde, Bihać and Srebrenica, to be “safe areas” which should be free from any armed attack or any other hostile act and fully accessible to UNPROFOR and international humanitarian agencies (resolutions 819 of 16 April 1993 and 824 of 6 May 1993). However, these resolutions were not adhered to by the parties to the conflict. In his report of 26 August 1993, the Special Rapporteur noted that

“Since May 1993 supplies of electricity, water and gas to Sarajevo have all but stopped . . ., a significant proportion of the damage caused to the supply lines has been deliberate, according to United Nations Protection Force engineers who have attempted to repair them. Repair crews have been shot at by both Bosnian Serb and government forces . . .” (Report of 26 August 1993, para. 6.)

He further found that UNHCR food and fuel convoys had been “obstructed or attacked by Bosnian Serb and Bosnian Croat forces and sometimes also by governmental forces” (Report of 26 August 1993, para. 15). The Commission of Experts also found that the “blockade of humanitarian aid ha[d] been used as an important tool in the siege” (Report of the Commission of Experts, Ann. VI, p. 17). According to the Special Rapporteur, the targeting of the civilian population by shelling and sniping continued and even intensified throughout 1994 and 1995 (Report of 4 November 1994, paras. 27-28; Report of 16 January 1995, para. 13; Report of 5 July 1995, paras. 67-70). The Special Rapporteur noted that

“[a]ll sides are guilty of the use of military force against civilian populations and relief operations in Sarajevo. However, one cannot lose sight of the fact that the main responsibility lies with the [Bosnian Serb] forces, since it is they who have adopted the tactic of laying siege to the city.” (Report of 17 November 1992, para. 42.)

325. The Court notes that in the Galić case, the Trial Chamber of the ICTY found that the Serb forces (the SRK) conducted a campaign of sniping and shelling against the civilian population of Sarajevo (Galić, IT-98-29-T, Judgment, 5 December 2003, para. 583). It was

“convinced by the evidence in the Trial Record that civilians in ARBiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory . . ., and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured” (ibid., para. 591).

These findings were subsequently confirmed by the Appeals Chamber (Galić, IT-98-29-A, Judgment, 30 November 2006, paras. 107-109). The ICTY also found that the shelling which hit the Markale market on 5 February 1994, resulting in 60 persons killed and over 140 injured, came from behind Bosnian Serb lines, and was deliberately aimed at civilians (ibid., paras. 333 and 335 and Galić, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para. 496).

326. The Respondent argues that the safe areas proclaimed by the Security Council had not been completely disarmed by the Bosnian army. For instance, according to testimony given in the Galić case by the Deputy Commander of the Bosnian army corps covering the Sarajevo area, the Bosnian army had deployed 45,000 troops within Sarajevo. The Respondent also pointed to further testimony in that case to the effect that certain troops in the Bosnian army were wearing civilian clothes and that the Bosnian army was using civilian buildings for its bases and positioning its tanks and artillery in public places. Moreover, the Respondent observed that, in his book, Fighting for Peace, General Rose was of the view that military equipment was installed in the vicinity of civilians, for instance, in the grounds of the hospital in Sarajevo and that “[t]he Bosnians had evidently chosen this location with the intention of attracting Serb fire, in the hope that the resulting carnage would further tilt international support in their favour” (Michael Rose, Fighting for Peace, 1998, p. 254).

327. The Applicant also points to evidence of sieges of other towns in Bosnia and Herzegovina. For instance, with regard to Gorazde, the Special Rapporteur found that the enclave was being shelled and had been denied convoys of humanitarian aid for two months. Although food was being air-dropped, it was insufficient (Report of 5 May 1992, para. 42). In a later report, the Special Rapporteur noted that, as of spring 1994, the town had been subject to a military offensive by Bosnian Serb forces, during which civilian objects including the hospital had been targeted and the water supply had been cut off (Report of 10 June 1994, paras. 7-12). Humanitarian convoys were harassed including by the detention of UNPROFOR personnel and the theft of equipment (Report of

328. The Court finds that virtually all the incidents recounted by the Applicant have been established by the available evidence. It takes account of the assertion that the Bosnian army may have provoked attacks on civilian areas by Bosnian Serb forces, but does not consider that this, even if true, can provide any justification for attacks on civilian areas. On the basis of a careful examination of the evidence presented by the Parties, the Court concludes that civilian members of the protected group were deliberately targeted by Serb forces in Sarajevo and other cities. However, reserving the question whether such acts are in principle capable of falling within the scope of Article II, paragraph (c), of the Convention, the Court does not find sufficient evidence that the alleged acts were committed with the specific intent to destroy the protected group in whole or in part. For instance, in the Galić case, the ICTY found that

“the attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition . . . the only reasonable conclusion in light of the evidence in the Trial Record is that the primary purpose of the campaign was to instil in the civilian population a state of extreme fear” (Galić, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para. 593).

These findings were not overruled by the judgment of the Appeals Chamber of 30 November 2006 (Galić, IT-98-29-A, Judgment: see e.g., paras. 107-109, 335 and 386-390). The Special Rapporteur of the United Nations Commission on Human Rights was of the view that “[t]he siege, including the shelling of population centres and the cutting off of supplies of food and other essential goods, is another tactic used to force Muslims and ethnic Croats to flee” (Report of 28 August 1992, para. 17). The Court thus finds that it has not been conclusively established that the acts were committed with the specific intent (dolus specialis) to destroy the protected group in whole or in part.

329. The Applicant claims that deportations and expulsions occurred systematically all over Bosnia and Herzegovina. With regard to Banja Luka, the Special Rapporteur noted that since late November 1993, there had been a “sharp rise in repossessions of apartments, whereby Muslim and Croat tenants [were] summarily evicted” and that “a form of housing agency had been established . . . which chooses accommodation for incoming Serb displaced persons, evicts Muslim or Croat residents and reputedly receives payment for its services in the form of possessions left behind by those who have been evicted” (Report of 21 February 1994, para. 8). In a report dated 21 April 1995 dedicated to the situation in Banja Luka, the Special Rapporteur observed that since the beginning of the war, there had been a 90 per cent reduction in the local Muslim population (Report of 21 April 1995, para. 4). He noted that a forced labour obligation imposed by the de facto authorities in Banja Luka, as well as “the virulence of the ongoing campaign of violence” had resulted in “practically all non-Serbs fervently wishing to leave the Banja Luka area” (Report of 21 April 1995, para. 24). Those leaving Banja Luka were required to pay fees and to relinquish in writing their claim to their homes, without reimbursement (Report of 21 April 1995, para. 26). The displacements were “often very well organized, involving the bussing of people to the Croatian border, and involve[d] large numbers of people” (Report of 4 November 1994, para. 23). According to the Special Rapporteur, “[o]n one day alone in mid-June 1994, some 460 Muslims and Croats were displaced” (ibid.).

330. As regards Bijeljina, the Special Rapporteur observed that, between mid-June and 17 September 1994, some 4,700 non-Serbs were displaced from the Bijeljina and Janja regions. He noted that many of the displaced, “whether forced or choosing to depart, were subject to harassment and theft by the Bosnian Serb forces orchestrating the displacement” (Report of 4 November 1994, para. 21). These reports were confirmed by those of non-governmental organizations based on witness statements taken on the ground (Amnesty International, “Bosnia and Herzegovina: Living for the Day — Forced expulsions from Bijeljina and Janja”, December 1994, p. 2).

331. As for Zvornik, the Commission of Experts, relying on a study carried out by the Ludwig Boltzmann Institute of Human Rights based on an evaluation of 500 interviews of individuals who had fled the area, found that a systematic campaign of forced deportation had occurred (Report of the Commission of Experts, Vol. I, Ann. IV, pp. 55 et seq). The study observed that Bosnian Muslims obtained an official stamp on their identity card indicating a change of domicile in exchange for transferring their property to an “agency for the exchange of houses” which was subsequently a prerequisite for being able to leave the town (Lud-
wig Boltzmann Institute of Human Rights, “‘Ethnic Cleansing Operations’ in the northeast Bosnian city of Zvornik from April through June 1992”, pp. 28-29). According to the study, forced deportations of Bosnian Muslims began in May/June 1992 by bus to Mali Zvornik and from there to the Bosnian town of Tuzla or to Subotica on the Serbian-Hungarian border (ibid., pp. 28 and 35-36). The Special Rapporteur’s report of 10 February 1993 supports this account, stating that deportees from Zvornik had been “ordered, some at gunpoint, to board buses and trucks and later trains”, provided with Yugoslav passports and subsequently taken to the Hungarian border to be admitted as refugees (Report of 10 February 1993, para. 99).

332. According to the Trial Chamber of the ICTY in its review of the indictment in the cases against Karadžić and Mladić, “[t]housands of civilians were unlawfully expelled or deported to other places inside and outside the Republic of Bosnia and Herzegovina” and “[t]he result of these expulsions was the partial or total elimination of Muslims and Bosnian Croats in some of [the] Bosnian Serb-held regions of Bosnia and Herzegovina”. The Chamber further stated that “[i]n the municipalities of Prijedor, Foča, Vlasenica, Brčko and Bosanski Samac, to name but a few, the once non-Serbian majority was systematically exterminated or expelled by force or intimidation” (Karadžić and Mladić, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 16).

333. The Respondent argues that displacements of populations may be necessary according to the obligations set down in Articles 17 and 49, paragraph 2, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, for instance if the security of the population or imperative military reasons so demand. It adds that the displacement of populations has always been a way of settling certain conflicts between opposing parties and points to a number of examples of forced population displacements in history following an armed conflict. The Respondent also argues that the mere expulsion of a group cannot be characterized as genocide, but that, according to the ICTY Judgment in the Stakić case, “[a] clear distinction must be drawn between physical destruction and mere dissolution of a group” and “[t]he expulsion of a group or part of a group does not in itself suffice for genocide” (Stakić, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519).

334. The Court considers that there is persuasive and conclusive evidence that deportations and expulsions of members of the protected group occurred in Bosnia and Herzegovina. With regard to the Respondent’s argument that in time of war such deportations or expulsions may be justified under the Geneva Convention, or may be a normal way of settling a conflict, the Court would observe that no such justification could be accepted in the face of proof of specific intent (dolus specialis). However, even assuming that deportations and expulsions may be categorized as falling within Article II, paragraph (c), of the Genocide Convention, the Court cannot find, on the basis of the evidence presented to it, that it is conclusively established that such deportations and expulsions were accompanied by the intent to destroy the protected group in whole or in part (see paragraph 190 above).

Destruction of historical, religious and cultural property

335. The Applicant claims that throughout the conflict in Bosnia and Herzegovina, Serb forces engaged in the deliberate destruction of historical, religious and cultural property of the protected group in “an attempt to wipe out the traces of their very existence”. 336. In the Tadić case, the ICTY found that “[n]on-Serb cultural and religious symbols throughout the region were targeted for destruction” in the Banja Luka area (Tadić, IT-94-1-T, Trial Chamber Judgment, 7 May 1997, para. 149). Further, in reviewing the indictments of Karadžić and Mladić, the Trial Chamber stated that:

“Throughout the territory of Bosnia and Herzegovina under their control, Bosnian Serb forces . . . destroyed, quasi-systematically, the Muslim and Catholic cultural heritage, in particular, sacred sites. According to estimates provided at the hearing by an expert witness, Dr. Kaiser, a total of 1,123 mosques, 504 Catholic churches and five synagogues were destroyed or damaged, for the most part, in the absence of military activity or after the cessation thereof.

This was the case in the destruction of the entire Islamic and Catholic heritage in the Banja Luka area, which had a Serbian majority and the nearest area of combat to which was several dozen kilometres away. All of the mosques and Catholic churches were destroyed. Some mosques were destroyed with explosives and the ruins were then levelled and the rubble thrown in the public dumps in order to eliminate any vestige of Muslim presence.

Aside from churches and mosques, other religious and cultural symbols like cemeteries and monasteries were targets of the attacks.” (Karadžić and Mladić, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 15.)

In the Brđanin case, the Trial Chamber was “satisfied beyond reasonable doubt that there was wilful damage done to both Muslim and Roman Catholic religious buildings and institutions in the relevant municipalities by Bosnian Serb forces” (Brđanin, IT-99-36-T, Judgment, 1 September 2004, paras. 640 and 658). On the basis of the findings regarding a number of incidents in various regions of Bosnia and Herzegovina, the
Trial Chamber concluded that a “campaign of devastation of institutions dedicated to religion took place throughout the conflict” but “intensified in the summer of 1992” and that this concentrated period of significant damage was “indicative that the devastation was targeted, controlled and deliberate” (Brčin, IT-99-36-T, paras. 642-657). For instance, the Trial Chamber found that the Bosanska Krupa town mosque was mined by Bosnian Serb forces in April 1992, that two mosques in Bosanski Petrovac were destroyed by Bosnian Serb forces in July 1992 and that the mosques in Staro Šipovo, Bešinjevo and Pijeva were destroyed on 7 August 1992 (ibid., paras. 644, 647 and 656).

337. The Commission of Experts also found that religious monuments especially mosques and churches had been destroyed by Bosnian Serb forces (Report of the Commission of Experts, Vol. I, Ann. IV, pp. 5, 9, 21 ff.). In its report on the Prijedor region, the Commission found that at least five mosques and associated buildings in Prijedor town had been destroyed and noted that it was claimed that all 16 mosques in the Kozarac area had been destroyed and that not a single mosque, or other Muslim religious building, remained intact in the Prijedor region (Report of the Commission of Experts, Vol. I, Ann. V, p. 106). The report noted that those buildings were “allegedly not desecrated, damaged and destroyed for any military purpose nor as a side-effect of the military operations as such” but rather that the destruction “was due to later separate operations of dynamiting” (ibid.).

338. The Special Rapporteur found that, during the conflict, “many mosques, churches and other religious sites, including cemeteries and monasteries, have been destroyed or profaned” (Report of 17 November 1992, para. 26). He singled out the “systematic destruction and profanation of mosques and Catholic churches in areas currently or previously under [Bosnian Serb] control” (Report of 17 November 1992, para. 26).

339. Bosnia and Herzegovina called as an expert Mr. András Riedlmayer, who had carried out a field survey on the destruction of cultural heritage in 19 municipalities in Bosnia and Herzegovina for the Prosecutor of the ICTY in the Milošević case and had subsequently studied seven further municipalities in two other cases before the ICTY (“ Destruction of Cultural Heritage in Bosnia and Herzegovina, 1992-1996: A Post-war Survey of Selected Municipalities“, Milošević, IT-2002-54-T, Exhibit Number P486). In his report prepared for the Milošević case, Mr. Riedlmayer documented 392 sites, 60 per cent of which were inspected first hand while for the other 40 per cent his assessment was based on photographs and information obtained from other sources judged to be reliable and where there was corroborating documentation (Riedlmayer Report, p. 5).

340. The report compiled by Mr. Riedlmayer found that of the 277 mosques surveyed, none were undamaged and 136 were almost or entirely destroyed (Riedlmayer Report, pp. 9-10). The report found that:

“The damage to these monuments was clearly the result of attacks directed against them, rather than incidental to the fighting. Evidence of this includes signs of blast damage indicating explosives placed inside the mosques or inside the stairwells of minarets; many mosques [were] burnt out. In a number of towns, including Bijeljina, Janja (Bijeljina municipality), Foća, Banja Luka, Sanski Most, Zvornik and others, the destruction of mosques took place while the area was under the control of Serb forces, at times when there was no military action in the immediate vicinity.” (Ibid., p. 11.)

The report also found that, following the destruction of mosques:

“the ruins [of the mosques] were razed and the sites levelled with heavy equipment, and all building materials were removed from the site . . . Particularly well-documented instances of this practice include the destruction and razing of 5 mosques in the town of Bijeljina; of 2 mosques in the town of Janja (in Bijeljina municipality); of 12 mosques and 4 turbes in Banja Luka; and of 3 mosques in the city of Brčko.” (Ibid., p. 12.)

Finally, the Report noted that the sites of razed mosques had been “turned into rubbish tips, bus stations, parking lots, automobile repair shops, or flea markets” (Ibid., p. 14), for example, a block of flats and shops had been erected on the site of the Zamlaz Mosque in Zvornik and a new Serbian Orthodox church was built on the site of the destroyed Divic Mosque (Ibid., p. 14).

341. Mr. Riedlmayer’s report together with his testimony before the Court and other corroborative sources detail the destruction of the cultural and religious heritage of the protected group in numerous locations in Bosnia and Herzegovina. For instance, according to the evidence before the Court, 12 of the 14 mosques in Mostar were destroyed or damaged and there are indications from the targeting of the minaret that the destruction or damage was deliberate (Council of Europe, Information Report: The Destruction by War of the Cultural Heritage in Croatia and Bosnia-Herzegovina, Parliamentary Assembly doc. 6756, 2 February 1993, paras. 129 and 155). In Foća, the town’s 14 historic mosques were allegedly destroyed by Serb forces. In Banja Luka, all 16 mosques were destroyed by Serb forces including the city’s two largest mosques,
342. The Court notes that archives and libraries were also subjected to attacks during the war in Bosnia and Herzegovina. On 17 May 1992, the Institute for Oriental Studies in Sarajevo was bombarded with incendiary munitions and burnt, resulting in the loss of 200,000 documents including a collection of over 5,000 Islamic manuscripts (Riedlmayer Report, p. 18; Council of Europe, Parliamentary Assembly; Second Information Report on War Damage to the Cultural Heritage in Croatia and Bosnia-Herzegovina, doc. 6869, 17 June 1993, p. 11, Ann. 38). On 25 August 1992, Bosnia’s National Library was bombarded and an estimated 1.5 million volumes were destroyed (Riedlmayer Report, p. 19). The Court observes that, although the Respondent considers that there is no certainty as to who shelled these institutions, there is evidence that both the Institute for Oriental Studies in Sarajevo and the National Library were bombarded from Serb positions.

343. The Court notes that, in cross-examination of Mr. Riedlmayer, counsel for the Respondent pointed out that the municipalities included in Mr. Riedlmayer’s report only amounted to 25 per cent of the territory of Bosnia and Herzegovina. Counsel for the Respondent also called into question the methodology used by Mr. Riedlmayer in compiling his report. However, having closely examined Mr. Riedlmayer’s report and having listened to his testimony, the Court considers that Mr. Riedlmayer’s findings do constitute persuasive evidence as to the destruction of historical, cultural and religious heritage in Bosnia and Herzegovina albeit in a limited geographical area.

344. In light of the foregoing, the Court considers that there is conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group during the period in question. The Court takes note of the submission of the Applicant that the destruction of such heritage was “an essential part of the policy of ethnic purification” and was “an attempt to wipe out the traces of [the] very existence” of the Bosnian Muslims. However, in the Court’s view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention. In this regard, the Court observes that, during its consideration of the draft text of the Convention, the Sixth Committee of the General Assembly decided not to include cultural genocide in the list of punishable acts. Moreover, the ILC subsequently confirmed this approach, stating that:

“As clearly shown by the preparatory work for the Convention . . ., the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.” (Report of the International Law Commission on the work of its Forty-eighth Session, Yearbook of the International Law Commission 1996, Vol. II, Part Two, pp. 45-46, para. 12.)

Furthermore, the ICTY took a similar view in the Krstić case, finding that even in customary law, “despite recent developments”, the definition of acts of genocide is limited to those seeking the physical or biological destruction of a group (Krstić, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 580). The Court concludes that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention. At the same time, it also endorses the observation made in the Krstić case that “where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group” (ibid.).

Camps

345. The Court notes that the Applicant has presented substantial evidence as to the conditions of life in the detention camps and much of this evidence has already been discussed in the sections regarding Articles II (a) and (b). The Court will briefly examine the evidence presented by the Applicant which relates specifically to the conditions of life in the principal camps.

(a) Drina River Valley

(i) Sušica camp

346. In the Sentencing Judgment in the case of Dragan Nikolić, the Commander of Sušica camp, the ICTY found that he subjected detainees to inhumane living conditions by depriving them of adequate food, water, medical care, sleeping and toilet facilities (Nikolić, IT-94-2-S, Sentencing Judgment, 18 December 2003, para. 69).
347. In the Knnejelac case, the ICTY Trial Chamber made the following findings regarding the conditions at the camp:

“the non-Serb detainees were forced to endure brutal and inadequate living conditions while being detained at the KP Dom, as a result of which numerous individuals have suffered lasting physical and psychological problems. Non-Serbs were locked in their rooms or in solitary confinement at all times except for meals and work duty, and kept in overcrowded rooms even though the prison had not reached its capacity. Because of the overcrowding, not everyone had a bed or even a mattress, and there were insufficient blankets. Hygienic conditions were poor. Access to baths or showers, with no hot water, was irregular at best. There were insufficient hygienic products and toiletries. The rooms in which the non-Serbs were held did not have sufficient heating during the harsh winter of 1992. Heaters were deliberately not placed in the rooms, windowpanes were left broken and clothes made from blankets to combat the cold were confiscated. Non-Serb detainees were fed starvation rations leading to severe weight loss and other health problems. They were not allowed to receive visits after April 1992 and therefore could not supplement their meagre food rations and hygienic supplies.” (Knnejelac, IT-97-25-T, Judgment, 15 March 2002, para. 440.)

348. In the Trial Judgment in the Kvocka et al. case, the ICTY Trial Chamber provided the following description of the poor conditions in the Omarska camp based on the accounts of detainees:

“Detainees were kept in inhuman conditions and an atmosphere of extreme mental and physical violence pervaded the camp. Intimidation, extortion, beatings, and torture were customary practices. The arrival of new detainees, interrogations, mealtimes, and use of the toilet facilities provided recurrent opportunities for abuse. Outsiders entered the camp and were permitted to attack the detainees at random and at will . . .

The Trial Chamber finds that the detainees received poor quality food that was often rotten or inedible, caused by the high temperatures and sporadic electricity during the summer of 1992. The food was sorely inadequate in quantity. Former detainees testified of the acute hunger they suffered in the camp: most lost 25 to 35 kilograms in body weight during their time at Omarska; some lost considerably more.” (Kvocka et al., IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, paras. 45 and 55.)

349. The Stakic Trial Judgment contained the following description of conditions in the Keraterm camp based on multiple witness accounts:

“The detainees slept on wooden pallets used for the transport of goods on bare concrete in a big storage room. The conditions were cramped and people often had to sleep on top of each other. In June 1992, Room 1, which according to witness statements was slightly larger than Courtroom 2 of this Tribunal (98.6 m²), held 320 people and the number continued to grow. The detainees were given one meal a day, made up of two small slices of bread and some sort of stew. The rations were insufficient for the detainees. Although families tried to deliver food and clothing every day they rarely succeeded. The detainees could see their families walking to the camp and leaving empty-handed, so in all likelihood someone at the gates of the camp took the food and prevented it from being distributed to the detainees.” (Stakic, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 163.)

350. With respect to the Trnopolje camp, the Stakic Trial Judgment described the conditions as follows, noting that they were slightly better than at Omarska and Keraterm:

“The detainees were provided with food at least once a day and, for some time, the families of detainees were allowed to bring food. However the quantity of food available was insufficient and people often went hungry. Moreover, the water supply was insufficient and the toilet facilities inadequate. The majority of the detainees slept in the open air. Some devised makeshift shelters of blankets, plastic bags. While clearly inadequate, the conditions in the Trnopolje camp were not as appalling as those that prevailed in Omarska and Keraterm.” (Ibid., para. 190.)
Banja Luka

351. According to ICTY Trial Chamber in the Plavšić Sentencing Judgment:

"the sanitary conditions in Manjača were 'disastrous ... inhuman and really brutal': the concept of sanitation did not exist. The temperature inside was low, the inmates slept on the concrete floor and they relieved themselves in the compound or in a bucket placed by the door at night. There was not enough water, and any water that became available was contaminated. In the first three months of Adil Draganović's detention, Manjača was a 'camp of hunger' and when there was food available, it was of a very poor quality. The inmates were given two small meals per day, which usually consisted of half a cup of warm tea, which was more like warm water, and a small piece of thin, 'transparent' bread. Between two and a half thousand men there were only 90 loaves of bread, with each loaf divided into 20 or 40 pieces. Most inmates lost between 20 and 30 kilograms of body weight while they were detained at Manjača. The witness believes that had the ICRC and UNHCR not arrived, the inmates would have died of starvation." (Plavšić, IT-00-39-S and 40/1-S, Sentencing Judgment, 27 February 2003, para. 48.)

Bosanski Šamac

352. In its Judgment in the Simić case, the Trial Chamber made the following findings:

"the detainees who were imprisoned in the detention centres in Bosanski Šamac were confined under inhumane conditions. The prisoners were subjected to humiliation and degradation. The forced singing of 'Chetnik' songs and the verbal abuse of being called 'ustasha' or 'balija' were forms of such abuse and humiliation of the detainees. They did not have sufficient space, food or water. They suffered from unhygienic conditions, and they did not have appropriate access to medical care. These appalling detention conditions, the cruel and inhumane treatment through beatings and the acts of torture caused severe physical suffering, thus attacking the very fundamentals of human dignity . . . This was done because of the non-Serb ethnicity of the detainees." (Simić, IT-95-9-T, Judgment, 17 October 2003, para. 773.)

353. The Respondent does not deny that the camps in Bosnia and Herzegovina were in breach of humanitarian law and, in most cases, in breach of the law of war. However, it notes that, although a number of detention camps run by the Serbs in Bosnia and Herzegovina were the subject of investigation and trials at the ICTY, no conviction for genocide was handed down on account of any criminal acts committed in those camps. With specific reference to the Manjača camp, the Respondent points out that the Special Envoy of the United Nations Secretary-General visited the camp in 1992 and found that it was being run correctly and that a Muslim humanitarian organization also visited the camp and found that "material conditions were poor, especially concerning hygiene [but there were no signs of maltreatment or execution of prisoners]."

354. On the basis of the elements presented to it, the Court considers that there is convincing and persuasive evidence that terrible conditions were inflicted upon detainees of the camps. However, the evidence presented has not enabled the Court to find that those acts were accompanied by specific intent (dolus specialis) to destroy the protected group, in whole or in part. In this regard, the Court observes that, in none of the ICTY cases concerning camps cited above, has the Tribunal found that the accused acted with such specific intent (dolus specialis).

* * *

355. The Applicant invoked several arguments to show that measures were imposed to prevent births, contrary to the provision of Article II, paragraph (d), of the Genocide Convention. First, the Applicant claimed that the

"forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practised when various municipalities were occupied by the Serb forces . . . in all probability entailed a decline in the birth rate of the group, given the lack of physical contact over many months'."

The Court notes that no evidence was provided in support of this statement.

356. Secondly, the Applicant submitted that rape and sexual violence against women led to physical trauma which interfered with victims' reproductive functions and in some cases resulted in infertility. However, the only evidence adduced by the Applicant was the indictment in the Gagović case before the ICTY in which the Prosecutor stated that one witness could no longer give birth to children as a result of the sexual abuse she suffered (Gagović et al., IT-96-23-I, Initial Indictment, 26 June 1996, para. 7.10). In the Court's view, an indictment by the Prosecutor...
does not constitute persuasive evidence (see paragraph 217 above). Moreover, it notes that the Gagović case did not proceed to trial due to the death of the accused.

357. Thirdly, the Applicant referred to sexual violence against men which prevented them from procreating subsequently. In support of this assertion, the Applicant noted that, in the Tadić case, the Trial Chamber found that, in Omarska camp, the prison guards forced one Bosnian Muslim man to bite off the testicles of another Bosnian Muslim man (Tadić, IT-94-1-T, Judgment, 7 May 1997, para. 198). The Applicant also cited a report in the newspaper, Le Monde, on a study by the World Health Organization and the European Union on sexual assaults on men during the conflict in Bosnia and Herzegovina, which alleged that sexual violence against men was practically always accompanied by threats to the effect that the victim would no longer produce Muslim children. The article in Le Monde also referred to a statement by the President of a non-governmental organization called the Medical Centre for Human Rights to the effect that approximately 5,000 non-Serb men were the victims of sexual violence. However, the Court notes that the article in Le Monde is only a secondary source. Moreover, the results of the World Health Organization and European Union study were only preliminary, and there is no indication as to how the Medical Centre for Human Rights arrived at the figure of 5,000 male victims of sexual violence.

358. Fourthly, the Applicant argued that rape and sexual violence against men and women led to psychological trauma which prevented victims from forming relationships and founding a family. In this regard, the Applicant noted that in the Akayesu case, the ICTR considered that “rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate” (Akayesu, ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 508). However, the Court notes that the Applicant presented no evidence that this was the case for women in Bosnia and Herzegovina.

359. Fifthly, the Applicant considered that Bosnian Muslim women who suffered sexual violence might be rejected by their husbands or not be able to find a husband. Again, the Court notes that no evidence was presented in support of this statement.

360. The Respondent considers that the Applicant “alleges no fact, puts forward no serious argument, and submits no evidence” for its allegations that rapes were committed in order to prevent births within a group and notes that the Applicant’s contention that there was a decline in births within the protected group is not supported by any evidence concerning the birth rate in Bosnia and Herzegovina either before or after the war.

361. Having carefully examined the arguments of the Parties, the Court finds that the evidence placed before it by the Applicant does not enable it to conclude that Bosnian Serb forces committed acts which could be qualified as imposing measures to prevent births in the protected group within the meaning of Article II (d) of the Convention.

(9) Article II (e): Forcibly Transferring Children of the Protected Group to Another Group

362. The Applicant claims that rape was used “as a way of affecting the demographic balance by impregnating Muslim women with the sperm of Serb males” or, in other words, as “procreative rape”. The Applicant argues that children born as a result of these “forced pregnancies” would not be considered to be part of the protected group and considers that the intent of the perpetrators was to transfer the unborn children to the group of Bosnian Serbs.

363. As evidence for this claim, the Applicant referred to a number of sources including the following. In the indictment in the Gagović et al. case, the Prosecutor alleged that one of the witnesses was raped by two Bosnian Serb soldiers and that “[t]hese perpetrators told her that she would now give birth to Serb babies” (Gagović et al., IT-96-23-I, Initial Indictment, 26 June 1996, para. 9.3). However, as in paragraph 356 above, the Court notes that an indictment cannot constitute persuasive evidence for the purposes of the case now before it and that the Gagović case did not proceed to trial. The Applicant further referred to the Report of the Commission of Experts which stated that one woman had been detained and raped daily by three or four soldiers and that “[s]he was told that she would give birth to a chetnik boy” (Report of the Commission of Experts, Vol. I, p. 59, para. 248).

364. The Applicant also cited the Review of the Indictment in the Karadžić and Mladić cases in which the Trial Chamber stated that “[s]ome camps were specially devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late to undergo an abortion” and that “[i]t would seem that the aim of many rapes was enforced impregnation” (Karadžić and Mladić, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 64). However, the Court notes that this finding of the Trial Chamber was based only on the testimony of one amicus curiae and on the above-mentioned incident reported by the Commission of Experts (ibid., para. 64, footnote 154).
Finally, the Applicant noted that in the Kunarac case, the ICTY Trial Chamber found that, after raping one of the witnesses, the accused had told her that “she would now carry a Serb baby and would not know who the father would be” (Kunarac et al. cases, Nos. IT-96-23-T and IT-96-231-T, Judgment, 22 February 2001, para. 583).

366. The Respondent points out that Muslim women who had been raped gave birth to their babies in Muslim territory and consequently the babies would have been brought up not by Serbs but, on the contrary, by Muslims. Therefore, in its view, it cannot be claimed that the children were transferred from one group to the other.

367. The Court, on the basis of the foregoing elements, finds that the evidence placed before it by the Applicant does not establish that there was any form of policy of forced pregnancy, nor that there was anyaim to transfer children of the protected group to another group within the meaning of Article II (e) of the Convention.

* * *

(10) Alleged Genocide outside Bosnia and Herzegovina

368. In the submissions in its Reply, the Applicant has claimed that the Respondent has violated its obligations under the Genocide Convention “by destroying in part, and attempting to destroy in whole, national, ethical or religious groups within the, but not limited to the, territory of Bosnia and Herzegovina, including in particular the Muslim population . . . ” (emphasis added). The Applicant devoted a section in its Reply to the contention that acts of genocide, for which the Respondent was allegedly responsible, also took place on the territory of the FRY; these acts were similar to those perpetrated on Bosnian territory, and the constituent elements of “ethnic cleansing as a policy” were also found in the territory of the FRY. This question of genocide committed within the FRY was not actively pursued by the Applicant in the course of the oral argument before the Court; however, the submission quoted above was maintained in the final submissions presented at the hearings, and the Court must therefore address it. It was claimed by the Applicant that the genocidal policy was aimed not only at citizens of Bosnia and Herzegovina, but also at Albanians, Sandžak Muslims, Croats, Hungarians and other minorities; however, the Applicant has not established to the satisfaction of the Court any facts in support of that allegation. The Court has already found (paragraph 196 above) that, for purposes of establishing genocide, the targeted group must be defined positively, and not as a “non-Serb” group.

369. The Applicant has not in its arguments dealt separately with the question of the nature of the specific intent (dolus specialis) alleged to accompany the acts in the FRY complained of. It does not appear to be contending that actions attributable to the Respondent, and committed on the territory of the FRY, were accompanied by a specific intent (dolus specialis), peculiar to or limited to that territory, in the sense that the objective was to eliminate the presence of non-Serbs in the FRY itself. The Court finds in any event that the evidence offered does not in any way support such a contention. What the Applicant has sought to do is to convince the Court of a pattern of acts said to evidence specific intent (dolus specialis) inspiring the actions of Serb forces in Bosnia and Herzegovina, involving the destruction of the Bosnian Muslims in that territory; and that same pattern lay, it is contended, behind the treatment of Bosnian Muslims in the camps established in the FRY, so that that treatment supports the pattern thesis. The Applicant has emphasized that the same treatment was meted out to those Bosnian Muslims as was inflicted on their compatriots in Bosnia and Herzegovina. The Court will thus now turn to the question whether the specific intent (dolus specialis) can be deduced, as contended by the Applicant, from the pattern of actions against the Bosnian Muslims taken as a whole.

* * *

(11) The Question of Pattern of Acts Said to Evidence an Intent to Commit Genocide

370. In the light of its review of the factual evidence before it of the atrocities committed in Bosnia and Herzegovina in 1991-1995, the Court has concluded that, save for the events of July 1995 at Srebrenica, the necessary intent required to constitute genocide has not been conclusively shown in relation to each specific incident. The Applicant however relies on the alleged existence of an overall plan to commit genocide, indicated by the pattern of genocidal or potentially acts of genocide committed throughout the territory, against persons identified everywhere and in each case on the basis of their belonging to a specified group. In the case, for example, of the conduct of Serbs in the various camps (described in paragraphs 252-256, 262-273, 307-310 and 312-318 above), it suggests that “[t]he genocidal intent of the Serbs becomes particularly clear in the description of camp practices, due to their striking similarity all over the territory of Bosnia and Herzegovina”. Drawing attention to the similarities between actions attributed to the Serbs in Croatia, and the later events at, for example, Kosovo, the Applicant observed that “it is not surprising that the picture of the takeovers and the following human and cultural destruction looks indeed similar from 1991
through 1999. These acts were perpetrated as the expression of one single project, which basically and effectively included the destruction in whole or in part of the non-Serb group, wherever this ethnically and religiously defined group could be conceived as obstructing the all-Serbs-in-one-State group concept.

371. The Court notes that this argument of the Applicant moves from the intent of the individual perpetrators of the alleged acts of genocide complained of to the intent of higher authority, whether within the VRS or the Republika Srpska, or at the level of the Government of the Respondent itself. In the absence of an official statement of aims reflecting such an intent, the Applicant contends that the specific intent (dolus specialis) of those directing the course of events is clear from the consistency of practices, particularly in the camps, showing that the pattern was of acts committed “within an organized institutional framework”. However, something approaching an official statement of an overall plan is, the Applicant contends, to be found in the Decision on Strategic Goals issued on 12 May 1992 by Momčilo Krajišnik as the President of the National Assembly of Republika Srpska, published in the Official Gazette of the Republika Srpska, and the Court will first consider what significance that Decision may have in this context. The English translation of the Strategic Goals presented by the Parties during the hearings, taken from the Report of Expert Witness Donia in the Milošević case before the ICTY, Exhibit No. 537, reads as follows:

“DECISION ON THE STRATEGIC GOALS OF THE SERBIAN PEOPLE IN BOSNIA AND HERZEGOVINA

The Strategic Goals, i.e., the priorities, of the Serbian people in Bosnia and Herzegovina are:

1. Separation as a state from the other two ethnic communities.
3. The establishment of a corridor in the Drina River valley, i.e., the elimination of the border between Serbian states.
4. The establishment of a border on the Una and Neretva rivers.
5. The division of the city of Sarajevo into a Serbian part and a Muslim part, and the establishment of effective state authorities within each part.
6. An outlet to the sea for the Republika Srpska.”

While the Court notes that this document did not emanate from the Government of the Respondent, evidence before the Court of intercepted exchanges between President Milošević of Serbia and President Karadžić of the Republika Srpska is sufficient to show that the objectives defined represented their joint view.

372. The Parties have drawn the Court’s attention to statements in the Assembly by President Karadžić which appear to give conflicting interpretations of the first and major goal of these objectives, the first on the day they were adopted, the second two years later. On that first occasion, the Applicant contended, he said: “It would be much better to solve this situation by political means. It would be best if a truce could be established right away and the borders set up, even if we lose something.” Two years later he said (according to the translation of his speech supplied by the Applicant):

“We certainly know that we must give up something — that is beyond doubt in so far as we want to achieve our first strategic goal: to drive our enemies by the force of war from their homes, that is the Croats and Muslims, so that we will no longer be together [with them] in a State.”

The Respondent disputes the accuracy of the translation, claiming that the stated goal was not “to drive our enemies by the force of war from their homes” but “to free the homes from the enemy”. The 1992 objectives do not include the elimination of the Bosnian Muslim population. The 1994 statement even on the basis of the Applicant’s translation, however shocking a statement, does not necessarily involve the intent to destroy in whole or in part the Muslim population in the enclaves. The Applicant’s argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership — to create a larger Serb State, by a war of conquest if necessary — did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion. The 1992 objectives, particularly the first one, were capable of being achieved by the displacement of the population and by territory being acquired, actions which the Respondent accepted (in the latter case at least) as being unlawful since they would be at variance with the inviolability of borders and the territorial integrity of a State which had just been recognized internationally. It is significant that in cases in which the Prosecutor has put the Strategic Goals in issue, the ICTY has not characterized them as genocidal (see Brđanin, IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 303, and Stakić, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, paras. 546-561 (in particular para. 548)). The Court does not see the 1992 Strategic Goals as establishing the specific intent.

373. Turning now to the Applicant’s contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims and also Croats, demonstrates the necessary intent, the Court cannot agree with such a broad proposition. The dolus specialis, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demon-
strated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.

374. Furthermore, and again significantly, the proposition is not consistent with the findings of the ICTY relating to genocide or with the actions of the Prosecutor, including decisions not to charge genocide offences in possibly relevant indictments, and to enter into plea agreements, as in the Plavšić and Sikirica et al. cases (IT-00-40 and IT-95-8), by which the genocide-related charges were withdrawn. Those actions of the Prosecution and the Tribunal can be conveniently enumerated here. Prosecutions for genocide and related crimes before the ICTY can be grouped in the following way:

(a) convictions in respect of charges involving genocide relating to Srebrenica in July 1995: Krstić (IT-98-33) (conviction of genocide at trial was reduced to aiding and abetting genocide on appeal) and Blagojević (IT-02-60) (conviction of complicity in genocide “through aiding and abetting” at trial is currently on appeal);

(b) plea agreements in which such charges were withdrawn, with the accused pleading guilty to crimes against humanity: Obrenović (IT-02-60/2) and Momir Nikolić (IT-02-60/1);

(c) acquittals on genocide-related charges in respect of events occurring elsewhere: Krajinić (paragraph 219 above) (on appeal), Jelisić (IT-95-10) (completed), Stakić (IT-97-24) (completed), Brđanin (IT-99-36) (on appeal) and Sikirica (IT-95-8) (completed);

(d) cases in which genocide-related charges in respect of events occurring elsewhere were withdrawn: Plavšić (IT-00-39 and 40/1) (plea agreement), Župljanin (IT-99-36) (genocide-related charges withdrawn) and Mejakic (IT-95-4) (genocide-related charges withdrawn);

(e) case in which the indictment charged genocide and related crimes in Srebrenica and elsewhere in which the accused died during the proceedings: Milošević (IT-02-54);

(f) cases in which indictments charge genocide or related crimes in respect of events occurring elsewhere, in which accused have died before or during proceedings: Kovačević and Drlića (IT-97-24) and Talić (IT-99-36/1);

(g) pending cases in which the indictments charge genocide and related crimes in Srebrenica and elsewhere: Karadžić and Mladić (IT-95-5/18); and

(h) pending cases in which the indictments charge genocide and related crimes in Srebrenica: Popović, Beara, Draško Nikolić, Borovčanin, Pandurević and Trbić (IT-05-88/1) and Tolimir (IT-05-88/2).

375. In the cases of a number of accused, relating to events in July 1995 in Srebrenica, charges of genocide or its related acts have not been brought: Erdemović (IT-96-22) (completed), Jokić (IT-02-60) (on appeal), Milićević and Gvero (IT-05-88, part of the Popović et al. proceeding referred to in paragraph 374 (h) above), Perišić (IT-04-81) (pending) and Stanišić and Starovolj (IT-03-69) (pending).

376. The Court has already concluded above that — save in the case of Srebrenica — the Applicant has not established that any of the widespread and serious atrocities, complained of as constituting violations of Article II, paragraphs (a) to (e), of the Genocide Convention, were accompanied by the necessary specific intent (dolus specialis) on the part of the perpetrators. It also finds that the Applicant has not established the existence of that intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent. Having however concluded (paragraph 297 above), in the specific case of the massacres at Srebrenica in July 1995, that acts of genocide were committed in operations led by members of the VRS, the Court now turns to the question whether those acts are attributable to the Respondent.

* * *

VII. THE QUESTION OF RESPONSIBILITY FOR EVENTS AT SREBRENICA UNDER ARTICLE III, PARAGRAPH (a), OF THE GENOCIDE CONVENTION

(1) The Alleged Admission

377. The Court first notes that the Applicant contends that the Respondent has in fact recognized that genocide was committed at Srebrenica, and has accepted legal responsibility for it. The Applicant called attention to the following official declaration made by the Council of Ministers of the Respondent on 15 June 2005, following the showing on a Belgrade television channel on 2 June 2005 of a video-recording of the murder by a paramilitary unit of six Bosnian Muslim prisoners near Srebrenica (paragraph 289 above). The statement reads as follows:

"Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia
nor Montenegro, but an undemocratic regime of terror and death, against whom the majority of citizens of Serbia and Montenegro put up the strongest resistance.

Our condemnation of crimes in Srebrenica does not end with the direct perpetrators. We demand the criminal responsibility of all who committed war crimes, organized them or ordered them, and not only in Srebrenica.

Criminals must not be heroes. Any protection of the war criminals, for whatever reason, is also a crime.”

The Applicant requests the Court to declare that this declaration “be regarded as a form of admission and as having decisive probative force regarding the attributability to the Yugoslav State of the Srebrenica massacre”.

378. It is for the Court to determine whether the Respondent is responsible for any acts of genocide which may be established. For purposes of a finding of this kind the Court may take into account any statements made by either party that appear to bear upon the matters in issue, and have been brought to its attention (cf. Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, pp. 263 ff., paras. 32 ff., and Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, pp. 465 ff., paras. 271 ff.; Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, pp. 573-574, paras. 38-39), and may accord to them such legal effect as may be appropriate. However, in the present case, it appears to the Court that the declaration of 15 June 2005 was of a political nature; it was clearly not intended as an admission, which would have had a legal effect in complete contradiction to the submissions made by the Respondent before this Court, both at the time of the declaration and subsequently. The Court therefore does not find the statement of 15 June 2005 of assistance to it in determining the issues before it in the case.

* * *

(2) The Test of Responsibility

379. In view of the foregoing conclusions, the Court now must ascertain whether the international responsibility of the Respondent can have been incurred, on whatever basis, in connection with the massacres committed in the Srebrenica area during the period in question. For the reasons set out above, those massacres constituted the crime of genocide within the meaning of the Convention. For this purpose, the Court may be required to consider the following three issues in turn. First, it needs to be determined whether the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility; this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable, specifically in the case of the events at Srebrenica, to the Respondent. Second, the Court will need to ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent under those same rules of State responsibility; that is to say, the acts referred to in Article III, paragraphs (b) to (e), one of these being complicity in genocide. Finally, it will be for the Court to rule on the issue as to whether the Respondent complied with its twofold obligation deriving from Article I of the Convention to prevent and punish genocide.

380. These three issues must be addressed in the order set out above, because they are so interrelated that the answer on one point may affect the relevance or significance of the others. Thus, if and to the extent that consideration of the first issue were to lead to the conclusion that some acts of genocide are attributable to the Respondent, it would be unnecessary to determine whether it may also have incurred responsibility under Article III, paragraphs (b) to (e), of the Convention for the same acts. Even though it is theoretically possible for the same acts to result in the attribution to a State of acts of genocide (contemplated by Art. III, para. (a)), conspiracy to commit genocide (Art. III, para. (b)), and direct and public incitement to commit genocide (Art. III, para. (c)), there would be little point, where the requirements for attribution are fulfilled under (a), in making a judicial finding that they are also satisfied under (b) and (c), since responsibility under (a) absorbs that under the other two. The idea of holding the same State responsible by attributing to it acts of “genocide” (Art. III, para. (a)), “attempt to commit genocide” (Art. III, para. (d)), and “complicity in genocide” (Art. III, para. (e)), in relation to the same actions, must be rejected as untenable both logically and legally.

381. On the other hand, there is no doubt that a finding by the Court that no acts that constitute genocide, within the meaning of Article II and Article III, paragraph (a), of the Convention, can be attributed to the Respondent will not free the Court from the obligation to determine whether the Respondent’s responsibility may nevertheless have been incurred through the attribution to it of the acts, or some of the acts, referred to in Article III, paragraphs (b) to (e). In particular, it is clear that acts of complicity in genocide can be attributed to a State to which no act of genocide could be attributed under the rules of State responsibility, the content of which will be considered below.

382. Furthermore, the question whether the Respondent has complied with its obligations to prevent and punish genocide arises in different terms, depending on the replies to the two preceding questions. It is only if the Court answers the first two questions in the negative that it will have to consider whether the Respondent fulfilled its obligation of pre-
vention, in relation to the whole accumulation of facts constituting genocide. If a State is held responsible for an act of genocide (because it was committed by a person or organ whose conduct is attributable to the State), or for one of the other acts referred to in Article III of the Convention (for the same reason), then there is no point in asking whether it complied with its obligation of prevention in respect of the same acts, because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated. On the other hand, it is self-evident, as the Parties recognize, that if a State is not responsible for any of the acts referred to in Article III, paragraphs (a) to (e), of the Convention, this does not mean that its responsibility cannot be sought for a violation of the obligation to prevent genocide and the other acts referred to in Article III.

Finally, it should be made clear that, while, as noted above, a State’s responsibility deriving from any of those acts renders moot the question whether it satisfied its obligation of prevention in respect of the same conduct, it does not necessarily render superfluous the question whether the State complied with its obligation to punish the perpetrators of the acts in question. It is perfectly possible for a State to incur responsibility at once for an act of genocide (or complicity in genocide, incitement to commit genocide, or any of the other acts enumerated in Article III) committed by a person or organ whose conduct is attributable to it, and for the breach by the State of its obligation to punish the perpetrator of the act: these are two distinct internationally wrongful acts attributable to the State, and both can be asserted against it as bases for its international responsibility.

Having thus explained the interrelationship among the three issues set out above (paragraph 379), the Court will now proceed to consider the first of them. This is the question whether the massacres committed at Srebrenica during the period in question, which constitute the crime of genocide within the meaning of Articles II and III, paragraph (a), of the Convention, are attributable, in whole or in part, to the Respondent. This question has in fact two aspects, which the Court must consider separately. First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.

* * *

385. The first of these two questions relates to the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility as follows:

"Article 4
Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

386. When applied to the present case, this rule first calls for a determination whether the acts of genocide committed in Srebrenica were perpetrated by “persons or entities” having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force. It must be said that there is nothing which could justify an affirmative response to this question. It has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres. It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica. That participation was repeatedly condemned by the political organs of the United Nations, which demanded that the FRY put an end to it (see, for example, Security Council resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993)). It has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica (see also paragraphs 278 to 297 above). Further, neither the Republika Srpska, nor the VRS were de jure organs of the FRY, since none of them had the status of organ of that State under its internal law.

387. The Applicant has however claimed that all officers in the VRS, including General Mladić, remained under FRY military administration, and that their salaries were paid from Belgrade right up to 2002, and
accompanyingly contends that these officers “were de jure organs of [the FRY], intended by their superiors to serve in Bosnia and Herzegovina with the VRS”. On this basis it has been alleged by the Applicant that those officers, in addition to being officers of the VRS, remained officers of the VJ, and were thus de jure organs of the Respondent (paragraph 238 above). The Respondent however asserts that only some of the VRS officers were being “administered” by the 30th Personnel Centre in Belgrade, so that matters like their payment, promotion, pension, etc., were being handled from the FRY (paragraph 238 above); and that it has not been clearly established whether General Mladic was one of them. The Applicant has shown that the promotion of Mladic to the rank of Colonel General on 24 June 1994 was handled in Belgrade, but the Respondent emphasizes that this was merely a verification for administrative purposes of a promotion decided by the authorities of the Republika Srpska.

388. The Court notes first that no evidence has been presented that either General Mladic or any of the other officers whose affairs were handled by the 30th Personnel Centre were, according to the internal law of the Respondent, officers of the army of the Respondent — a de jure organ of the Respondent. Nor has it been conclusively established that General Mladic was one of those officers; and even on the basis that he might have been, the Court does not consider that he would, for that reason alone, have to be treated as an organ of the FRY for the purposes of the application of the rules of State responsibility. There is no doubt that the FRY was providing substantial support, inter alia, financial support, to the Republika Srpska (cf. paragraph 241 above), and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but this did not automatically make them organs of the FRY. Those officers were appointed to their commands by the President of the Republika Srpska, and were subordinated to the political leadership of the Republika Srpska. In the absence of evidence to the contrary, those officers must be taken to have received their orders from the Republika Srpska or the VRS, not from the FRY. The expression “State organ”, as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf (cf. ILC Commentary to Art. 4, para. (1)). The functions of the VRS officers, including General Mladic, were however to act on behalf of the Bosnian Serb authorities, in particular the Republika Srpska, not on behalf of the FRY; they exercised elements of the public authority of the Republika Srpska. The particular situation of General Mladic, or of any other VRS officer present at Srebrenica who may have been “administered” from Belgrade, is not therefore such as to lead the Court to modify the conclusion reached in the previous paragraph.

389. The issue also arises as to whether the Respondent might bear responsibility for the acts of the “Scorpions” in the Srebrenica area. In this connection, the Court will consider whether it has been proved that the Scorpions were a de jure organ of the Respondent. It is in dispute between the Parties as to when the “Scorpions” became incorporated into the forces of the Respondent. The Applicant has claimed that incorporation occurred by a decree of 1991 (which has not been produced as an Annex). The Respondent states that “these regulations [were] relevant exclusively for the war in Croatia in 1991” and that there is no evidence that they remained in force in 1992 in Bosnia and Herzegovina. The Court observes that, while the single State of Yugoslavia was disintegrating at that time, it is the status of the “Scorpions” in mid-1995 that is of relevance to the present case. In two of the intercepted documents presented by the Applicant (the authenticity of which was queried — see paragraph 289 above), there is reference to the “Scorpions” as “MUP of Serbia” and “a unit of Ministry of Interiors of Serbia”. The Respondent identified the senders of these communications, Ljubisa Borovcanin and Savo Cvjetinovic, as being “officials of the police forces of Republika Srpska”. The Court observes that neither of these communications was addressed to Belgrade. Judging on the basis of these materials, the Court is unable to find that the “Scorpions” were, in mid-1995, de jure organs of the Respondent. Furthermore, the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.

390. The argument of the Applicant however goes beyond mere contemplation of the status, under the Respondent’s internal law, of the persons who committed the acts of genocide: it argues that Republika Srpska and the VRS, as well as the paramilitary militias known as the “Scorpions”, the “Red Berets”, the “Tigers” and the “White Eagles” must be deemed, notwithstanding their apparent status, to have been de facto organs of the FRY, in particular at the time in question, so that all of their acts, and specifically the massacres at Srebrenica, must be considered attributable to the FRY, just as if they had been organs of that State under its internal law; reality must prevail over appearances. The Respondent rejects this contention, and maintains that these were not de facto organs of the FRY.

391. The first issue raised by this argument is whether it is possible in principle to attribute to a State conduct of persons — or groups of persons — who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State’s responsibility for an internationally wrongful act. The Court has in fact already addressed this question, and given an answer to it in principle, in
its Judgment of 27 June 1986 in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, Judgment, I.C.J. Reports 1986, pp. 62-64). In paragraph 109 of that Judgment the Court stated that it had to “determine...whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government” (p. 62).

Then, examining the facts in the light of the information in its possession, the Court observed that “there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf” (para. 109), and went on to conclude that “the evidence available to the Court...is insufficient to demonstrate [the contras’] complete dependence on United States aid”, so that the Court was “unable to determine that the contras force may be equated for legal purposes with the forces of the United States” (pp. 62-63, para. 110).

392. The passages quoted show that, according to the Court’s jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.

393. However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court’s Judgment quoted above expressly described as “complete dependence”. It remains to be determined in the present case whether, at the time in question, the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it; it is only if this condition is met that they can be equated with organs of the Respondent for the purposes of its international responsibility.

394. The Court can only answer this question in the negative. At the relevant time, July 1995, neither the Republika Srpska nor the VRS could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy. While the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years (see paragraph 238 above), and these ties undoubtedly remained powerful, they were, at least at the relevant time, not such that the Bosnian Serbs’ political and military organizations should be equated with organs of the FRY. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders; at the very least, these are evidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given by the Respondent to the Republika Srpska, without which it could not have “conduct[ed] its crucial or most significant military and paramilitary activities” (I.C.J. Reports 1986, p. 63, para. 111), did this signify a total dependence of the Republika Srpska upon the Respondent.

395. The Court now turns to the question whether the “Scorpions” were in fact acting in complete dependence on the Respondent. The Court has not been presented with materials to indicate this. The Court also notes that, in giving his evidence, General Dannatt, when asked under whose control or whose authority the paramilitary groups coming from Serbia were operating, replied, “they would have been under the command of Mladic and part of the chain of the command of the VRS”. The Parties referred the Court to the Stanišić and Simatović case (IT-03-69, pending); notwithstanding that the defendants are not charged with genocide in that case, it could have its relevance for illuminating the status of the “Scorpions” as Serbian MUP or otherwise. However, the Court cannot draw further conclusions as this case remains at the indictment stage. In this respect, the Court recalls that it can only form its opinion on the basis of the information which has been brought to its notice at the time when it gives its decision, and which emerges from the pleadings and documents in the case file, and the arguments of the Parties made during the oral exchanges.

The Court therefore finds that the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent’s international responsibility.

* * *

(4) The Question of Attribution of the Srebrenica Genocide to the Respondent on the Basis of Direction or Control

396. As noted above (paragraph 384), the Court must now determine whether the massacres at Srebrenica were committed by persons who,
though not having the status of organs of the Respondent, nevertheless acted on its instructions or under its direction or control, as the Applicant argues in the alternative; the Respondent denies that such was the case.

397. The Court must emphasize, at this stage in its reasoning, that the question just stated is not the same as those dealt with thus far. It is obvious that it is different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs de facto, even though not enjoying that status under internal law. The answer to the latter question depends, as previously explained, on whether those persons were in a relationship of such complete dependence on the State that they cannot be considered otherwise than as organs of the State, so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility. Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent’s instructions, or under its direction or control. An affirmative answer to this question would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would merely mean that the FRY’s international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FRY, or could be equated with those organs — this question having already been answered in the negative. What must be determined is whether FRY organs — incontestably having that status under the FRY’s internal law — originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.

398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility as follows:

"Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

399. This provision must be understood in the light of the Court’s jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) referred to above (paragraph 391). In that Judgment the Court, as noted above, after having rejected the argument that the contras were to be equated with organs of the United States because they were “completely dependent” on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself “directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State” (I.C.J. Reports 1986, p. 64, para. 115); this led to the following significant conclusion:

“For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.” (Ibid., p. 65.)

400. The test thus formulated differs in two respects from the test — described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of “complete dependence” on the respondent State; it has to be proved that they acted in accordance with that State’s instructions or under its “effective control”. It must however be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the “effective control” of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (see paragraph 399 above). The rules
for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed lex specialis. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.

402. The Court notes however that the Applicant has further questioned the validity of applying, in the present case, the criterion adopted in the Military and Paramilitary Activities Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the Tadić case (IT-94-1-A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the Military and Paramilitary Activities case: it held that the appropriate criterion, applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY under the law of State responsibility, was that of the “overall control” exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case (on this point, ibid., para. 145). In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY’s instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber’s reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber’s view. First, the Court observes that the ICTY was not called upon in the Tadić case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY’s trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

404. This is the case of the doctrine laid down in the Tadić Judgment. Insofar as the “overall control” test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the “overall control” test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test be applied in resolving the two issues, which are very different in nature: the degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State’s responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the “overall control” test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State’s responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the “overall control” test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility.

407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under
A few hours into the meeting, General Mladic arrived at Doboj and met with President Milosevic, the meeting place for the Nijazi arrangements. Mr. Bildt, who remained opposed to some of the arrangements pertaining to the other enclaves, Sarajevo in particular, appeared convinced to present the demands on Srebrenica to the other enclaves. Subsequent to the signing of this agreement, the Special Representative later also ordered President Milosevic to evacuate the same point. (Ibid., para. 392.)

409. By 19 July, on the basis of the Belgrade meeting, Mr. Bildt had agreed to the UNPROFOR Commander also coming to Belgrade, in order to finalize some of the military details with Mladic. (A/54/549, paras. 372-373.)

410. The Court was referred to other evidence supporting or denying the Respondent's effective control over Srebrenica in July 1995. The Respondent quotes two substantial reports prepared seven years after the events, both of which are in the public domain, and readily accessible. The first, 'Aodvans', published in 2002 by the Netherlands Institute for War Documentation, was prepared over a lengthy period by an expert team. The Respondent was drawn attention to the fact that this report contains no suggestion that the FRY leadership was involved in planning the attack or the killing of non-Serbs, nor...
any hard evidence of assistance by the Yugoslav army to the armed forces of the Republika Srpska before the attack; nor any suggestion that the Belgrade Government had advance knowledge of the attack. The Respondent also quotes this passage from point 10 of the Epilogue to the Report relating to the “mass slaughter” and “the executions” following the fall of Srebrenica: “There is no evidence to suggest any political or military liaison with Belgrade, and in the case of this mass murder such a liaison is highly improbable.” The Respondent further observes that the Applicant’s only response to this submission is to point out that “the report, by its own admission, is not exhaustive”, and that this Court has been referred to evidence not used by the authors.

411. The Court observes, in respect of the Respondent’s submissions, that the authors of the Report do conclude that Belgrade was aware of the intended attack on Srebrenica. They record that the Dutch Military Intelligence Service and another Western intelligence service concluded that the July 1995 operations were co-ordinated with Belgrade (Part III, Chap. 7, Sect. 7). More significantly for present purposes, however, the authors state that “there is no evidence to suggest participation in the preparations for executions on the part of Yugoslav military personnel or the security agency (RDB). In fact there is some evidence to support the opposite view . . .” (Part IV, Chap. 2, Sect. 20). That supports the passage from point 10 of the Epilogue quoted by the Respondent, which was preceded by the following sentence: “Everything points to a central decision by the General Staff of the VRS.”

412. The second report is Balkan Battlegrounds, prepared by the United States Central Intelligence Agency, also published in 2002. The first volume under the heading “The Possibility of Yugoslav involvement” arrives at the following conclusion:

“No basis has been established to implicate Belgrade’s military or security forces in the post-Srebrenica atrocities. While there are indications that the VJ or RDB [the Serbian State Security Department] may have contributed elements to the Srebrenica battle, there is no similar evidence that Belgrade-directed forces were involved in any of the subsequent massacres. Eyewitness accounts by survivors may be imperfect recollections of events, and details may have been overlooked. Narrations and other available evidence suggest that only Bosnian Serb troops were employed in the atrocities and executions that followed the military conquest of Srebrenica.” (Balkan Battlegrounds, p. 353.)
decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY.

As for the killings committed by the “Scorpions” paramilitary militias, notably at Trnovo (paragraph 289 above), even if it were accepted that they were an element of the genocide committed in the Srebrenica area, which is not clearly established by the decisions thus far rendered by the ICTY (see, in particular, the Trial Chamber’s decision of 12 April 2006 in the Stanišić and Simatović case, IT-03-69), it has not been proved that they took place either on the instructions or under the control of organs of the FRY.

414. Finally, the Court observes that none of the situations, other than those referred to in Articles 4 and 8 of the ILC’s Articles on State Responsibility, in which specific conduct may be attributed to a State, matches the circumstances of the present case in regard to the possibility of attributing the genocide at Srebrenica to the Respondent. The Court does not see itself required to decide at this stage whether the ILC’s Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case. The acts constituting genocide were not committed by persons or entities which, while not being organs of the FRY, were empowered by it to exercise elements of the governmental authority (Art. 5), nor by organs placed at the Respondent’s disposal by another State (Art. 6), nor by persons in fact exercising elements of the governmental authority in the absence or default of the official authorities of the Respondent (Art. 9); finally, the Respondent has not acknowledged and adopted the conduct of the perpetrators of the acts of genocide as its own (Art. 11).

415. The Court concludes from the foregoing that the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State responsibility: thus, the international responsibility of the Respondent is not engaged on this basis.

* * *

VIII. THE QUESTION OF RESPONSIBILITY, IN RESPECT OF SREBRENICA, FOR ACTS ENUMERATED IN ARTICLE III, PARAGRAPHS (b) TO (e), OF THE GENOCIDE CONVENTION

416. The Court now comes to the second of the questions set out in paragraph 379 above, namely, that relating to the Respondent’s possible responsibility on the ground of one of the acts related to genocide enumerated in Article III of the Convention. These are: conspiracy to commit genocide (Art. III, para. (b)), direct and public incitement to commit genocide (Art. III, para. (c)), attempt to commit genocide (Art. III, para. (d)) — though no claim is made under this head in the Applicant’s final submissions in the present case — and complicity in genocide (Art. III, para. (e)). For the reasons already stated (paragraph 380 above), the Court must make a finding on this matter inasmuch as it has replied in the negative to the previous question, that of the Respondent’s responsibility in the commission of the genocide itself.

417. It is clear from an examination of the facts of the case that subparagraphs (b) and (c) of Article III are irrelevant in the present case. It has not been proved that organs of the FRY, or persons acting on the instructions or under the effective control of that State, committed acts that could be characterized as “[c]onspiracy to commit genocide” (Art. III, para. (b)), or as “[d]irect and public incitement to commit genocide” (Art. III, para. (c)), if one considers, as is appropriate, only the events in Srebrenica. As regards paragraph (b), what was said above regarding the attribution to the Respondent of acts of genocide, namely that the massacres were perpetrated by persons and groups of persons (the VRS in particular) who did not have the character of organs of the Respondent, and did not act on the instructions or under the effective control of the Respondent, is sufficient to exclude the latter’s responsibility in this regard. As regards subparagraph (c), none of the information brought to the attention of the Court is sufficient to establish that organs of the Respondent, or persons acting on its instructions or under its effective control, directly and publicly incited the commission of the genocide in Srebrenica; nor is it proven, for that matter, that such organs or persons incited the commission of acts of genocide anywhere else on the territory of Bosnia and Herzegovina. In this respect, the Court must only accept precise and incontrovertible evidence, of which there is clearly none.

418. A more delicate question is whether it can be accepted that acts which could be characterized as “complicity in genocide”, within the meaning of Article III, paragraph (e), can be attributed to organs of the Respondent or to persons acting under its instructions or under its effective control.

This question calls for some preliminary comment.

419. First, the question of “complicity” is to be distinguished from the question, already considered and answered in the negative, whether the perpetrators of the acts of genocide committed in Srebrenica acted on the instructions of or under the direction or effective control of the organs of the FRY. It is true that in certain national systems of criminal law, giving instructions or orders to persons to commit a criminal act is considered as the mark of complicity in the commission of that act. However, in the particular context of the application of the law of international responsibility in the domain of genocide, if it were established that a genocidal act had been committed on the instructions or under the direction of a
State, the necessary conclusion would be that the genocide was attributable to the State, which would be directly responsible for it, pursuant to the rule referred to above (paragraph 398), and no question of complicity would arise. But, as already stated, that is not the situation in the present case.

However there is no doubt that “complicity”, in the sense of Article III, paragraph (e), of the Convention, includes the provision of means to enable or facilitate the commission of the crime; it is thus on this aspect that the Court must focus. In this respect, it is noteworthy that, although “complicity”, as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the “aid or assistance” furnished by one State for the commission of a wrongful act by another State.

420. In this connection, reference should be made to Article 16 of the ILC’s Articles on State Responsibility, reflecting a customary rule, which reads as follows:

“Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.”

Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between “complicity in genocide”, within the meaning of Article III, paragraph (e), of the Convention, and the “aid or assistance” of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 — setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity. In other words, to ascertain whether the Respondent is responsible for “complicity in genocide” within the meaning of Article III, paragraph (e), which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished “aid or assistance” in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.

421. Before the Court turns to an examination of the facts, one further comment is required. It concerns the link between the specific intent (dolus specialis) which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime): the question arises whether complicity presupposes that the accomplice shares the specific intent (dolus specialis) of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at least an organ or person acted knowingly, that is to say, in particular, aware of the specific intent (dolus specialis) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will thus first consider whether this latter condition is met in the present case. It is only if it replies to that question of fact in the affirmative that it will need to determine the legal point referred to above.

422. The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. Undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY. However, the sole task of the Court is to establish the legal responsibility of the Respondent, a responsibility which is subject to very specific conditions. One of those conditions is not fulfilled, because it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.

423. A point which is clearly decisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken; the Court has found (paragraph 295 above) that that decision was taken shortly before it was actually carried out, a process which took a very short time (essentially between 13 and 16 July 1995), despite the exceptionally high number of victims. It has therefore not been conclusively established
that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.

424. The Court concludes from the above that the international responsibility of the Respondent is not engaged for acts of complicity in genocide mentioned in Article III, paragraph (e), of the Convention. In the light of this finding, and of the findings above relating to the other paragraphs of Article III, the international responsibility of the Respondent is not engaged under Article III as a whole.

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IX. THE QUESTION OF RESPONSIBILITY FOR BREACH OF THE OBLIGATIONS TO PREVENT AND PUNISH GENOCIDE

425. The Court now turns to the third and last of the questions set out in paragraph 379 above: has the respondent State complied with its obligations to prevent and punish genocide under Article I of the Convention?

Despite the clear links between the duty to prevent genocide and the duty to punish its perpetrators, these are, in the view of the Court, two distinct yet connected obligations, each of which must be considered in turn.

426. It is true that, simply by its wording, Article I of the Convention brings out the close link between prevention and punishment: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." It is also true that one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent. Lastly, it is true that, although in the subsequent Articles, the Convention includes fairly detailed provisions concerning the duty to punish (Articles III to VII), it reverts to the obligation of prevention, stated as a principle in Article I, only in Article VIII:

"Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

427. However, it is not the case that the obligation to prevent has no separate legal existence of its own; that it is, as it were, absorbed by the obligation to punish, which is therefore the only duty the performance of which may be subject to review by the Court. The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.

This is the reason why the Court will first consider the manner in which the Respondent has performed its obligation to prevent before examining the situation as regards the obligation to punish.

(1) THE OBLIGATION TO PREVENT GENOCIDE

428. As regards the obligation to prevent genocide, the Court thinks it necessary to begin with the following introductory remarks and clarifications, amplifying the observations already made above.

429. First, the Genocide Convention is not the only international instrument providing for an obligation on the States parties to it to take certain steps to prevent the acts it seeks to prohibit. Many other instruments include a similar obligation, in various forms: see, for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Art. 2); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 14 December 1973 (Art. 4); the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994 (Art. 11); the International Convention on the Suppression of Terrorist Bombings of 15 December 1997 (Art. 15). The content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented.

The decision of the Court does not, in this case, purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts. Still less does the decision of the Court purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law. The Court will therefore confine itself to determining the specific scope of the duty to prevent in the Genocide Convention, and to the extent that such a
determination is necessary to the decision to be given on the dispute before it. This will, of course, not absolve it of the need to refer, if need be, to the rules of law whose scope extends beyond the specific field covered by the Convention.

430. Secondly, it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment in concreto, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.

431. Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility:

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (dolus specialis), it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible a posteriori, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.

In consequence, in the present case the Court will have to consider the Respondent's conduct, in the light of its duty to prevent, solely in connection with the massacres at Srebrenica, because these are the only acts in respect of which the Court has concluded in this case that genocide was committed.

432. Fourth and finally, the Court believes it especially important to lay stress on the differences between the requirements to be met before a State can be held to have violated the obligation to prevent genocide — within the meaning of Article I of the Convention — and those to be satisfied in order for a State to be held responsible for "complicity in genocide" — within the meaning of Article III, paragraph (e) — as previously discussed. There are two main differences; they are so significant as to make it impossible to treat the two types of violation in the same way.

In the first place, as noted above, complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent
results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission; this is merely the reflection of the notion that the ban on genocide and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur.

In the second place, as also noted above, there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts. By contrast, a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed. As will be seen below, this latter difference could prove decisive in the present case in determining the responsibility incurred by the Respondent.

433. In light of the foregoing, the Court will now consider the facts of the case. For the reasons stated above (paragraph 431), it will confine itself to the FRY’s conduct vis-à-vis the Srebrenica massacres.

434. The Court would first note that, during the period under consideration, the FRY was in a position of influence over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other, which, though somewhat weaker than in the preceding period, nonetheless remained very close.

435. Secondly, the Court cannot but note that, on the relevant date, the FRY was bound by very specific obligations by virtue of the two Orders indicating provisional measures delivered by the Court in 1993. In particular, in its Order of 8 April 1993, the Court stated, inter alia, that although not able, at that early stage in the proceedings, to make “definitive findings of fact or of imputability” (I.C.J. Reports 1993, p. 22, para. 44) the FRY was required to ensure:

“that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide . . .” (I.C.J. Reports 1993, p. 24, para. 52 A (2)).

The Court’s use, in the above passage, of the term “influence” is particularly revealing of the fact that the Order concerned not only the persons or entities whose conduct was attributable to the FRY, but also all those with whom the Respondent maintained close links and on which it could exert a certain influence. Although in principle the two issues are separate, and the second will be examined below, it is not possible, when considering the way the Respondent discharged its obligation of prevention under the Convention, to fail to take account of the obligation incumbent upon it, albeit on a different basis, to implement the provisional measures indicated by the Court.

436. Thirdly, the Court recalls that although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above: paragraph 424), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave. Among the documents containing information clearly suggesting that such an awareness existed, mention should be made of the above-mentioned report (see paragraphs 283 and 285 above) of the United Nations Secretary-General prepared pursuant to General Assembly resolution 53/35 on the “fall of Srebrenica” (United Nations doc. A/54/549), which recounts the visit to Belgrade on 14 July 1995 of the European Union negotiator Mr. Bildt to meet Mr. Milošević. Mr. Bildt, in substance, informed Mr. Milošević of his serious concern and

“pressed the President to arrange immediate access for the UNHCR to assist the people of Srebrenica, and for the ICRC to start to register those who were being treated by the BSA [Bosnian Serb Army] as prisoners of war”.

437. The Applicant has drawn attention to certain evidence given by General Wesley Clark before the ICTY in the Milošević case. General Clark referred to a conversation that he had had with Milošević during the negotiation of the Dayton Agreement. He stated that

“I went to Milošević and I asked him. I said, ‘If you have so much influence over these [Bosnian] Serbs, how could you have allowed
General Mladic to have killed all those people at Srebrenica? And he looked to me — at me. His expression was very grave. He paused before he answered, and he said, 'Well, General Clark, I warned him not to do this, but he didn’t listen to me.' And it was in the context of all the publicity at the time about the Srebrenica massacre.” (Milosevic, IT-02-54-T, Transcript, 16 December 2003, pp. 30494-30495).

General Clark gave it as his opinion, in his evidence before the ICTY, that the circumstances indicated that Milosevic had foreknowledge of what was to be “a military operation combined with a massacre” (ibid., p. 30497). The ICTY record shows that Milosevic denied ever making the statement to which General Clark referred, but the Trial Chamber nevertheless relied on General Clark’s testimony in its Decision of 16 June 2004 when rejecting the Motion for Judgment of Acquittal (Milosevic, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 280).

438. In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milosevic above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milosevic’s own observations to Mladic, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.

Such is the case here. In view of the foregoing, the Court concludes that the Respondent violated its obligation to prevent the Srebrenica genocide in such a manner as to engage its international responsibility. * * *

(2) The Obligation to Punish Genocide

439. The Court now turns to the question of the Respondent’s compliance with its obligation to punish the crime of genocide stemming from Article I and the other relevant provisions of the Convention.

440. In its fifth final submission, Bosnia and Herzegovina requests the Court to adjudge and declare:

“5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal.”

441. This submission implicitly refers to Article VI of the Convention, according to which:

“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

442. The Court would first recall that the genocide in Srebrenica, the commission of which it has established above, was not carried out in the Respondent’s territory. It concludes from this that the Respondent cannot be charged with not having tried before its own courts those accused of having participated in the Srebrenica genocide, either as principal perpetrators or as accomplices, or of having committed one of the other acts mentioned in Article III of the Convention in connection with the Srebrenica genocide. Even if Serbian domestic law granted jurisdiction to its criminal courts to try those accused, and even supposing such proceedings were compatible with Serbia’s other international obligations, inter alia its obligation to co-operate with the ICTY, to which the Court will revert below, an obligation to try the perpetrators of the Srebrenica massacre in Serbia’s domestic courts cannot be deduced from Article VI. Article VI only obliges the Contracting Parties to institute and exercise
terриториal criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.

443. It is thus to the obligation for States parties to co-operate with the “international penal tribunal” mentioned in the above provision that the Court must now turn its attention. For it is certain that once such a court has been established, Article VI obliges the Contracting Parties “which shall have accepted its jurisdiction” to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory — even if the crime of which they are accused was committed outside it — and, failing prosecution of them in the parties’ own courts, that they will hand them over for trial by the competent international tribunal.

444. In order to determine whether the Respondent has fulfilled its obligations in this respect, the Court must first answer two preliminary questions: does the ICTY constitute an “international penal tribunal” within the meaning of Article VI? And must the Respondent be regarded as having “accepted the jurisdiction” of the tribunal within the meaning of that provision?

445. As regards the first question, the Court considers that the reply must definitely be in the affirmative. The notion of an “international penal tribunal” within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III. The nature of the legal instrument by which such a court is established is without importance in this respect. When drafting the Genocide Convention, its authors probably thought that such a court would be created by treaty: a clear pointer to this lies in the reference to “those Contracting Parties which shall have accepted [the] jurisdiction” of the international penal tribunal. Yet, it would be contrary to the object of the provision to interpret the notion of “international penal tribunal” restrictively in order to exclude from it a court which, as in the case of the ICTY, was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter. The Court has found nothing to suggest that such a possibility was considered by the authors of the Convention, but no intention of seeking to exclude it can be imputed to them.

446. The question whether the Respondent must be regarded as having “accepted the jurisdiction” of the ICTY within the meaning of Article VI must consequently be formulated as follows: is the Respondent obliged to accept the jurisdiction of the ICTY, and to co-operate with the Tribunal by virtue of the Security Council resolution which established it, or of some other rule of international law? If so, it would have to be concluded that, for the Respondent, co-operation with the ICTY constitutes both an obligation stemming from the resolution concerned and from the United Nations Charter, or from another norm of international law obliging the Respondent to co-operate, and an obligation arising from its status as a party to the Genocide Convention, this last clearly being the only one of direct relevance in the present case.

447. For the purposes of the present case, the Court only has to determine whether the FRY was under an obligation to co-operate with the ICTY, and if so, on what basis, from when the Srebrenica genocide was committed in July 1995. To that end, suffice it to note that the FRY was under an obligation to co-operate with the ICTY from 14 December 1995 at the latest, the date of the signing and entry into force of the Dayton Agreement between Bosnia and Herzegovina, Croatia and the FRY. Annex 1A of that treaty, made binding on the parties by virtue of its Article II, provides that they must fully co-operate, notably with the ICTY. Thus, from 14 December 1995 at the latest, and at least on the basis of the Dayton Agreement, the FRY must be regarded as having “accepted [the] jurisdiction” of the ICTY within the meaning of Article VI of the Convention. This fact is sufficient for the Court in its consideration of the present case, since its task is to rule upon the Respondent’s compliance with the obligation resulting from Article VI of the Convention in relation to the Srebrenica genocide, from when it was perpetrated to the present day, and since the Applicant has not invoked any failure to respect the obligation to co-operate alleged to have occurred specifically between July and December 1995. Similarly, the Court is not required to decide whether, between 1995 and 2000, the FRY’s obligation to co-operate had any legal basis besides the Dayton Agreement. Needless to say, the admission of the FRY to the United Nations in 2000 provided a further basis for its obligation to co-operate: but while the legal basis concerned was thereby confirmed, that did not change the scope of the obligation. There is therefore no need, for the purposes of assessing how the Respondent has complied with its obligation under Article VI of the Convention, to distinguish between the period before and the period after its admission as a Member of the United Nations, at any event from 14 December 1995 onwards.

448. Turning now to the facts of the case, the question the Court must answer is whether the Respondent has fully co-operated with the ICTY, in particular by arresting and handing over to the Tribunal any persons accused of genocide as a result of the Srebrenica genocide and finding themselves on its territory. In this connection, the Court would first observe that, during the oral proceedings, the Respondent asserted that the duty to co-operate had been complied with following the régime change in Belgrade in the year 2000, thus implicitly admitting that such had not been the case during the preceding period. The conduct of the
organs of the FRY before the régime change however engages the Respondent’s international responsibility just as much as it does that of its State authorities from that date. Further, the Court cannot but attach a certain weight to the plentiful, and mutually corroborative, information suggesting that General Mladic, indicted by the ICTY for genocide, as one of those principally responsible for the Srebrenica massacres, was on the territory of the Respondent at least on several occasions and for substantial periods during the last few years and is still there now, without the Serb authorities doing what they could and can reasonably do to ascertain exactly where he is living and arrest him. In particular, counsel for the Applicant referred during the hearings to recent statements made by the Respondent’s Minister for Foreign Affairs, reproduced in the national press in April 2006, and according to which the intelligence services of that State knew where Mladic was living in Serbia, but refrained from informing the authorities competent to order his arrest because certain members of those services had allegedly remained loyal to the fugitive. The authenticity and accuracy of those statements has not been disputed by the Respondent at any time.

449. It therefore appears to the Court sufficiently established that the Respondent failed in its duty to co-operate fully with the ICTY. This failure constitutes a violation by the Respondent of its duties as a party to the Dayton Agreement, and as a Member of the United Nations, and accordingly a violation of its obligations under Article VI of the Genocide Convention. The Court is of course without jurisdiction in the present case to declare that the Respondent has breached any obligations other than those under the Convention. But as the Court has jurisdiction to declare a breach of Article VI insofar as it obliges States to co-operate with the “international penal tribunal”, the Court may find for that purpose that the requirements for the existence of such a breach have been met. One of those requirements is that the State whose responsibility is in issue must have “accepted [the] jurisdiction” of that “international penal tribunal”; the Court thus finds that the Respondent was under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the Convention, and failed in that duty. On this point, the Applicant’s submissions relating to the violation by the Respondent of Articles I and VI of the Convention must therefore be upheld.

450. It follows from the foregoing considerations that the Respondent failed to comply both with its obligation to prevent and its obligation to punish genocide deriving from the Convention, and that its international responsibility is thereby engaged.

X. THE QUESTION OF RESPONSIBILITY FOR BREACH OF THE COURT’S ORDERS INDICATING PROVISIONAL MEASURES

451. In its seventh submission Bosnia and Herzegovina requests the Court to adjudge and declare:

"7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court."

452. The Court observes that its “orders on provisional measures under Article 41 [of the Statute] have binding effect” (LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 506, para. 109). Although the Court only had occasion to make such a finding in a judgment subsequent to the Orders that it made in the present dispute, this does not affect the binding nature of those Orders, since in the Judgment referred to the Court did no more than give the provisions of the Statute the meaning and scope that they had possessed from the outset. It notes that provisional measures are aimed at preserving the rights of each of the parties pending the final decision of the Court. The Court’s Orders of 8 April and 13 September 1993 indicating provisional measures created legal obligations which both Parties were required to satisfy.

453. The Court indicated the following provisional measures in the dispositif, paragraph 52, of its Order of 8 April 1993:

“A. (1). . . . . . . . . . . . . . . . . . . . . .
The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide;

(2). . . . . . . . . . . . . . . . . . . . . . .
The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group;
XI. THE QUESTION OF REPARATION

459. Having thus found that the Respondent has failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide, the Court turns to the question of reparation. The Applicant, in its final submissions, has asked the Court to decide that the Respondent “must redress the consequences of its international wrongful acts and, as a result of the international responsibility incurred for . . . violations of the Convention on the Prevention and Punishment of the Crime of Genocide, must pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as parens patriae for its citizens, full compensation for the damages and losses caused” (submission 6 (b)).

The Applicant also asks the Court to decide that the Respondent “shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal” (submission 6 (a)), and that the Respondent “shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court” (submission 6 (d)). These submissions, and in particular that relating to compensation, were however predicated on the basis that the Court would have upheld, not merely that part of the Applicant’s claim as relates to the obligation of prevention and punishment, but also the claim that the Respondent has violated its substantive obligation not to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement, and the claim that the Respondent has aided and abetted genocide. The Court has now to consider what is the appropriate form of reparation for the other forms of violation of the Convention which have been alleged against the Respondent and which the Court has found to have been established, that is to say breaches of the obligations to prevent and punish.

460. The principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the Factory at Chorzów case: that “reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed” (P.C.I.J., Series A, No. 17, p. 47; see
also Article 31 of the ILC’s Articles on State Responsibility). In the circumstances of this case, as the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of *restitutio in integrum*. Insofar as restitution is not possible, as the Court stated in the case of the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, “[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it” (*I.C.J. Reports* 1997, p. 81, para. 152.; cf. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *Advisory Opinion, I.C.J. Reports* 2004, p. 198, paras. 152-153; see also Article 36 of the ILC’s Articles on State Responsibility). It is therefore appropriate to consider what were the consequences of the failure of the Respondent to comply with its obligations under the Genocide Convention to prevent and punish the crime of genocide, committed in Bosnia and Herzegovina, and what damage can be said to have been caused thereby.

461. The Court has found that the authorities of the Respondent could not have been unaware of the grave risk of genocide once the VRS forces had decided to take possession of the Srebrenica enclave, and that in view of its influence over the events, the Respondent must be held to have had the means of action by which it could seek to prevent genocide, and to have manifestly refrained from employing them (paragraph 438). To that extent therefore it failed to comply with its obligation of prevention under the Convention. The obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide. To make this finding, the Court did not have to decide whether the acts of genocide committed at Srebrenica would have occurred anyway even if the Respondent had done as it should have and employed the means available to it. This is because, as explained above, the obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome. It therefore does not follow from the Court’s reasoning above in finding a violation by the Respondent of its obligation of prevention that the atrocious suffering caused by the genocide committed at Srebrenica would not have occurred had the violation not taken place.

462. The Court cannot however leave it at that. Since it now has to rule on the claim for reparation, it must ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent with the consequence that the Respondent should be required to make reparation for it, in accordance with the principle of customary international law stated above. In this context, the question just mentioned, whether the genocide at Srebrenica would have taken place even if the Respondent had attempted to prevent it by employing all means in its possession, becomes directly relevant, for the definition of the extent of the obligation of reparation borne by the Respondent as a result of its wrongful conduct. The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent’s breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so. As noted above, the Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought. Since the Court cannot therefore regard as proven a causal nexus between the Respondent’s violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide.

463. It is however clear that the Applicant is entitled to reparation in the form of satisfaction, and this may take the most appropriate form, as the Applicant itself suggested, of a declaration in the present Judgment that the Respondent has failed to comply with the obligation imposed by the Convention to prevent the crime of genocide. As in the *Corfu Channel (United Kingdom v. Albania)* case, the Court considers that a declaration of this kind is “in itself appropriate satisfaction” (*Merits, Judgment, I.C.J. Reports* 1949, pp. 35, 36), and it will, as in that case, include such a declaration in the operative clause of the present Judgment. The Applicant acknowledges that this failure is no longer continuing, and accordingly has withdrawn the request made in the Reply that the Court declare that the Respondent “has violated and is violating the Convention” (emphasis added).

464. The Court now turns to the question of the appropriate reparation for the breach by the Respondent of its obligation under the Convention to punish acts of genocide; in this respect, the Applicant asserts the existence of a continuing breach, and therefore maintains (*inter alia*) its request for a declaration in that sense. As noted above (paragraph 440), the Applicant includes under this heading the failure “to transfer individuals accused of genocide or any other act prohibited by the Conven-
tion to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal”; and the Court has found that in that respect the Respondent is indeed in breach of Article VI of the Convention (paragraph 449 above). A declaration to that effect is therefore one appropriate form of satisfaction, in the same way as in relation to the breach of the obligation to prevent genocide. However, the Applicant asks the Court in this respect to decide more specifically that

“Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal.”

465. It will be clear from the Court’s findings above on the question of the obligation to punish under the Convention that it is satisfied that the Respondent has outstanding obligations as regards the transfer to the ICTY of persons accused of genocide, in order to comply with its obligations under Articles I and VI of the Genocide Convention, in particular in respect of General Ratko Mladić (paragraph 448). The Court will therefore make a declaration in these terms in the operative clause of the present Judgment, which will in its view constitute appropriate satisfaction.

466. In its final submissions, the Applicant also requests the Court to decide “that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court”. As presented, this submission relates to all the wrongful acts, i.e. breaches of the Genocide Convention, attributed by the Applicant to the Respondent, thus including alleged breaches of the Respondent’s obligation not itself to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement. Insofar as the Court has not upheld these claims, the submission falls. There remains however the question whether it is appropriate to direct that the Respondent provide guarantees and assurances of non-repetition in relation to the established breaches of the obligations to prevent and punish genocide. The Court notes the reasons advanced by counsel for the Applicant at the hearings in support of the submission, which relate for the most part to “recent events [which] cannot fail to cause concern as to whether movements in Serbia and Montenegro calling for genocide have disappeared”. It considers that these indications do not constitute sufficient grounds for requiring guarantees of non-repetition. The Applicant also referred in this connection to the question of non-compliance with provisional measures, but this matter has already been examined above (paragraphs 451 to 458), and will be mentioned further below. In the circumstances, the Court considers that the declaration referred to in paragraph 465 above is sufficient as regards the Respondent’s continuing duty of punishment, and therefore does not consider that this is a case in which a direction for guarantees of non-repetition would be appropriate.

467. Finally, the Applicant has presented the following submission:

“That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court.”

The provisional measures indicated by the Court’s Order of 8 April 1993, and reiterated by the Order of 13 September 1993, were addressed specifically to the Respondent’s obligation “to prevent commission of the crime of genocide” and to certain measures which should “in particular be taken to that end (I.C.J. Reports 1993, p. 24, para. 52 (A) (1) and (2)).

468. Provisional measures under Article 41 of the Statute are indicated “pending [the] final decision” in the case, and the measures indicated in 1993 will thus lapse on the delivery of the present Judgment (cf. Anglo-Iranian Oil Co. (United Kingdom v. Iran), Preliminary Objections, Judgment, I.C.J. Reports 1952, p. 114; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 442, para. 112). However, as already observed (paragraph 452 above), orders made by the Court indicating provisional measures under Article 41 of the Statute have binding effect, and their purpose is to protect the rights of either party, pending the final decision in the case.

469. The Court has found above (paragraph 456) that, in respect of the massacres at Srebrenica in July 1995, the Respondent failed to take measures which would have satisfied the requirements of paragraphs 52 (A) (1) and (2) of the Court’s Order of 8 April 1993 (reaffirmed in the Order of 13 September 1993). The Court however considers that, for purposes of reparation, the Respondent’s non-compliance with the provisional measures ordered is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention. The Court does not therefore find it appropriate to give effect to the Applicant’s request for an order for symbolic compensation in this respect. The Court will however include in the operative clause of the present Judgment, by way of satisfaction, a declaration that the Respondent has failed to comply with the Court’s Orders indicating provisional measures.
470. The Court further notes that one of the provisional measures indicated in the Order of 8 April and reaffirmed in that of 13 September 1993 was addressed to both Parties. The Court’s findings in paragraphs 456 to 457 and 469 are without prejudice to the question whether the Applicant did not also fail to comply with the Orders indicating provisional measures.

* * *

XII. OPERATIVE CLAUSE

471. For these reasons,

THE COURT,

(1) by ten votes to five,

Rejects the objections contained in the final submissions made by the Respondent to the effect that the Court has no jurisdiction; and affirms that it has jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to adjudicate upon the dispute brought before it on 20 March 1993 by the Republic of Bosnia and Herzegovina;

in favour: President Higgins; Vice-President Al-Khasawneh; Judges Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;

against: Judges Ranjeva, Shi, Koroma, Skotnikov; Judge ad hoc Kreća;

(2) by thirteen votes to two,

Finds that Serbia has not committed genocide, through its organs or persons whose acts engage its responsibility under customary international law, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

in favour: President Higgins; Vice-President Al-Khasawneh; Judges Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Kreća;

against: Vice-President Al-Khasawneh; Judge ad hoc Mahiou;

(3) by thirteen votes to two,

Finds that Serbia has not conspired to commit genocide, nor incited the commission of genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

in favour: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Kreća;

against: Vice-President Al-Khasawneh; Judge ad hoc Mahiou;

(4) by eleven votes to four,

Finds that Serbia has not been complicit in genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

in favour: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Sepúlveda-Amor, Skotnikov; Judge ad hoc Kreća;

against: Vice-President Al-Khasawneh; Judges Keith, Bennouna; Judge ad hoc Mahiou;

(5) by twelve votes to three,

Finds that Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995;

in favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;

against: Judges Tomka, Skotnikov; Judge ad hoc Kreća;

(6) by fourteen votes to one,

Finds that Serbia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal;

in favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Mahiou;

against: Judge ad hoc Kreća;

(7) by thirteen votes to two,

Finds that Serbia has violated its obligation to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995;

in favour: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;

against: Judge Skotnikov; Judge ad hoc Kreća;

(8) by fourteen votes to one,

Decides that Serbia shall immediately take effective steps to ensure full compliance with its obligation under the Convention on the Prevention
and Punishment of the Crime of Genocide to punish acts of genocide as
defined by Article II of the Convention, or any of the other acts pro-
scribed by Article III of the Convention, and to transfer individuals
accused of genocide or any of those other acts for trial by the Interna-
tional Criminal Tribunal for the former Yugoslavia, and to co-operate
fully with that Tribunal;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ran-
jeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-
Amor, Bennouna, Skotnikov; Judge ad hoc Mahiou;
AGAINST: Judge ad hoc Kreča;

(9) by thirteen votes to two,

Finds that, as regards the breaches by Serbia of the obligations referred
to in subparagraphs (5) and (7) above, the Court’s findings in those para-
graphs constitute appropriate satisfaction, and that the case is not one in
which an order for payment of compensation, or, in respect of the viola-
tion referred to in subparagraph (5), a direction to provide assurances
and guarantees of non-repetition, would be appropriate.

IN FAVOUR: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma,
Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge
ad hoc Mahiou;
AGAINST: Vice-President Al-Khasawneh; Judge ad hoc Mahiou.

Done in English and in French, the English text being authoritative,
at the Peace Palace, The Hague, this twenty-sixth day of February,
two thousand and seven, in three copies, one of which will be placed
in the archives of the Court and the others transmitted to the Govern-
ment of Bosnia and Herzegovina and the Government of Serbia, respec-

tively.

(Signed) Rosalyn Higgins,
President.

(Signed) Philippe Couvreur,
Registrar.

Vice-President Al-Khasawneh appends a dissenting opinion to the
Judgment of the Court; Judges Ranjeva, Shi and Koroma append a
joint dissenting opinion to the Judgment of the Court; Judge Ranjeva
appends a separate opinion to the Judgment of the Court; Judges Shi
and Koroma append a joint declaration to the Judgment of the Court;
Judges Owada and Tomka append separate opinions to the Judgment
of the Court; Judges Keith, Bennouna and Skotnikov append declarations
International Criminal Tribunal for the former Yugoslavia

Prosecutor v. Duško Tadić
Judgment

Appeals Chamber, 15 July 1999
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Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh
Judgement of: 15 July 1999
I. INTRODUCTION

A. Procedural background

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal" or "Tribunal") is seised of three appeals in relation to the Opinion and Judgment rendered by Trial Chamber II on 7 May 1997 in the case of The Prosecutor v. Duško Tadic, Case No.: IT-94-1-T ("Judgment") and the subsequent Sentencing Judgment of 14 July 1997 ("Sentencing Judgment"). With the exception of the Appeals Chamber's judgment in The Prosecutor v. Dražen Erdemović where the accused had entered a plea of guilty, this is the first time that the Appeals Chamber is deciding an appeal from a final judgement of a Trial Chamber.

2. The Indictment (as amended) charged the accused, Duško Tadic, with 34 counts of crimes within the jurisdiction of the International Tribunal. At his initial appearance before the Trial Chamber on 26 April 1995, the accused pleaded not guilty to all counts. Three of the counts were subsequently withdrawn at trial. Of the remaining 31 counts, the Trial Chamber found the accused guilty on nine counts, guilty in part on two counts and not guilty on twenty counts.

3. Both Duško Tadic ("Defence" or "Appellant") and the Prosecutor ("Prosecution" or "Cross-Appellant") now appeal against separate aspects of the Judgment ("Appeal against Judgment" and "Cross-Appeal", respectively). Additionally, the Defence appeals against the Sentencing Judgment ("Appeal against Sentencing Judgment"). Combined, these appeals are referred to as "the Appeals".

4. Oral argument on the Appeals was heard by the Appeals Chamber on 19, 20 and 21 April 1999. On 21 April 1999, the Appeals Chamber reserved its judgement to a later date.

5. Having considered the written and oral submissions of the Prosecution and the Defence, the Appeals Chamber,

HEREBY RENDERS ITS JUDGEMENT.

1. The Appeals

(a) Notices of Appeal

6. A notice of appeal against the Judgment was filed on behalf of Duško Tadic on 3 June 1997. Subsequently, on 8 January 1999, the Defence filed an amended notice of appeal ("Amended Notice of Appeal against Judgment"). Leave to amend the notice of appeal was granted, in part, by the Appeals Chamber in an oral order made on 25 January 1999.

7. On 6 June 1997, the Prosecution filed a notice of appeal against the Judgment ("Notice of Cross-Appeal").

8. After the notices of appeal against the Judgment were filed, proceedings continued before the Trial Chamber in relation to sentencing, and on 14 July 1997 the Trial Chamber delivered its Sentencing Judgment. Sentences were imposed for each of the 11 counts on which the Appellant had been found guilty or guilty in part, to be served concurrently. On 11 August 1997, the Defence filed a notice of appeal against the Sentencing Judgment. The Prosecution has not appealed against the Sentencing Judgment.

Case No.: IT-94-1-A

15 July 1999
b) Filing of Briefs

9. As set out in further detail below, the present proceedings were significantly delayed by repeated applications for extension of time in relation to an application for admission of additional evidence first made by the Defence on 6 October 1997.9 In January 1998, the Appeals Chamber suspended the timetable for filings in the Appeals until the determination of the Appellant’s application.10 Following the Appeals Chamber’s decision of 15 October 1998 on the matter,11 the normal appeals sequence resumed. In view of the rather complicated pattern formed by the parties’ briefs on the Appeals, it is useful to refer to the written submissions filed by the parties.

10. The Defence filed separate briefs for the Appeal against Judgement (“Appellant’s Brief on Judgement”) and the Appeal against Sentencing Judgement (“Appellant’s Brief on Sentencing Judgement”). These briefs were filed on 12 January 1998.12 The Prosecution responded to the briefs of the Appellant on 16 and 17 November 1998 (“Prosecution’s Response to Appellant’s Brief on Judgement” and “Prosecution’s Response to Appellant’s Brief on Sentencing Judgement”, respectively).13

11. As a consequence of filing an Amended Notice of Appeal against Judgement, the Defence filed an Amended Brief of Argument (with annexes) on 8 January 1999 (“Appellant’s Amended Brief on Judgement”). This subsequent brief was accepted by order of the Appeals Chamber on 25 January 1999.15

12. Alongside the filings in relation to the Appellant’s Appeal against Judgement and Appeal against Sentencing Judgement, both parties filed written submissions in relation to the Prosecution’s Cross-Appeal. The Prosecution’s brief in relation to the Cross-Appeal was filed on 12 January 1998 (“Cross-Appellant’s Brief”).16 A response to the Prosecution’s brief was filed by the Defence on 24 July 1998.17 The Prosecution filed a brief in reply on 1 December 1998 (“Cross-Appellant’s Brief in Reply”).18 The Defence subsequently filed a further response to the Cross-Appellant’s Brief (“Defence’s Substituted Response to Cross-Appellant’s Brief”).19 The filing of this further brief was accepted by order of the Appeals Chamber on 4 March 1999.20

13. Skeleton arguments consolidating and clarifying the parties’ respective positions in relation to the Appeals were filed by both parties on 19 March 1999.21

2. Applications for Admission of Additional Evidence under Rule 115

14. A confidential motion for the admission of a significant amount of additional evidence was filed by the Defence on 6 October 1997.22 In the motion, as supplemented by subsequent submissions, the Defence sought leave under Rule 115 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”) to present additional documentary material and to call more than 80 witnesses before the Appeals Chamber.23 In addition, or in the alternative, the Defence requested that the motion be considered as a

9 “Motion for the Extension of the Time Limit”, Case No.: IT-94-1-A, 6 October 1997.
10 T. 105 (22 January 1998).
14 “Amended Brief of Argument on behalf of the Appellant”, Case No.: IT-94-1-A, 8 January 1999.
21 Skeleton Argument – Appellant’s Appeal Against Conviction, Case No.: IT-94-1-A, 19 March 1999 (“Skeleton Argument – Appellant’s Appeal Against Conviction”); “Skeleton Argument – Appeal Against Sentence”, Case No.: IT-94-1-A, 19 March 1999; “Skeleton Argument of the Prosecution”, Case No.: IT-94-1-A, 19 March 1999 (“Skeleton Argument of the Prosecution”). See also “Skeleton Argument – Prosecutor’s Cross-Appeal, Case No.: IT-94-1-A, originally filed by the Defence on 19 March 1999 and subsequently re-filed on 20 April 1999 (‘Defence’s Skeleton Argument on the Cross-Appeal’)
22 “Motion for the Extension of the Time Limit”, Case No.: IT-94-1-A, 6 October 1997.
23 Rule 115 provides:

(A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion must be served on the other party and filed with the
motion for review of the judgement on the basis of a "new fact" within the meaning of Rule 119 of the Rules.24

15. The proceedings in relation to the motion continued for just under twelve months. A substantial number of extensions of time was sought by both parties.25

16. By decision of the Appeals Chamber on 15 October 1998 and for the reasons stated therein, the Defence motion for the admission of additional evidence was dismissed ("Decision on Admissibility of Additional Evidence").26 Considering the motion under Rule 115 of the Rules, the Appeals Chamber expressed its view that additional evidence should not be admitted lightly at the appellate stage. Construing the standard established by this Rule, it was noted that additional evidence is not admissible in the absence of a reasonable explanation as to why the evidence was not available at trial. The Appeals Chamber held that such unavailability must not result from the lack of due diligence on the part of counsel who undertook the defence of the accused before the Trial Chamber. Commenting further on the second criterion of admissibility under Rule 115, it was considered that for the purposes of the present case, the interests of justice required admission of additional evidence only if (a) the evidence was relevant to a material issue, (b) the evidence was credible, and (c) the evidence was such that it would probably show that the conviction was unsafe. Applying these criteria to the evidence sought to be admitted, the Appeals Chamber was not satisfied that the interests of justice required that any material which was not available at trial be presented on appeal.

17. Further motions for the admission of additional evidence pursuant to Rule 115 were made by the Defence on 8 January and 19 April 1999.27 By oral orders of 25 January and 19 April 1999, the motions were rejected by the Appeals Chamber.28

3. Contempt proceedings

18. In the course of the appeal process, proceedings were initiated by the Appeals Chamber against Mr. Milan Vujin, former lead counsel for the Appellant, relating to allegations of contempt of the International Tribunal.29 These allegations are subject to proceedings separate from the Appeals.

19. A hearing on the contempt proceedings commenced on 26 April 1999. The matter is currently pending before the Appeals Chamber.

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24 Rule 119 provides:

"Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement."


26 "Decision on Appellant’s Motion for the Extension of the Time-limit and Admission of Additional Evidence", Case No.: IT-94-1-A, 15 October 1998.


29 See "Scheduling Order Concerning Allegations against Prior Counsel", Case No.: IT-94-1-A, 10 February 1999. At the outset of the appellate process, Mr. Milan Vujin acted as lead counsel for the Defence, with the assistance of Mr. R. J. Livingston. By a decision of the Deputy Registrar on 19 November 1998, Mr. Milan Vujin was withdrawn as counsel for the accused and replaced by Mr. William Clegg as lead counsel (See "Decision of Deputy Registrar regarding the Assignment of Counsel and the Withdrawal of Lead Counsel for the Accused", Case No.: IT-94-1-A, 19 November 1998).
B. Grounds of Appeal

1. The Appeal against Judgement

20. As set out in the Appellant’s Amended Notice of Appeal against Judgement and Appellant’s Amended Brief on Judgement, the Defence advances the following two grounds of appeal against Judgement:

Ground (1): The Appellant’s right to a fair trial was prejudiced as there was no “equality of arms” between the Prosecution and the Defence due to the prevailing circumstances in which the trial was conducted.30

Ground (3): The Trial Chamber erred at paragraph 397 of the Judgement when it decided that it was satisfied beyond reasonable doubt that the Appellant was guilty of the murders of Osman Didovic and Edin Beji.31

21. The Defence sought leave to amend its Notice of Appeal to include a further ground of appeal (“Ground 2”), alleging that the Appellant’s right to a fair trial was gravely prejudiced by the conduct of his former counsel, Mr. Milan Vujin.32 Leave to amend the Notice of Appeal to include this ground was denied by the Appeals Chamber on 25 January 1999,33 thus leaving only Grounds 1 and 3 in the Appellant’s Appeal against Judgement.

2. The Cross-Appeal

22. The Prosecution raises the following grounds of appeal against the Judgement:

Ground (1): The majority of the Trial Chamber erred when it decided that the victims of the acts ascribed to the accused in Section III of the Judgement did not enjoy the protection of the grave breaches regime of the Geneva Conventions of 12 August 1949 as recognised by Article 2 of the Statute of the International Tribunal (“Statute”).34

Ground (2): The Trial Chamber erred when it decided that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the accused had played any part in the killing of any of the five men from the village of Jaskici, as alleged in Counts 29, 30 and 31 of the Indictment.35

Ground (3): The Trial Chamber erred when it held that in order to be found guilty of a crime against humanity, the Prosecution must prove beyond reasonable doubt that the accused not only formed the intent to commit the underlying offence but also knew of the context of a widespread or systematic attack on the civilian population and that the act was not taken for purely personal reasons unrelated to the armed conflict.36

Ground (4): The Trial Chamber erred when it held that discriminatory intent is an element of all crimes against humanity under Article 5 of the Statute of the International Tribunal.37

Ground (5): The majority of the Trial Chamber erred in a decision of 27 November 1996 in which it denied a Prosecution motion for production of defence witness statements (“Witness Statements Decision”).38

3. The Appeal against Sentencing Judgement

23. The Defence raises the following grounds of appeal against the Sentencing Judgement:

Ground (1): The total sentence of 20 years decided by the Trial Chamber is unfair.39

(i) The sentence is unfair as it was longer than the facts of the case required or demanded.40

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30 Appellant’s Amended Notice of Appeal against Judgement, paras. 1.1-1.4; Appellant’s Amended Brief on Judgement, paras. 1.1-1.12.
31 Appellant’s Amended Notice of Appeal against Judgement, paras. 3.1-3.6; Appellant’s Amended Brief on Judgement, paras. 3.1-3.11.
32 Amended Notice of Appeal, paras. 2.1-2.4.
34 Notice of Cross-Appeal, p. 2; Cross-Appellant’s Brief, paras. 2.1-2.88.
35 Notice of Cross-Appeal, p. 2; Cross-Appellant’s Brief, paras. 3.1-3.33.
36 Notice of Cross-Appeal, p. 3; Cross-Appellant’s Brief, paras. 4.1-4.23.
37 Notice of Cross-Appeal, p. 3; Cross-Appellant’s Brief, paras. 5.1-5.28.
38 Notice of Cross-Appeal, p. 3; Cross-Appellant’s Brief, paras. 6.1-6.32 with reference to “Decision on Prosecution Motion for Production of Defence Witness Statements”, Case No.: IT-94-1-T, Trial Chamber II, 27 November 1996.
(ii) The Trial Chamber erred by failing to take into account the general practice regarding prison sentences in the courts of the former Yugoslavia, as required by Article 24 of the Statute of the International Tribunal. Under this practice, a 20-year sentence is the longest sentence that can be imposed, but only as an alternative to the death penalty.\textsuperscript{41}

(iii) The Trial Chamber paid insufficient attention to the personal circumstances of Duško Tadić.\textsuperscript{42}

Ground (2): The Trial Chamber erred by recommending that the calculation of the minimum sentence should commence “from the date of this Sentencing Judgement or of the final determination of any appeal, whichever is the latter”.\textsuperscript{43}

Ground (3): The Trial Chamber erred in not giving the Appellant credit for the time spent in confinement in Germany before the International Tribunal requested deferral in this case.\textsuperscript{44}

C. Relief Requested

1. The Appeal against Judgement

24. In the Appeal against Judgement the Defence seeks the following relief:\textsuperscript{45}

(i) That the decision of the Trial Chamber that the Appellant is guilty of the crimes proved against him be set aside.

(ii) That a re-trial of the Appellant be ordered.

(iii) In the alternative to the relief sought under (i) and (ii) above, that the decision of the Trial Chamber at paragraph 397 of the Judgement that the Appellant is guilty of the murders of Osman Didovic and Edin Bej\textsuperscript{i} be reversed.

(iv) That the sentence of the Appellant be reviewed in the light of the relief sought under (iii) above.

2. The Cross-Appeal

25. In the Cross-Appeal the Prosecution seeks the following relief:

(i) That the majority decision of the Trial Chamber at page 227, paragraph 607 of the Judgement, holding that the victims of the acts ascribed to the Appellant in Section III of the Judgement did not enjoy the protection of the prohibitions prescribed by the grave breaches regime applicable to civilians in the hands of a party to an armed conflict of which they are not nationals (which falls under Article 2 of the Statute of the Tribunal), be reversed.\textsuperscript{46}

(ii) That the finding of the Trial Chamber at page 132, paragraph 373 of the Judgement, that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the Appellant had played any part in the killing of any of the five men from the village of Jaski\textsuperscript{c}, be reversed.\textsuperscript{47}

(iii) That the decision of the Trial Chamber at pages 252-253, paragraph 656 of the Judgement, that in order to be found guilty of a crime against humanity the Prosecution must prove beyond reasonable doubt that the Appellant not only formed the intent to commit the underlying offence but also knew of the context of the widespread or systematic attack on the civilian population and that the act was not taken for purely personal reasons unrelated to the armed conflict, be reversed.\textsuperscript{48}

(iv) That the decision of the Trial Chamber at page 250, paragraph 652 of the Judgement, that discriminatory intent is an ingredient of all crimes against humanity under Article 5 of the Statute, be reversed.\textsuperscript{49}

(v) That the Witness Statements Decision be reviewed.\textsuperscript{50}

\textsuperscript{40} T. 303 (21 April 1999).
\textsuperscript{41} Appellant’s Brief on Sentencing Judgement, pp. 4-6; T. 304 (21 April 1999).
\textsuperscript{42} Appellant’s Brief on Sentencing Judgement, pp. 9-10; T. 305 (21 April 1999).
\textsuperscript{43} Sentencing Judgement, para. 76. See Appellant’s Brief on Sentencing Judgement, p. 10.
\textsuperscript{44} Ibid., p. 14.
\textsuperscript{45} Appellant’s Amended Notice of Appeal against Judgement, p. 3.
\textsuperscript{46} Notice of Cross-Appeal, p. 3.
\textsuperscript{47} Ibid., p. 4.
\textsuperscript{48} Ibid.
\textsuperscript{49} Ibid.
\textsuperscript{50} Ibid.
3. The Appeal against Sentencing Judgement

26. By the Appeal against Sentencing Judgement, the Defence would appear to seek the following relief:

(i) That the sentence imposed by the Trial Chamber be reduced.

(ii) That the calculation of the minimum sentence imposed by the Trial Chamber be altered to run from the commencement of the Appellant’s detention.

(iii) That the Appellant be given credit for time spent in detention in Germany prior to the request for deferral made by the International Tribunal in this case.

D. Sentencing Procedure

27. The Appeal against Sentencing Judgement was the subject of oral argument by the parties. However, in the view of the Appeals Chamber, that appeal may be conveniently considered in connection with the appeal by the Prosecution relating to certain counts of the Indictment in respect of which the accused was acquitted. Both the Prosecution and the Appellant agreed that, if the Appellant were found guilty on those counts, there should be a separate sentencing procedure relating thereto. As will appear below, the Appellant is found guilty on those counts, with the consequence that there will have to be a separate sentencing procedure in relation to those counts. The Appeals Chamber considers that its decision on the Appeal against Sentencing Judgement should correspondingly be deferred to the stage of a separate sentencing procedure.

28. An earlier procedure provided for a sentencing hearing to take place subsequent to conviction; that procedure was replaced, in July 1998, by Sub-rule 87(C) of the Rules, which provides for sentence to be imposed when conviction is ordered. The earlier procedure was applied when the Appellant was originally sentenced and was in force when the Appeals were brought. In respect of the change, Sub-rule 6(D) provides as follows:

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50 Ibid.
II. FIRST GROUND OF APPEAL BY THE DEFENCE: INEQUALITY OF ARMS LEADING TO DENIAL OF FAIR TRIAL

A. Submissions of the Parties

1. The Defence Case

29. In the first ground of the Appeal against Judgment, the Defence alleges that the Appellant's right to a fair trial was prejudiced by the circumstances in which the trial was conducted. Specifically, it alleges that the lack of cooperation and the obstruction by certain external entities -- the Government of the Republika Srpska and the civic authorities in Prijedor -- prevented it from properly presenting its case at trial. The Defence contends that, whilst most Defence witnesses were Serbs still residing in the Republika Srpska, the majority of the witnesses appearing for the Prosecution were Muslims residing in countries in Western Europe and North America whose governments cooperated fully. It avers that the lack of cooperation displayed by the authorities in the Republika Srpska had a disproportionate impact on the Defence. It is accordingly submitted that there was no "equality of arms" between the Prosecution and the Defence at trial, and that the effect of this lack of cooperation was serious enough to frustrate the Appellant's right to a fair trial.

30. Citing cases decided by both the European Commission of Human Rights ("Eur. Commission H. R.") and the European Court of Human Rights ("Eur. Court H. R.") under the provision in the European Convention on Human Rights ("ECHR") corresponding to Article 20(1) of the Statute, the Defence submits that the guarantee of a fair trial under the Statute incorporates the principle of equality of arms. The Defence accepts the Prosecution's submission that there is no case law which would support the inclusion of matters outside the control of the Prosecution or the Trial Chamber within the ambit of the principle of equality of arms. However, the Defence argues that this principle ought to embrace not only procedural equality or parity of both parties before the Tribunal, but also substantive equality in the interests of ensuring a fair trial. It is accordingly submitted that the Appeals Chamber, when determining the scope of this principle, should be guided by the overriding right of the accused to a fair trial.

31. Relying on the same cases decided under the ECHR, the Defence further claims that the principle of equality of arms embraces the minimum procedural guarantee, set down in Article 21(4)(b) of the Statute, to have adequate time and facilities for the preparation of the defence. It contends that the uncooperative stance of the authorities in the Republika Srpska had the effect of denying the Appellant adequate time and facilities to prepare for trial to which he was entitled under the Statute, resulting in denial of a fair trial.

32. In support of its submissions, the Defence cites paragraph 530 of the judgement to show that the Trial Chamber was aware that both parties suffered from limited access to evidence in the territory of the former Yugoslavia. The Defence acknowledges that the Trial Chamber, recognising the difficulties faced by both parties in gaining access to evidence, exercised its powers under the Statute and Rules to alleviate the difficulties through a variety of means. However, it contends that the Trial Chamber recognised that its assistance did not resolve these difficulties but merely "alleviated" them. The Defence alleges that the inequality of arms persisted despite the assistance of the Trial Chamber and the exercise of due diligence by trial counsel, as the latter were unable to identify and trace relevant and material Defence witnesses, and potential witnesses that had been identified refused to testify out of fear. It submits that the lack of fault attributable to the Trial Chamber or the Prosecution did not serve to correct the inequality in arms, and that under these circumstances, a fair trial was impossible.

53 Appellant's Amended Brief on Judgement, paras. 1.1-1.3; T. pp. 35-40 (19 April 1999).
54 Appellant's Amended Brief on Judgement, para 1.11.
55 Appellant's Amended Notice of Appeal against Judgement, p. 6.
56 Appellant's Amended Notice of Appeal against Judgement, para 1.11.
57 Appellant's Amended Brief on Judgement, paras. 1.4-1.6; T. 29-31, 40, 45-48 (19 April 1999).
33. The Defence contends that the Appeals Chamber should adopt the following two-fold test to determine whether, on the facts, a violation of the principle of equality of arms, broadly construed, has been established.

1) Did the Defence prove on the balance of probabilities that the failure of the civic authorities in Prijedor and the government of the Republika Srpska to cooperate with the Tribunal led to relevant and admissible evidence not being presented by trial counsel, despite their having acted with due diligence, because significant witnesses did not appear at trial?

2) If so, was the imbalance created between the parties sufficient to frustrate the Appellant’s right to a fair trial?

34. With respect to the first branch of this test, the Defence asserts that the Appeals Chamber in its Decision on Admissibility of Additional Evidence recognised that certain Defence witnesses were intimidated into not appearing before the Trial Chamber. While acknowledging that the Appeals Chamber denied the admission of the evidence in question on the ground that it found that trial counsel did not act with due diligence to secure attendance of those witnesses at trial, it contends that what is important is that the Appeals Chamber accepted the allegations of intimidation. It adds that the Appeals Chamber in this decision also accepted that there were witnesses unknown to trial counsel during trial proceedings, despite counsel having acted with due diligence in looking for witnesses. From this the Defence draws the conclusion that, had there been some measure of cooperation, trial counsel could have called at least some of these witnesses. Thus, it is argued that relevant and admissible evidence helpful to the case for the Defence was not presented to the Trial Chamber. It is further asserted that the reason why so many witnesses could not be found was due to lack of cooperation on the part of the authorities in the Republika Srpska.

35. As regards the second branch of the test, the Defence contends that this is a matter of weight and balance. While recognising that not every inability to ensure the production of evidence would render a trial unfair, it submits that, on the facts of the case, the volume and content of relevant and admissible evidence that could not be called at trial was such as to create an inequality of arms that served to frustrate a fair trial.

36. Finally, the Defence contends that the fact that trial counsel did not file a motion seeking a stay of trial proceedings should not be held to prevent the Defence from raising the matter of denial of a fair trial on appeal. In this respect, the Defence maintains that trial counsel might have been unaware of the degree of obstruction by the Bosnian Serb authorities in preventing the discovery of witnesses helpful to the Defence case. It is further pointed out that lead trial counsel in his opening statement emphasised that the prevailing conditions might frustrate the fairness of the trial. Defence counsel opined that trial counsel’s decision not to seek an adjournment of the proceedings could be attributed to the wish not to prolong the extended period of the Appellant’s pre-trial detention.

2. The Prosecution Case

37. The Prosecution argues that equality of arms means procedural equality. According to the Prosecution, this principle entitles both parties to equality before the courts, giving them the same access to the powers of the court and the same right to present their cases. However, in its view, the principle does not call for equalising the material and practical circumstances of the two parties. Accordingly, it is contended that the claim of the Defence that it was unable to secure the attendance of important witnesses at trial does not demonstrate that there has been an inequality of arms, unless that inability was due to a relevant procedural disadvantage suffered by the Defence. It is asserted that while the obligation of the Trial Chamber is to place the parties on an equal footing as regards the presentation of the case, that Chamber cannot be responsible for factors which are beyond its capacity or competence.

38. The Prosecution does not deny that in certain circumstances it could amount to a violation of fundamental fairness or “manifest injustice” to convict an accused who was unable to obtain and present certain significant evidence at trial. In its view, however, this
is a matter that goes beyond the concept of "equality of arms" as properly understood, and requires examination on a case-by-case basis. It is submitted that on the facts, no such injustice existed in the instant case.

39. In the view of the Prosecution, the issue raised by the present ground of appeal is whether the degree of lack of cooperation and obstruction by the authorities in the Republika Srpska was such as to deny the Appellant a fair trial. It submits that the Defence must prove that the result of such lack of cooperation was to prevent the Defence from presenting its case at trial, and contends that the Defence has failed to meet this burden. It maintains that the Defence had a reasonable opportunity to defend the Appellant under the same procedural conditions and with the same procedural rights as were accorded to the Prosecution, and that it indeed put forward a vigorous defence by presenting the defences of alibi and mistaken identity. In addition, it is noted that the Defence was helped by the broad disclosure obligation on the Prosecution under the Rules, which extends an obligation upon the Prosecution to disclose all exculpatory evidence of which it is aware. Furthermore, it is submitted that, whereas the Defence received some measure of cooperation from the authorities in the Republika Srpska, the Prosecution in fact received no such cooperation at all. Finally, it is alleged that the Defence has not substantiated its claim that any lack of cooperation substantially disadvantaged the Defence as compared to the Prosecution.

40. The Prosecution further argues that the standard which the Defence advocates for establishing a violation of the principle of equality of arms or the right to a fair trial is set too low. It claims that the Defence does not prove a violation of this principle merely by showing that relevant evidence was not presented at trial. In its view, a higher standard is called for, according to which the burden is on the Defence to prove an "abuse of discretion" by the Trial Chamber. The Prosecution maintains that the Defence has not satisfied this burden, as it has not shown that the Trial Chamber acted inappropriately in proceeding with the trial.

41. In contrast to the view put forward by the Defence, the Prosecution denies that the Decision on Admissibility of Additional Evidence supports the position that the Appellant did not receive a fair trial. It notes that the majority of the proposed additional evidence was found by the Appeals Chamber to have been available to the Defence at trial. Furthermore, with respect to that portion of the proposed additional evidence which was found not to have been available at trial, it notes that the Appeals Chamber, after careful consideration, found that the interests of justice did not require it to be admitted on appeal. Thus, in the Prosecution's view, rather than showing a denial of fair trial, this decision is consistent with the view that the rights of the Appellant in this respect were not violated by any lack of cooperation on the part of the authorities of the Republika Srpska.

42. The Prosecution further emphasises that Defence counsel failed to make a motion for dismissal of the case on the basis that a fair trial was impossible because of lack of cooperation of the authorities of the Republika Srpska. It notes that, by not doing so, the Defence failed to give the Trial Chamber the opportunity to take additional measures to overcome the difficulties faced by the Defence. It is submitted that this omission by the Defence further provides an indication that it did not believe that the Appellant's right to a fair trial had been violated.

B. Discussion

1. Applicability of Articles 20(1) and 21(4)(b) of the Statute

43. Article 20(1) of the Statute provides that "[t]he Trial Chambers shall ensure that a trial is fair and expeditious [...]." This provision mirrors the corresponding guarantee provided for in international and regional human rights instruments: the International Covenant on Civil and Political Rights (1966) ("ICCPR"), the European Convention on Human Rights, and others.

63 Prosecution's Response to Appellant's Brief on Judgement, paras. 3.21-3.23; T. 88-89 (20 April 1999).
64 T. 90-91 (20 April 1999).
65 T. 97 (20 April 1999).
66 T. 9, 98-99 (20 April 1999).
67 Skeleton Argument of the Prosecution, para.10; Prosecution's Response to Appellant's Brief on Judgement, paras. 3.29, 6.9.
68 Skeleton Argument of the Prosecution, para. 6.
69 T. 96 (20 April 1999).
70 T. 100 (20 April 1999).
71 Article 14(1) of the ICCPR provides in part: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by an competent, independent and impartial tribunal established by law. [...]."
Human Rights (1950),72 and the American Convention on Human Rights (1969).73 The right to a fair trial is central to the rule of law: it upholds the due process of law. The Defence submits that due process includes not only formal or procedural due process but also substantive due process.74

44. The parties do not dispute that the right to a fair trial guaranteed by the Statute covers the principle of equality of arms. This interpretation accords with findings of the Human Rights Committee ("HRC") under the ICCPR. The HRC stated in Morae v. France75 that a fair hearing under Article 14(1) of the ICCPR must at a minimum include, inter alia, equality of arms. Similarly, in Robinson v. Jamaica76 and Wolf v. Panama77 the HRC found that there was inequality of arms in violation of the right to a fair trial under Article 14(1) of the ICCPR. Likewise, the case law under the ECHR cited by the Defence accepts that the principle is implicit in the fundamental right of the accused to a fair trial. The principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee. The Appeals Chamber finds that there is no reason to distinguish the notion of fair trial under Article 20(1) of the Statute from its equivalent in the ECHR and ICCPR, as interpreted by the relevant judicial and supervisory treaty bodies under those instruments. Consequently, the Chamber holds that the principle of equality of arms falls within the fair trial guarantee under the Statute.

45. What has to be decided in the present appeal is the scope of application of the principle. The Defence alleges that it should include not only procedural equality, but also substantive equality.78 In its view, matters outside the control of the Trial Chamber can prejudice equality of arms if their effect is to disadvantage one party disproportionately. The Prosecution rejoins that equality of arms refers to the equality of the parties before the Trial Chamber. It argues that the obligation on the Trial Chamber is to ensure that the parties before it are accorded the same procedural rights and operate under the same procedural conditions in court. According to the Prosecution, the lack of cooperation by the authorities in the Republika Srpska could not imperil the equality of arms enjoyed by the Defence at trial because the Trial Chamber had no control over the actions or the lack thereof of those authorities.

46. The Defence contends that the minimum guarantee in Article 21(4)(b) of the Statute to adequate time and facilities for the preparation of defence at trial forms part of the principle of equality of arms, implicit in Article 20(1). It argues that, since the authorities in the Republika Srpska failed to cooperate with the Defence, the Appellant did not have adequate facilities for the preparation of his defence, thereby prejudicing his enjoyment of equality of arms.

47. The Appeals Chamber accepts the argument of the Defence that, on this point, the relationship between Article 20(1) and Article 21(4)(b) is of the general to the particular. It also agrees that, as a minimum, a fair trial must entitle the accused to adequate time and facilities for his defence.

48. In deciding on the scope of application of the principle of equality of arms, account must be taken first of the international case law. In Kaufman v. Belgium,79 a civil case, the Eur. Commission H. R. found that equality of arms means that each party must have a reasonable opportunity to defend its interests "under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent".80 In Dombo Beheer B.V. v. The Netherlands,81 another civil proceeding, the Eur. Court H. R. adopted the view expressed by the Eur. Commission H. R. on equality of arms, holding that "as regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent".82 The Court decided in a criminal proceeding, Delcourt v. Belgium,83 that the principle entitled both parties to full equality of treatment, maintaining that the conditions of trial must not "put the accused

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72 Article 6(1) of the ECHR provides in part: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

73 Article 8(1) of the American Convention on Human Rights provides in part: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature."

74 T. 29-35 (19 April 1999).


78 T. 29-35 (19 April 1999).

79 Kaufman v. Belgium, 50 DR 98.

80 Ibid, p. 315.


82 Ibid, para. 40.

It can safely be concluded from the ECHR jurisprudence, as cited by the Defence, that equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.

There is nothing in the ECHR case law that suggests that the principle is applicable to conditions, outside the control of a court, that prevented a party from securing the attendance of certain witnesses. All the cases considered applications that the judicial body had the power to grant.

The HRC has interpreted the principle as designed to provide to a party rights and guarantees that are procedural in nature. The HRC observed in B.d.B. et al. v. The Netherlands, a civil case, that Article 14 of the ICCPR “guarantees procedural equality” to ensure that the conduct of judicial proceedings is fair. Where applicants were sentenced to lengthy prison terms in judicial proceedings conducted in the absence of procedural guarantees, the HRC has found a violation of the right to fair trial under Article 14(I). The communications decided under the ICCPR are silent as to whether the principle extends to cover a party’s inability to secure the attendance at trial of certain witnesses where fault is attributable, not to the court, but to an external, independent entity.

The case law mentioned so far relates to civil or criminal proceedings before domestic courts. These courts have the capacity, if not directly, at least through the extensive enforcement powers of the State, to control matters that could materially affect the fairness of a trial. It is a different matter for the International Tribunal. The dilemma faced by this Tribunal is that, to hold trials, it must rely upon the cooperation of States without having the power to compel them to cooperate through enforcement measures.

The Tribunal must rely on the cooperation of States because evidence is often in the custody of a State and States can impede efforts made by counsel to find that evidence. Moreover, without a police force, indictees can only be arrested or transferred to the International Tribunal through the cooperation of States or, pursuant to Sub-rule 59bis, through action by the Prosecution or the appropriate international bodies. Lacking independent means of enforcement, the ultimate recourse available to the International Tribunal in the event of failure by a State to cooperate, in violation of its obligations under Article 29 of the Statute, is to report the non-compliance to the Security Council.

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52. In light of the above considerations, the Appeals Chamber is of the view that under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case. The Trial Chambers are mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia where some States have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal. Provisions under the Statute and the Rules exist to alleviate the difficulties faced by the parties so that each side may have equal access to witnesses. The Chambers are empowered to issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. This includes the power to:

1. adopt witness protection measures, ranging from partial to full protection;
2. take evidence by video-link or by way of deposition;
3. summon witnesses and order their attendance;

84 Ibid., para. 34.
85 In Kaufman v. Belgium, 50 DR 98, the Eur. Commission H. R. held that equality of arms did not give the applicant a right to lodge a counter-memorial. In Neumeister v. Austrie. Eur. Court of H. R., Judgment of 27 June 1966, Series A., no. 8, the Court decided that the principle did not apply to the examination of the applicant’s request for provisional release, despite the prosecutor having been heard ex parte. In Bendenoun v. France, Eur. Court H. R., Judgment of 24 February 1994, Series A., no. 284, the Court ruled that an applicant who did not receive a complete file from the tax authorities was not entitled thereto under the principle of equality of arms because he was aware of its contents and gave no reason for the request. In Dombro Beheer B.V. v. The Netherlands, Eur. Court H. R., Judgment of 27 October 1993, Series A., no. 274, the Court held that there was a breach of equality of arms where the single first hand witness for the applicant company was barred from testifying whereas the defendant bank’s witness was heard.
89 Ibid., para. 33.
(4) issue binding orders to States for, inter alia, the taking and production of
evidence; and

(5) issue binding orders to States to assist a party or to summon a witness and order
his or her attendance under the Rules.

A further important measure available in such circumstances is:

(6) for the President of the Tribunal to send, at the instance of the Trial Chamber, a
request to the State authorities in question for their assistance in securing the
attendance of a witness.

In addition, whenever the aforementioned measures have proved to be to no avail, a
Chamber may, upon the request of a party or proprio motu:

(7) order that proceedings be adjourned or, if the circumstances so require, that they
be stayed.

53. Relying on the principle of equality of arms, the Defence is submitting that the
Appellant did not receive a fair trial because relevant and admissible evidence was not
presented due to lack of cooperation of the authorities in the Republika Srpska in securing
the attendance of certain witnesses. The Defence is not complaining that the Trial Chamber
was negligent in responding to a request for assistance. The Appeals Chamber finds that the
Defence has not substantiated its claim that the Appellant was not given a reasonable
opportunity to present his case. There is no evidence to show that the Trial Chamber failed
to assist him when seized of a request to do so. Indeed, the Defence concedes that the Trial
Chamber gave every assistance it could to the Defence when asked to do so, and even
allowed a substantial adjournment at the close of the Prosecution’s case to help Defence
efforts in tracing witnesses.90 Further, the Appellant acknowledges that the Trial Chamber
did not deny the Defence attendance of any witness but, on the contrary, took virtually all
steps requested and necessary within its authority to assist the Appellant in presenting
witness testimony. Numerous instances of the granting of such motions and orders by the
Trial Chamber, on matters such as protective measures for witnesses, approving the giving
of evidence via video-conference link from Banja Luka in the Republika Srpska, and
granting confidentiality and safe conduct to several Defence witnesses are set forth in the
Judgement of the Trial Chamber.91 Indeed, the Decision on Admissibility of Additional
Evidence, by which the Defence was precluded from presenting additional evidence, was
based on the fact that the Defence had failed to establish that it would have been in the
interests of justice to admit such evidence. This indicates that the fact that it could not
present such evidence did not detract from the fairness of the trial.

54. A further example of a measure of the Trial Chamber which was designed to assist
in the preparation and presentation of the Defence case is that the Trial Chamber’s Presiding
Judge brought to the attention of the President of the International Tribunal certain
difficulties concerning the possible attendance of three witnesses who had been summoned
by the Defence.92 She requested the President of the International Tribunal to send a letter to
the Acting President of the Republika Srpska, Mrs. B. Plavsic, to urge her to assist the
Defence in securing the presence and cooperation of these Defence witnesses.

Consequently, on 19 September 1996, the President of the Tribunal sent a letter to
Mrs. Plavsic. In this letter, he made reference to obstacles encountered by the Defence in
securing the cooperation of these witnesses. In view, inter alia, of the accused’s right to a
fair trial, Mrs. Plavsic was therefore enjoined to “take whatever action is necessary
immediately to resolve this matter so that the Defence may go forward with its case.”93

55. The Appeals Chamber can conceive of situations where a fair trial is not possible
because witnesses central to the defence case do not appear due to the obstructionist efforts
of a State. In such circumstances, the defence, after exhausting all the other measures
mentioned above, has the option of submitting a motion for a stay of proceedings. The
Defence opined during the oral hearing that the reason why such action was not taken in the
present case may have been due to trial counsel’s concern regarding the long period of
detention on remand. The Appeals Chamber notes that the Rules envision some relief in
such a situation, in the form of provisional release, which, pursuant to Sub-rule 65(B), may
be granted “in exceptional circumstances”. It is not hard to imagine that a stay of
proceedings occasioned by the frustration of a fair trial under prevailing trial conditions

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90 T. 47 (19 April 1999); Judgement, para. 32 ("Following a recess of three weeks after the close of the
Prosecution case to permit the Defence to make its final preparations, the Defence case opened on 10
September 1996[...].")

91 Judgement, paras. 29-35.
92 T. 59, 60 (20 April 1999).
93 Letter from President Cassese to Mrs. B. Plavsic of 19 September 1996, referred to by Judge Shahabuddeen
during the hearing on 20 April 1999 (ibid.).
would amount to exceptional circumstances under this rule. The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial de novo, as the Defence seeks to do in this case.

C. Conclusion

56. The Appeals Chamber finds that the Appellant has failed to show that the protection offered by the principle of equality of arms was not extended to him by the Trial Chamber. This ground of Appeal, accordingly, fails.

III. THIRD GROUND OF APPEAL BY THE DEFENCE: ERROR OF FACT LEADING TO A MISCARRIAGE OF JUSTICE

A. Submissions of the Parties

1. The Defence

57. The Trial Chamber made the factual finding that the Appellant was guilty of the murder of two Muslim policemen, Edin Besi} and a man identified at trial by the name of Osman, based on the testimony of only one witness, Nihad Seferovi}. The Defence contends that the Trial Chamber erred in deciding that it was satisfied beyond reasonable doubt that he was guilty of the two murders because the Chamber relied on the uncorroborated evidence of Mr. Seferovi}. The Defence maintains that Mr. Seferovi} is an unreliable witness because he was introduced to the Prosecution by the government of Bosnia and Herzegovina, a source which the Defence alleges the Trial Chamber found to be tainted for having planted another Prosecution witness, Dragan Opači}. The latter was found to be untruthful at trial and, consequently, withdrawn by the Prosecution.

58. The Defence argues that the Trial Chamber erred in relying on the evidence of Mr. Seferovi} because it is implausible (e.g., Mr. Seferovi}, a Muslim who lived in an area under bombardment by Serbian paramilitary forces, fled to the mountains for safety. He testified at trial that he was so concerned about the welfare of his pet pigeons that he returned to town to feed them while the Serbian paramilitaries were still there. On his return to town, he saw Mr. Tadi} kill two policemen. Defence counsel contended at trial that the witness was never in town at the time of the killings.

59. The Defence maintains that the Appeals Chamber, in reviewing the factual finding of the Trial Chamber, is entitled to consider all relevant evidence and can reverse the Chamber's finding if it is satisfied that no reasonable person could conclude that the evidence of Mr. Seferovi} proved that the Appellant was responsible for the killings.
60. The Defence asks the Appeals Chamber to reverse the Trial Chamber's finding that the Appellant is guilty of the murders of Edic Besi} and the man identified by the name of Osman.94

2. The Prosecution

61. The Prosecution argues that the Appeals Chamber, being an appellate body, cannot reverse the Trial Chamber's findings of fact unless it were to conclude that the Defence has proved that no reasonable person could have come to the conclusion reached by the Trial Chamber based on the evidence cited by it.95

62. The Prosecution claims that the Defence misrepresented the Trial Chamber's findings with respect to Dragan Opaci} in order to taint Mr. Seferovi} by association as an unreliable witness. Having lied about his family situation, Mr. Opaci} had clearly aroused the Prosecution's fears about his credibility. Consequently, he was withdrawn as a witness as a precautionary measure. The Trial Chamber asked the Prosecution to investigate this matter and, having examined the situation, the Prosecution found that the investigation did not support the Defence allegation that Mr. Opaci} was planted by the Bosnian government.

63. The Prosecution submits that the attempt to taint Mr. Seferovi}’s credibility by assimilating his position to that of Mr. Opaci} fails because the Trial Chamber concluded that the circumstances surrounding the testimony of the latter were unique to him. The situation of Mr. Seferovi} was not similar to that of Mr. Opaci}. There was no need to require corroboration of his testimony because the Trial Chamber concluded that he was a reliable witness.

B. Discussion

64. The two parties agree that the standard to be used when determining whether the Trial Chamber's factual finding should stand is that of unreasonableness, that is, a conclusion which no reasonable person could have reached. The task of hearing, assessing and weighing the evidence presented at trial is left to the judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.

65. The Appeals Chamber notes that it has been the practice of this Tribunal and of the International Criminal Tribunal for Rwanda ("ICTR")96 to accept as evidence the testimony of a single witness on a material fact without need for corroboration. The Defence does not dispute that corroboration is not required by law. As noted above, it submitted that, as a matter of fact, the evidence of Mr. Seferovi} cannot be relied on in the absence of corroboration because he was introduced to the Prosecution by the same source, the government of Bosnia and Herzegovina, which introduced another witness, Mr. Opaci}, who was subsequently withdrawn as a witness by the Prosecution for being untruthful. The Appeals Chamber finds that Mr. Seferovi}'s association with the Bosnian government does not taint him. The circumstances of Mr. Seferovi} and Mr. Opaci} are different. Mr. Opaci} was made known to the Prosecution while he was still in the custody of the Bosnian authorities, whereas Mr. Seferovi}'s introduction was made through the Bosnian embassy in Brussels. Mr. Seferovi} was subjected to strenuous cross-examination by Defence counsel at trial. Defence counsel at trial did not recall him after learning of the withdrawal of Mr. Opaci} as a witness. Furthermore, Defence counsel at trial never asked that Mr. Seferovi}'s testimony be disregarded on the ground that, like Mr. Opaci}, was also a tainted witness. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in relying on the uncorroborated testimony of Mr. Seferovi}.

66. The Defence alleges that the Trial Chamber erred in relying on the evidence of Mr. Seferovi} because it was implausible. Here, it is claimed that the Trial Chamber did not

94 In its submissions, the Defence refers to the victim identified by the Trial Chamber only as one "Osman", by the name "Osman Didovic". The Appeals Chamber is not here called upon to determine whether the name thus given by the Defence is accurate.

95 Prosecution's Response to Appellant's Brief on Judgement, para. 2.14.

96 More fully, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
act reasonably in concluding from the evidence of Mr. Seferović that the Appellant was responsible for the killing of the two policemen. The Appeals Chamber does not accept as inherently implausible the witness' claim that the reason why he returned to the town where the Serbian paramilitary forces had been attacking, and from which he had escaped, was to feed his pet pigeons. It is conceivable that a person may do such a thing, even though one might think such action to be an irrational risk. The Trial Chamber, after seeing the witness, hearing his testimony, and observing him under cross-examination, chose to accept his testimony as reliable evidence. There is no basis for the Appeals Chamber to consider that the Trial Chamber acted unreasonably in relying on that evidence for its finding that the Appellant killed the two men.

C. Conclusion

67. The Appellant has failed to show that Nihad Seferović's reliability as a witness is suspect, or that his testimony was inherently implausible. Since the Appellant did not establish that the Trial Chamber erred in relying on the evidence of Mr. Seferović for its factual finding that the Appellant killed the two men, the Appeals Chamber sees no reason to overturn the finding.

IV. THE FIRST GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE TRIAL CHAMBER'S FINDING THAT IT HAD NOT BEEN PROVED THAT THE VICTIMS WERE "PROTECTED PERSONS" UNDER ARTICLE 2 OF THE STATUTE (ON GRAVE BREACHES)

A. Submissions of the Parties

68. In the first ground of the Cross-Appeal, the Prosecution challenges the Appellant's acquittal on Counts 8, 9, 12, 15, 21 and 32 of the Indictment which charged the Appellant with grave breaches under Article 2 of the Statute. The Appellant was acquitted on these counts on the ground that the victims referred to in those counts had not been proved to be "protected persons" under the applicable provisions of the Fourth Geneva Convention. 97

69. The Prosecution maintains that all relevant criteria under Article 2 of the Statute were met. Consequently, the Trial Chamber erred by relying exclusively upon the "effective control" test derived from the Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) 98 in order to determine the applicability of the grave breach provisions of the relevant Geneva Convention. The Prosecution submits that the Chamber should have instead applied the provisions of the Geneva Conventions and the relevant principles and authorities of international humanitarian law which, in its view, apply a "demonstrable link" test.

70. In distinguishing the present situation from the facts in Nicaragua, the Prosecution notes that Nicaragua was concerned with State responsibility rather than individual criminal responsibility. Further, the Prosecution asserts that the International Court of Justice in Nicaragua deliberately avoided dealing with the question of which body of treaty rules was applicable. Instead the Court focused on the minimum yardstick of rules contained in

Common Article 3 of the Geneva Conventions, which in the Court's view applied to all conflicts in Nicaragua, thus obviating the need for the Court to decide which body of law was applicable in that case.

71. The Prosecution submits that the Trial Chamber erred by not applying the provisions of the Geneva Conventions and general principles of international humanitarian law to determine individual criminal responsibility for grave breaches of the Geneva Conventions. In the Prosecution's submission, these sources require that there be a "demonstrable link" between the perpetrator and a Party to an international armed conflict of which the victim is not a national.

72. The Prosecution submits that the "demonstrable link" test is satisfied on the facts of the case at hand. In its view, the Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska ("VRS") had a "demonstrable link" with the Federal Republic of Yugoslavia (Serbia and Montenegro) ("FRY") and the Army of the FRY ("VJ"); it was not a situation of mere logistical support by the FRY to the VRS.

73. In addition, the Prosecution submits that the Trial Chamber erred in finding that the only test relied upon in Nicaragua was the "effective control" test. The Court in Nicaragua also applied an "agency" test which, the Prosecution submits, is a more appropriate standard for determining the applicability of the grave breach provisions.

74. Were either the "effective control" test or the "agency" test to be adopted by the Appeals Chamber, the Prosecution submits that in any event both tests would be satisfied on the facts of this case. To support this contention, the Prosecution looks to the fact, inter alia, that after 19 May 1992, when the Yugoslav People's Army ("JNA") formally withdrew from Bosnia and Herzegovina, VRS soldiers continued to receive their salaries from the government of the FRY which also funded the pensions of retired VJ soldiers who had been serving with the VRS. The Prosecution looks to a number of additional factors in support of its contention that there was more than mere logistical support by the FRY after 19 May 1992. These factors include the structures and ranks of the VRS and VJ being identical, as well as the supervision of the VRS by the FRY after that date. From those facts, the Prosecution draws the inference that the FRY was exercising effective military control over the VRS.

2. The Defence Case

75. The Defence asserts that the Trial Chamber was correct in applying the "effective control" test derived from Nicaragua and submits that the "demonstrable link" test is incorrect. The Defence formulates the test which the Appeals Chamber should apply as "were the Bosnian Serbs acting as 'organs' of another State?"99

76. The Defence submits that it is misleading to distinguish Nicaragua on the basis that the decision is concerned only with State responsibility. The Defence further argues that the Court in Nicaragua was concerned with the broader question of which part of international humanitarian law should apply to the relevant conduct.

77. On the facts of the present case there is no evidential basis for concluding that after 19 May 1992, the VRS was either effectively controlled by or could be regarded as an agent of the FRY government. The Defence's submission is that the FRY and the Republika Srpska coordinated with each other, solely as allies. For this reason, the VRS was not an organ of the FRY.

78. The Defence submits that the "demonstrable link" test is not the correct test to be applied under Article 2 of the Statute. The Defence argues that the test has no authority in international law and submits that it should also be rejected for policy reasons. If the Appeals Chamber were to accept the "demonstrable link" test, this could result in the undesirable outcome of a State being held responsible for the actions of another State over which the State did not have any effective control. Further, the Defence submits that the test at issue introduces uncertainty into international law as it is unclear what degree of link is necessary in order to satisfy the test.

99 See Defence's Substituted Response to Cross-Appellant's Brief, para. 2.6.
79. The Defence concedes that if the correct test were the “demonstrable link” test, on the facts of this case the test would be satisfied.\footnote{100}

B. Discussion

1. The Requirements for the Applicability of Article 2 of the Statute

80. Article 2 of the Statute embraces various disparate classes of offences with their own specific legal ingredients. The general legal ingredients, however, may be categorised as follows.

(i) The nature of the conflict. According to the interpretation given by the Appeals Chamber in its decision on a Defence motion for interlocutory appeal on jurisdiction in the present case,\footnote{101} the international nature of the conflict is a prerequisite for the applicability of Article 2.

(ii) The status of the victim. Grave breaches must be perpetrated against persons or property defined as “protected” by any of the four Geneva Conventions of 1949. To establish whether a person is “protected”, reference must clearly be made to the relevant provisions of those Conventions.

81. In the instant case it therefore falls to the Appeals Chamber to establish first of all (i) on what legal conditions armed forces fighting in a prima facie internal armed conflict may be regarded as acting on behalf of a foreign Power and (ii) whether in the instant case the factual conditions which are required by law were satisfied.

82. Only if the Appeals Chamber finds that the conflict was international at all relevant times will it turn to the second question of whether the victims were to be regarded as “protected persons”.

\footnote{100}{See Defence’s Substituted Response to Cross-Appellant’s Brief, paras. 2.1 – 2.18; T. 219-220 (21 April 1999).}


2. The Nature of the Conflict

83. The requirement that the conflict be international for the grave breaches regime to operate pursuant to Article 2 of the Statute has not been contested by the parties.

84. It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.

85. In the instant case, the Prosecution claims that at all relevant times, the conflict was an international armed conflict between two States, namely Bosnia and Herzegovina (“BH”) on the one hand, and the FRY on the other.\footnote{102} Judge McDonald, in her dissent, also found the conflict to be international at all relevant times.\footnote{103}

86. The Trial Chamber found the conflict to be an international armed conflict between BH and FRY until 19 May 1992, when the JNA formally withdrew from Bosnia and Herzegovina.\footnote{104} However, the Trial Chamber did not explicitly state what the nature of the conflict was after 19 May 1992. As the Prosecution points out, “[t]he Trial Chamber made no express finding on the classification of the armed conflict between the Bosnian Serb..."\footnote{105}

\footnote{102}{See para. 2.25 of the Cross-Appellant’s Brief: “’...If the SFOR/FRY is a Party to an international armed conflict with [...] BH on the basis that the Trial Chamber found that until 19 May 1992 the JNA was involved in an international armed conflict with the BH, and that thereafter the VJ was directly involved in an armed conflict against the BH. Consequently, it is submitted that the only conclusion that can be drawn is that an international armed conflict existed between the BH and the FRY during 1992.’” (emphasis added).}

\footnote{103}{See para. 1 of Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, The Prosecutor v. Du‰o Tadi, Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997 (“Separate and Dissenting Opinion of Judge McDonald”) where she held: “I find that at all times relevant to the indictment, the armed conflict in opština Prijedor was international in character [...]”.}

\footnote{104}{See Judgement, paras. 569-608: “569. [...] It is clear from the evidence before the Trial Chamber that, from the beginning of 1992 until 19 May 1992, a state of international armed conflict existed in at least part of the territory of Bosnia and Herzegovina. This was an armed conflict between the forces of the Republic of Bosnia and Herzegovina on the one hand and those of the Federal Republic of Yugoslavia (Serbia and Montenegro), being the JNA (later the VJ), working with sundry paramilitary and Serb forces, on the other. [...] 570. For evidence of this it is enough to refer generally to the evidence presented as to the bombardment of Sarajevo, the seat of government of the Republic of Bosnia and Herzegovina, in April 1992 by Serb forces, their attack on towns along Bosnia and Herzegovina’s border with Serbia on the...”}

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Army (VRS) and the BH after the VRS was established in May 1992. Nevertheless, it may be held that the Trial Chamber at least implicitly considered that after 19 May 1992 the conflict became internal in nature.

87. In the instant case, there is sufficient evidence to justify the Trial Chamber’s finding of fact that the conflict prior to 19 May 1992 was international in character. The question whether after 19 May 1992 it continued to be international or became instead exclusively internal turns on the issue of whether Bosnian Serb forces – in whose hands the Bosnian victims in this case found themselves – could be considered as de iure or de facto organs of a foreign Power, namely the FRY.

3. The Legal Criteria for Establishing When, in an Armed Conflict Which is Prima Facie Internal, Armed Forces May Be Regarded as Acting On Behalf of a Foreign Power, Thereby Rendering the Conflict International

(a) International Humanitarian Law

88. The Prosecution maintains that the alleged perpetrator of crimes must be “sufficiently linked to a Party to the conflict” in order to come under the jurisdiction of Article 2 of the Statute. It further contends that “a showing of a demonstrable link between the VRS and the FRY or VJ” is sufficient. According to the Prosecution, “such a link could, at most, be proven by a showing of a general form of control. This legal standard finds support in the provisions of the Geneva Conventions, the jurisprudence of the trials that followed the Second World War, the Tribunal’s decisions, the writings of leading publicists, and other authorities.”

89. The Prosecution also contends that the determination of the conditions for considering whether Article 2 of the Statute is applicable must be made in accordance with the provisions of the Geneva Conventions and the relevant principles of international humanitarian law. By contrast, in its opinion the international law of State responsibility has no bearing on the requirements on grave breaches laid down in the relevant Geneva provisions. According to the Prosecution “it would lead to absurd results to apply the rules relating to State responsibility to assist in determining such a question” (i.e. whether certain armed forces are sufficiently related to a High Contracting Party).

90. Admittedly, the legal solution to the question under discussion might be found in the body of law that is more directly relevant to the question, namely, international humanitarian law. This corpus of rules and principles may indeed contain legal criteria for determining when armed forces fighting in an armed conflict which is prima facie internal may be regarded as acting on behalf of a foreign Power even if they do not formally possess the status of its organs. These criteria may differ from the standards laid down in general international law, that is in the law of State responsibility, for evaluating acts of individuals not having the status of State officials, but which are performed on behalf of a certain State.

91. The Appeals Chamber will therefore discuss the question at issue first from the viewpoint of international humanitarian law. In particular, the Appeals Chamber will consider the conditions under which armed forces fighting against the central authorities of the same State in which they live and operate may be deemed to act on behalf of another State. In other words, the Appeals Chamber will identify the conditions under which those forces may be assimilated to organs of a State other than that in whose territory they live and operate.

Drina River and their invasion of south-eastern Herzegovina from Serbia and Montenegro [...]”

105 Cross-Appellant’s Brief, para. 2.5.
106 See Judgement, paras. 607-608.
107 In addition to the evidence referred to in para. 570 of the Judgement, reference may also be made to the facts cited by Judge Li in his Separate Opinion to the Tadić Decision on Jurisdiction (para. 17-19), for example BH’s Declaration that it was at war with the FRY and the reports of various expert bodies suggesting that the conflict was international. Moreover, in three Rule 61 Decisions involving the conflict between the Serbs and the BH Government (Nikolić, Vukovar Hospital, and Karadžić and Mladic), Trial Chambers have found the conflict to have been an international armed conflict. (See “Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence”, The Prosecutor v. Dragan Nikolić], Case No.: IT-94-2-R61, Trial Chamber I, 20 October 1995, para 30 (Nikolić) (1995) II ICTY JR 738; “Review of Indictment Pursuant to Rule 61”, The Prosecutor v. Mile Mrksić et al., Case No.: IT-95-13-R61, Trial Chamber I, 3 April 1996, para 25; “Review of the Indictments Pursuant to Rule 61 of the Rules Procedure and Evidence”, The Prosecutor v. Radovan Karadžić] and Ratko Mladic], Case No.: IT-95-18-R61, Trial Chamber I, 11 July 1996, para 88).)
108 Cross-Appellant’s Brief, para. 2.31.
109 Ibid., para. 2.30.
110 Ibid.
111 Ibid., paras. 221-223.
A starting point for this discussion is provided by the criteria for lawful combatants laid down in the Third Geneva Convention of 1949. Under this Convention, militias or paramilitary groups or units may be regarded as legitimate combatants if they form "part of [the] armed forces" of a Party to the conflict (Article 4A(1)) or "belong [...]" to a "Party to the conflict" (Article 4A(2)) and satisfy the other four requirements provided for in Article 4A(2). It is clear that this provision is primarily directed toward establishing the requirements for the status of lawful combatants. Nevertheless, one of its logical consequences is that if, in an armed conflict, paramilitary units "belong" to a State other than the one against which they are fighting, the conflict is international and therefore serious violations of the Geneva Conventions may be classified as "grave breaches".

93. The content of the requirement of "belonging to a Party to the conflict" is far from clear or precise. The authoritative ICRC Commentary does not shed much light on the matter, for it too is rather vague. The rationale behind Article 4 was that, in the wake of World War II, it was universally agreed that States should be legally responsible for the conduct of irregular forces they sponsor. As the Israeli military court sitting in Ramallah rightly stated in a decision of 13 April 1999 in Kassem et al.: In view, however, of the experience of the two World Wars, the nations of the world found it necessary to add the fundamental requirement of the total responsibility of Governments

94. In other words, States have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces. In order for irregulars to qualify as lawful combatants, it appears that international rules and State practice therefore require control over them by a Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance of these irregulars vis-à-vis that Party to the conflict. These then may be regarded as the ingredients of the term "belonging to a Party to the conflict".

95. The Appeals Chamber thus considers that the Third Geneva Convention, by providing in Article 4 the requirement of "belonging to a Party to the conflict", implicitly refers to a test of control.

96. This conclusion, based on the letter and the spirit of the Geneva Conventions, is borne out by the entire logic of international humanitarian law. This body of law is not grounded on formalistic postulates. It is not based on the notion that only those who have the formal status of State organs, i.e., are members of the armed forces of a State, are duty bound both to refrain from engaging in violations of humanitarian law as well as - if they are in a position of authority - to prevent or punish the commission of such crimes. Rather, it is a realistic body of law, grounded on the notion of effectiveness and inspired by the aim of deterring deviation from its standards to the maximum extent possible. It follows, amongst other things, that humanitarian law holds accountable not only those having formal positions of authority but also those who wield de facto power as well as those who exercise control over perpetrators of serious violations of international humanitarian law. Hence, in

113 These four conditions are as follows: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognisable at a distance; (c) that of carrying arms openly; and (d) that of conducting their operations in accordance with the laws and customs of war.


115 Military Prosecutor v. Omar Mahmud Kassem et al., 42 International Law Reports 1971, p. 470, at p. 477. The court consequently held that the accused, members of the PLO captured by Israeli forces in the territories occupied by Israel, did not belong to any Party to the conflict. As the court put it (ibid., pp. 477-478): "In the present case [... n] Government with which we are in a state of war accepts responsibility for the acts of the Popular Front for the Liberation of Palestine. The Organisation itself, so far as we know, is not prepared to take orders from the Jordanian Government, witnessed by the fact that [the Organization] is illegal in Jordan and has been repeatedly harassed by the Jordanian authorities."
cases such as that currently under discussion, what is required for criminal responsibility to arise is some measure of control by a Party to the conflict over the perpetrators.\textsuperscript{116}

97. It is nevertheless imperative to specify what degree of authority or control must be wielded by a foreign State over armed forces fighting on its behalf in order to render international an armed conflict which is prima facie internal. Indeed, the legal consequences of the characterisation of the conflict as either internal or international are extremely important. Should the conflict eventually be classified as international, it would inter alia follow that a foreign State may in certain circumstances be held responsible for violations of international law perpetrated by the armed groups acting on its behalf.

(b) The Notion of Control: The Need for International Humanitarian Law to Be Supplemented by General International Rules Concerning the Criteria for Considering Individuals to be Acting as De Facto State Organs

98. International humanitarian law does not contain any criteria unique to this body of law for establishing when a group of individuals may be regarded as being under the control\textsuperscript{117} of a State, that is, as acting as de facto State officials. Consequently, it is necessary to determine when individuals who, formally speaking, are not military officials of a State may nevertheless be regarded as forming part of the armed forces of such a State.


\textquotedblleft It does not matter whether the person guilty of treatment contrary to the Convention is an agent of the Occupying Power or in the service of the occupied State what is important is to know where the decision leading to the unlawful act was made, where the intention was formed and the order given. If the unlawful act was committed at the instigation of the Occupying Power, then the Occupying Power is responsible if, on the other hand, it was the result of a truly independent decision on the part of the local authorities, the Occupying Power cannot be held responsible.\textquotedblright

\textsuperscript{117} The Appeals Chamber is aware of another approach taken to the question of imputability in the area of international humanitarian law. The Appeals Chamber is referring to the view whereby by virtue of Article 3 of the V\textsuperscript{th} Hague Convention of 1907 and Article 91 of Additional Protocol I, international humanitarian law establishes a special regime of State responsibility; under this lex specialis States are responsible for all acts committed by their \textquoteleft armed forces\textquoteright regardless of whether such forces acted as State officials or private persons. In other words, whether or not in an armed conflict individuals act in a private capacity, their acts are attributed to a State if such individuals are part of the \textquoteleft armed forces\textquoteright of that State. This opinion was authoritatively set forth by some members of the International Law Commission (\textquoteleft ILC\textquoteright) (Professor Reuter observed that \textquoteleft\textquoteleft it was now a principle of codified international law that States were responsible for all acts of their armed forces\textquoteright (Yearbook of the International Law Commission, 1975, vol. 1, p. 7, para 5)). Professor Ago stated that the V\textsuperscript{th} Hague Convention of 1907 \textquoteleft made provision for a veritable guarantee covering all damage that might be caused by armed forces, whether they had acted as organs or as private persons\textquoteright (Ibid., p. 16, para 4)). This view also has been forcefully advocated in the legal literature.

As is clear from the reasoning the Appeals Chamber sets out further on in the text of this judgement, even if this approach is adopted, the test of control as delineated by this Chamber remains indispensable for determining when individuals who, formally speaking, are not military officials of a State may nevertheless be regarded as forming part of the armed forces of such a State.

99. In dealing with the question of the legal conditions required for individuals to be considered as acting on behalf of a State, i.e., as de facto State officials, a high degree of control has been authoritatively suggested by the International Court of Justice in Nicaragua.

100. The issue brought before the International Court of Justice was whether a foreign State, the United States, because of its financing, organising, training, equipping and planning of the operations of organised military and paramilitary groups of Nicaraguan rebels (the so-called contras) in Nicaragua, was responsible for violations of international humanitarian law committed by those rebels. The Court held that a high degree of control was necessary for this to be the case. It required that (i) a Party not only be in effective control of a military or paramilitary group, but that (ii) the control be exercised with respect to the specific operation in the course of which breaches may have been committed.\textsuperscript{118} The Court went so far as to state that in order to establish that the United States was responsible for \textquoteleft acts contrary to human rights and humanitarian law\textquoteright allegedly perpetrated by the Nicaraguan contras, it was necessary to prove that the United States had specifically \textquoteleft directed or enforced\textquoteright the perpetration of those acts.\textsuperscript{119}

\textsuperscript{118} Nicaragua, para. 135. As the Court put it, there must be "effective control of the military or paramilitary operations in the course of which the alleged violations of international human rights and humanitarian law were committed."

\textsuperscript{119} Ibid., para. 115:

\textit{\textquoteleft\textquoteleft All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.\textquoteright\textquoteright}
101. As is apparent, and as was rightly stressed by Trial Chamber II in Rajic, and restated by the Prosecution in the instant case, the issue brought before the International Court of Justice revolved around State responsibility, what was at stake was not the criminal culpability of the contras for serious violations of international humanitarian law, but rather the question of whether or not the contras had acted as de facto organs of the United States on its request, thus generating the international responsibility of that State.

(ii) Two Preliminary Issues

102. Before examining whether the Nicaragua test is persuasive, the Appeals Chamber must deal with two preliminary matters which are material to our discussion in the instant case.

103. First, with a view to limiting the scope of the test at issue, the Prosecution has contended that the criterion for ascertaining State responsibility is different from that necessary for establishing individual criminal responsibility. In the former case one would have to decide whether serious violations of international humanitarian law by private individuals may be attributed to a State because those individuals acted as de facto State officials. In the latter case, one would have instead to establish whether a private individual may be held criminally responsible for serious violations of international humanitarian law amounting to “grave breaches”. Consequently, it has been asserted, the Nicaragua test, while valid within the context of State responsibility, is immaterial to the issue of individual criminal responsibility for “grave breaches”. The Appeals Chamber, with respect, does not share this view.

104. What is at issue is not the distinction between the two classes of responsibility. What is at issue is a preliminary question: that of the conditions on which under international law an individual may be held to act as a de facto organ of a State. Logically these conditions must be the same both in the case: (i) where the court’s task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating

the international responsibility of that State; and (ii) where the court must instead determine whether individuals are acting as de facto State officials, thereby rendering the conflict international and thus setting the necessary precondition for the “grave breaches” regime to apply. In both cases, what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather, the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international.

105. As stated above, international humanitarian law does not include legal criteria regarding imputability specific to this body of law. Reliance must therefore be had upon the criteria established by general rules on State responsibility.

106. The second preliminary issue relates to the interpretation of the judgement delivered by the International Court of Justice in Nicaragua. According to the Prosecution, in that case the Court applied “both an ‘agency’ test and an ‘effective control’ test.” In the opinion of the Prosecution, the Court first applied the “agency” test when considering whether the contras could be equated with United States officials for legal purposes, in order to determine whether the United States could incur responsibility in general for the acts of the contras. According to the Prosecution this test was one of dependency, on the one side, and control, on the other. In the opinion of the Prosecution, the Court then applied the “effective control” test to determine whether the United States could be held responsible for particular acts committed by the contras in violation of international humanitarian law. This test hinged on the issuance of specific directives or instructions concerning the breaches allegedly committed by the contras.

121 Cross-Appellant’s Brief, paras. 2.14-2.17.
122 Cross-Appellant’s Brief, paras. 2.16-2.17; Cross-Appellant’s Brief in Reply, para. 2.19.
123 Cross-Appellant’s Brief, para. 2.56.
124 According to the Prosecution (Cross-Appellant’s Brief, para. 2.58), the Court applied the “agency” test when considering whether the contras engaged the responsibility of the United States. The Prosecution has pointed out that in this regard the Court “did not refer to the need for effective control, but rather” – to quote the words of the Court cited by the Prosecution – “whether or not the relationship ?... was so much one of dependency on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government” (Nicaragua, para. 109).
125 Cross-Appellant’s Brief, paras. 2.57-2.58.
The Appeals Chamber considers that the Prosecution's submissions are based on a misreading of the judgement of the International Court of Justice and a misapprehension of the doctrine of State responsibility on which that judgement is grounded.

Clearly, the Court did use two tests, but in any case its tests were conceived in a manner different from what is contended by the Prosecution. Admittedly, in its judgement, the Court did not always follow a straight line of reasoning (whereas it would seem that a jurisprudential approach more consonant with customary international law was taken by Judge Ago in his Separate Opinion). In substance, however, the Court first evaluated those acts which, "in the submission of Nicaragua, involved the responsibility of the United States in a more direct manner". To this end it discussed two categories of individuals and their relative acts or transactions. First, the Court established whether the individuals concerned were officials of the United States, in which case their acts were indisputably imputable to the State. Almost in the same breath the Court then discussed the different question of whether individuals not having the status of United States officials but allegedly paid by and acting under the instructions of United States organs, could legally involve the responsibility of that State. These individuals were Latin American operatives, the so-called UCLAs ("Unilaterally Controlled Latino Assets"). The Court then moved to ascertain whether the responsibility of the United States could arise "in a less direct manner" (to borrow from the phraseology used by the Court). It therefore set out to determine whether other individuals, the so-called contras, although not formally officials of the United States, acted in such a way and were so closely linked to that State that their acts could be legally attributed to it.

It would therefore seem that in Nicaragua the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: the members of the Government administration or armed forces of the United States. With regard to these individuals, the Court clearly started from a basic assumption, which the same Court recently defined as "a well-established rule of international law", that a State incurs responsibility for acts in breach of international obligations committed by individuals who enjoy the status of organs under the national law of that State or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority. The other two categories embraced individuals who, by contrast, were not formally organs or agents of the State. There were, first, those individuals not having United States nationality (the UCLAs) who acted while being in the pay, and on the direct instructions and under the supervision of United States military or intelligence personnel, to carry out specific tasks such as the mining of Nicaraguan ports or oil installations. The Court held that their acts were imputable to the United States, either on account of the fact that, in addition to being paid by United States agents or officials, they had been given specific instructions by these agents or officials and had acted under their supervision, or because "agents of the United States" had "participated in the planning, direction, support and execution" of specific operations (such as the blowing up of underwater oil pipelines, attacks on oil and storage facilities, etc.).

The other category of individuals lacking the status of United States officials comprised the

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126 See Nicaragua, para. 75.
127 See the Advisory Opinion delivered by the ICJ on 29 April 1999 in Difference Relating to the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, para. 62.
128 See Nicaragua, paras. 387-390.
129 See Nicaragua, para. 75.
130 See Nicaragua, para. 75-80.
contras. It was primarily with regard to the contras that the Court asked itself on what conditions individuals without the status of State officials could nevertheless engage the responsibility of the United States as having acted as de facto State organs. It was with respect to the contras that the Court developed the doctrine of “effective control”.

110. At one stage in the judgement, when dealing with the contras, the Court appeared to lay down a “dependence and control” test:

What the Court has to determine at this point is whether or not the relationship of the contras to the United States government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States government, or as acting on behalf of that Government.

111. The Prosecution, and Judge McDonald in her dissent, argue that by these words the Court set out an “agency test”. According to them, the Court only resorted to the “effective control” standard once it had found no agency relationship between the contras and the United States to exist, so that the contras could not be considered organs of the United States. The Court, according to this argument, then considered whether specific operations of the contras could be attributed to the United States, and the standard it adopted for this attribution was the “effective control” standard.

112. The Appeals Chamber does not subscribe to this interpretation. Admittedly, in paragraph 115 of the Nicaragua judgement, where “effective control” is mentioned, it is unclear whether the Court is propounding “effective control” as an alternative test to that of “dependence and control” set out earlier in paragraph 109, or is instead spelling out the requirements of the same test. The Appeals Chamber believes that the latter is the correct interpretation. In Nicaragua, in addition to the “agency” test (properly construed, as shall be seen in the next paragraph, as being designed to ascertain whether or not an individual has the formal status of a State official), the Court propounded only the “effective control” test. This conclusion is supported by the evidently stringent application of the “effective control” test which the Court used in finding that the acts of the contras were not imputable to the United States.

113. In contrast with what the Prosecution, in following Judge McDonald’s dissent, has termed the “agency” test, the Court’s agency test amounts instead to a determination of the status of an individual as an organ or official (or member of a public entity exercising certain elements of governmental authority) within the domestic legal order of a particular State. In this regard, it would seem that the Separate Opinion of Judge Ago relied upon by Judge McDonald and the Prosecution does not actually support their interpretation.

114. On close scrutiny, and although the distinctions made by the Court might at first sight seem somewhat unclear, the contention is warranted that in the event, the Court essentially set out two tests of State responsibility: (i) responsibility arising out of unlawful acts of State officials; and (ii) responsibility generated by acts performed by private individuals acting as de facto State organs. For State responsibility to arise under (ii), the Court required that private individuals not only be paid or financed by a State, and their action be coordinated or supervised by this State, but also that the State should issue specific instructions concerning the commission of the unlawful acts in question. Applying this test, the Court concluded that in the circumstances of the case it was met as far as the UCLAs were concerned (who were paid and supervised by the United States and in addition acted under their specific instructions). By contrast, the test was not met as far as the contras were concerned: in their case no specific instructions had been issued by the United States concerning the violations of international humanitarian law which they had allegedly perpetrated.

134 Separate and Dissenting Opinion of Judge McDonald, para. 25.
135 Cross-Appellant’s Brief, para. 2.58.
136 See the Separate Opinion of Judge Ago in Nicaragua, paras. 14-17. Judge Ago correctly stated that it fell to the Court first to establish whether the individuals at issue had the status of national officials or officials of national public entities and then, where necessary, to consider whether, lacking this status, they acted instead as de facto State officials, thereby engaging the responsibility of the State. For the purpose of establishing the international responsibility of a State, he therefore identified two broad classes of individuals: those having the status of officials of the State or of its autonomous bodies, and those lacking such a status. Clearly, for Judge Ago the issue of deciding whether an individual had acted as a de facto State organ arose only with respect to the latter category. Furthermore, Judge Ago characterised the CIA and the so-called UCLAs in a manner different from the Court (see para. 19).
(ii) The Grounds On Which the Nicaragua Test Does Not Seem To Be Persuasive

115. The "effective control" test enunciated by the International Court of Justice was regarded as correct and upheld by Trial Chamber II in the judgement. The Appeals Chamber, with respect, does not hold the Nicaragua test to be persuasive. There are two grounds supporting this conclusion.

a. The Nicaragua Test Would Not Seem to Be Consonant With the Logic of the Law of State Responsibility

116. A first ground on which the Nicaragua test as such may be held to be unconvincing is based on the very logic of the entire system of international law on State responsibility.

117. The principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria. These principles are reflected in Article 8 of the Draft on State Responsibility adopted on first reading by the United Nations International Law Commission and, even more clearly, in the text of the same provisions as provisionally adopted in 1998 by the ILC Drafting Committee.

138. Article 8 of the Draft provides:

"The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

a) it is established that such person or group of persons was in fact acting on behalf of that State or
b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority" (U.N. Doc. A/35/10, para. 34, in Yearbook of the International Law Commission, 1980, vol. II (2)).


The text of Article 8 as provisionally adopted by the ILC Drafting Committee in 1998 provides:

"The conduct of a person or group of persons shall be considered as an act of State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct" (A/CN.4/L.569, p. 3).

118. One situation is the case of a private individual who is engaged by a State to perform some specific illegal acts in the territory of another State (for instance, kidnapping a State official, murdering a dignitary or a high-ranking State official, blowing up a power station or, especially in times of war, carrying out acts of sabotage). In such a case, it would be necessary to show that the State issued specific instructions concerning the commission of the breach in order to prove - if only by necessary implication - that the individual acted as a de facto State agent. Alternatively it would be necessary to show that the State has publicly given retroactive approval to the action of that individual. A generic authority over the individual would not be sufficient to engage the international responsibility of the State. A similar situation may come about when an unorganised group of individuals commits acts contrary to international law. For these acts to be attributed to the State it would seem necessary to prove not only that the State exercised some measure of authority over those individuals but also that it issued specific instructions to them concerning the performance of the acts at issue, or that it explicitly publicly endorsed those acts.

119. To these situations another one may be added, which arises when a State entrusts a private individual (or group of individuals) with the specific task of performing lawful actions on its behalf, but then the individuals, in discharging that task, breach an international obligation of the State (for instance, a private detective is requested by State authorities to protect a senior foreign diplomat but he instead seriously mistreats him while performing that task). In this case, by analogy with the rules concerning State responsibility for acts of State officials acting ultra vires, it can be held that the State incurs responsibility on account of its specific request to the private individual or individuals to discharge a task on its behalf.
One should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.

This kind of State control over a military group and the fact that the State is held responsible for acts performed by a group independently of any State instructions, or even contrary to instructions, to some extent equates the group with State organs proper. Under the rules of State responsibility, as restated in Article 10 of the Draft on State Responsibility as provisionally adopted by the International Law Commission, a State is internationally accountable for ultra vires acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.\textsuperscript{140}

The same logic should apply to the situation under discussion. As noted above, the situation of an organised group is different from that of a single private individual performing a specific act on behalf of a State. In the case of an organised group, the group normally engages in a series of activities. If it is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, whether or not each of them was specifically imposed, requested or directed by the State. To a large extent the wise words used by the United States-Mexico General Claims Commission in the Youmans case with regard to State responsibility for acts of State military officials should hold true for acts of organised groups over which a State exercises overall control.\textsuperscript{141}

What has just been said should not, of course, blur the necessary distinction between the various legal situations described. In the case envisaged by Article 10 of the Draft on State Responsibility (as well as in the situation envisaged in Article 7 of the same Draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State's public entity. In the case under discussion here, that of organised groups, State responsibility is instead the objective corollary of the overall control exercised by the State over the group. Despite these legal differences, the fact

\textsuperscript{139} Article 10, as adopted on first reading by the International Law Commission, provides:

"The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity". (Report of the International Law Commission on the work of its thirty-second session (5 May – 25 July 1988), U.N. Doc. A/35/10, p.31). See also the First Report on State Responsibility by the Special Rapporteur J. Crawford, U.N. Doc. A/CN.490/Add.5, pp. 29-31. The text of article 10, as provisionally adopted in 1998 by the ILC Drafting Committee provides:

"The conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, such organ or entity having acted in that capacity, shall be considered an act of the State under international law even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise" (U.N. Doc. A/CN.4/L.569, p. 3).

\textsuperscript{140} This sort of "objective" State responsibility also arises in a different case. Under the relevant rules on State responsibility as laid down in Article 7 of the International Law Commission Draft, a State incurs responsibility for acts of organs of its territorial governmental entities (regions, Länder, provinces, member States of Federal States, etc.) even if under the national Constitution these organs enjoy broad independence or complete autonomy. (See footnote 130 above).

\textsuperscript{141} The United States claimed that Mexico was responsible for the killing of United States nationals at the hands of a mob with the participation of Mexican soldiers. Mexico objected that, even if it were assumed that the soldiers were guilty of such participation, Mexico should not be held responsible for the wrongful acts of the soldiers, on the grounds that they had been ordered by the highest official in the locality to protect American citizens. Instead of carrying out these orders, however, they had acted in violation of them, in consequence of which the Americans had been killed. The Mexico/United States General Claims Commission dismissed the Mexican objection and held Mexico responsible. It stated that if international law were not to impute to a State wrongful acts committed by its officials outside their competence or contrary to instructions, "it would follow that no wrongful acts committed by an official could be considered as acts for which his Government could be held liable". It then added that: "[s]oldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no [international State] liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts" (Thomas H. Youmans (U.S.A.) v. United Mexican States, Decision of 23 November 1926, Reports of International Arbitral Awards, vol. IV, p. 116).
nevertheless remains that international law renders any State responsible for acts in breach of international law performed (i) by individuals having the formal status of organs of a State (and this occurs even when these organs act ultra vires or contra legem), or (ii) by individuals who make up organised groups subject to the State's control. International law does so regardless of whether or not the State has issued specific instructions to those individuals. Clearly, the rationale behind this legal regulation is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility.

b. The Nicaragua Test is at Variance With Judicial and State Practice

124. There is a second ground—of a similarly general nature as the one just expounded—on which the Nicaragua test as such may be held to be unpersuasive. This ground is determinative of the issue. The "effective control" test propounded by the International Court of Justice as an exclusive and all-embracing test is at variance with international judicial and State practice: such practice has envisaged State responsibility in circumstances where a lower degree of control than that demanded by the Nicaragua test was exercised. In short, as shall be seen, this practice has upheld the Nicaragua test with regard to individuals or unorganised groups of individuals acting on behalf of States. By contrast, it has applied a different test with regard to military or paramilitary groups.

125. In cases dealing with members of military or paramilitary groups, courts have clearly departed from the notion of "effective control" set out by the International Court of Justice (i.e., control that extends to the issuance of specific instructions concerning the various activities of the individuals in question). Thus, for instance, in the Stephens case, the Mexico-United States General Claims Commission attributed to Mexico acts committed during a civil war by a member of the Mexican "irregular auxiliary" of the army, which among other things lacked both uniforms and insignia. In this case the Commission did not enquire as to whether or not specific instructions had been issued concerning the killing of the United States national by that guard.

126. Similarly, in the Kenneth P. Yeager case, the Iran-United States Claims Tribunal ("Claims Tribunal") held that wrongful acts of the Iranian "revolutionary guards" or "revolutionary Komitehs" vis-à-vis American nationals carried out between 13 and 17 February 1979 were attributable to Iran (the Claims Tribunal referred in particular to the fact that two members of the "Guards" had forced the Americans to leave their house in order to depart from Iran, that the Americans had then been kept inside the Hilton Hotel for three days while the "Guards" manned the exits, and had subsequently been searched at the airport by other "Guards" who had taken their money). Iran, the respondent State, had argued that the conduct of those "Guards" was not attributable to it. It had admitted that "revolutionary guards and Komitehs personnel were engaged in the maintenance of law and order from January 1979 to months after February 1979 as government police forces rapidly lost control over the situation." It had asserted, however, that "these revolutionaries did not operate under the name 'Revolutionary Komitehs' or 'Revolutionary Guards', and that they were not affiliated with the Provisional Government." In other words, the "Guards" were "not authentic"; hence, their conduct was not attributable to Iran. The Claims Tribunal considered instead that the acts were attributable to Iran because the "Guards" or "Komitehs" had acted as de facto State organs of Iran. On this point the Claims Tribunal noted that:

[many of Ayatollah Khomeini's supporters were organised in local revolutionary committees, so-called Komitehs, which often emerged from the 'neighbourhood committees' formed before the victory of the revolution. These Komitehs served as local security forces in the immediate aftermath of the revolution. It is reported that they made arrests, confiscated property, and took people to prisons [...]

Under international law Iran cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary 'Komitehs' or 'Guards' and at the same time deny responsibility for wrongful acts committed by them."

127. With specific reference to the action of the "Guards" in the case at issue, the Claims Tribunal emphasised that the two guards who had forced the Americans to leave their house

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144 Ibid., para. 23.
145 Ibid., para. 37.
146 Ibid., paras 36, 45. The Claims Tribunal went on to note that: "[w]hile there were complaints about a lack of discipline among the numerous Komitehs, Ayatollah Khomeini stood behind they, and the Komitehs, in general, were loyal to him and the clergy. Soon after the victory of the Revolution, the Komitehs, contrary to other groups, obtained a firm position within the State structure and were eventually conferred a permanent place in the State budget" (ibid., para. 39; emphasis added).

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were “dressed in everyday clothes, but wear distinctive armbands indicating association with the new Government, and were armed with rifles.”

147 With reference to those who had searched the Americans at the airport, the Claims Tribunal stressed that “they were performing the functions of customs, immigration and security officers.” Clearly, those “Guards” made up organised armed groups performing de facto official functions. They were therefore different from the Iranian militants who had stormed the United States Embassy in Tehran on 4 November 1979, with regard to which the International Court of Justice noted that after the invasion of the Embassy they described themselves as “Muslim Student Followers of the Imam’s Policy.”

148 Be that as it may, what is notable is that the Iran–United States Claims Tribunal did not enquire as to whether specific instructions had been issued to the “Guards” with regard to the forced expulsion of Americans. The Claims Tribunal took the same stance in other cases.


150 The Claims Tribunal stated the following: “The Tribunal finds sufficient evidence in the record to establish a presumption that revolutionary ‘Komitehs’ or ‘Guards’ after 11 February 1979 were acting in fact on behalf of the new government, or at least exercising elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object. Under those circumstances, and for the kind of measures involved here, the Respondent has the burden of coming forward with evidence showing that members of ‘Komitehs’ or ‘Guards’ were in fact not acting on its behalf, or were not exercising elements of government authority, or that it could not control them”. (Kenneth P. Haeger v. Islamic Republic of Iran, 17 Iran-U.S. Claims Tribunal Reports, 1987, vol. IV, p. 92, at para. 43).

151 The Claims Tribunal went on to say: “[…] Rather, the evidence suggests that the new government, despite occasional complaints about a lack of discipline, stood behind them [the Komitehs]. The Tribunal is persuaded, therefore, that the revolutionary ‘Komitehs’ or ‘Guards’ involved in this Case were acting for Iran.” (para. 44).

152 The Tribunal then concluded that: “[n]or has the Respondent established that it could not control the revolutionary ‘Komitehs’ or ‘Guards’ in this operation [namely, forcing foreigners to leave the country]. Because the new government accepted their activity in principle and their role in the maintenance of public security, calls for more discipline phrased in general rather than specific terms, do not meet the standard of control required in order to effectively prevent these groups from committing wrongful acts against United States nationals. Under international law Iran cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary ‘Komitehs’ or ‘Guards’ and at the same time deny responsibility for wrongful acts committed by them” (para. 45).

153 See William L. Pereira Associates, Iran v. Islamic Republic of Iran, Award No. 116-1-3, 5 Iran-U.S. Claims Tribunal Reports, 1994, p. 198 at p. 226. See also Arthur Young and Company v. Islamic Republic of Iran, Telecommunications Company of Iran, Social Security Organization of Iran, Award No. 338-484-1, 17 Iran-U.S. Claims Tribunal Reports, 1987, p. 245). Here the Claims Tribunal found that in the circumstances of the case Iran was not responsible because there was no causal link between the action of the revolutionary guards and the alleged breach of international law. However, the Claims Tribunal held that otherwise Iran might have incurred international responsibility for acts of “armed men wearing patches on their pockets identifying them as members of the revolutionary guards” (para. 53). A similar stand was taken in Schott v. Islamic Republic of Iran, Award No. 474-268-1, 24 Iran-U.S. Claims Tribunal Reports, 1990, p. 203 at para. 59.

154 In Daley, on the other hand, the Claims Tribunal held Iran responsible for the expropriation of a car, for five Iranian “Revolutionary Guards” who had taken the car were “in army-type uniforms” at the entrance of a hotel which had come “under the control of Revolutionary Guards” a few days before (Daley v. Islamic Republic of Iran, Award No. 360-1-514-1, 18 Iran-U.S. Claims Tribunal Reports, 1988, 232 at paras. 39-20).

155 In its judgement, the Court stated the following on the point at issue here: “It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the ‘TRNC’. It is obvious from the large number of troops engaged in active duties in northern Cyprus […] that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the ‘TRNC’ […]” (ibid., para. 56).

156 2 SIE B/96 (unpublished typescript; kindly provided by the German Embassy to the Netherlands and on file with the International Tribunal’s Library).
international. The court did not enquire as to whether or not the specific acts committed by the accused or other Bosnian Serbs had been ordered by the authorities of the FYR.

130. Precisely what measure of State control does international law require for organised military groups? Judging from international case law and State practice, it would seem that for such control to come about, it is not sufficient for the group to be financially or even militarily assisted by a State. This proposition is confirmed by the international practice concerning national liberation movements. Although some States provided movements such as the PLO, SWAPO or the ANC with a territorial base or with economic and military assistance (short of sending their own troops to aid them), other States, including those against which these movements were fighting, did not attribute international responsibility for the acts of the movements to the assisting States. Nicaragua also supports this proposition, since the United States, although it aided the contras financially, and otherwise, was not held responsible for their acts (whereas on account of this financial and other assistance to the contras, the United States was held by the Court to be responsible for breaching the principle of non-intervention as well as its obligation not to use force against another State). This was clearly a case of responsibility for the acts of its own organs.

131. In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State yields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.

132. It should be added that courts have taken a different approach with regard to individuals or groups not organised into military structures. With regard to such individuals or groups, courts have not considered an overall or general level of control to be sufficient, but have instead insisted upon specific instructions or directives aimed at the commission of specific acts, or have required public approval of those acts following their commission.

The Appeals Chamber will mention, first of all, the United States Diplomatic and Consular Staff in Tehran case. There, the International Court of Justice rightly found that the Iranian students (who did not comprise an organised armed group) who had stormed the United States embassy and taken hostage 52 United States nationals, had not initially acted...
on behalf of Iran, for the Iranian authorities had not specifically instructed them to perform those acts. Nevertheless, Iran was held internationally responsible for failing to prevent the attack on the United States’ diplomatic premises and subsequently to put an end to that attack. Later on, the Iranian authorities formally approved and endorsed the occupation of the Embassy and the detention of the United States nationals by the militants and even went so far as to order the students not to put an end to that occupation. At this stage, according to the Court, the militants became de facto agents of the Iranian State and their acts became internationally attributable to that State.

134. The same approach was adopted in 1986 by the International Court itself in Nicaragua with regard to the UCLA’s (which the Court defined as “persons of the nationality of unidentified Latin American countries”). For specific internationally wrongful acts of these “persons” to be imputable to the United States, it was deemed necessary by the Court that these persons not only be paid by United States organs but also act “on the instructions” of those organs (in addition to their being supervised and receiving logistical support from them).

135. Similar views were propounded in 1987 by the Iran-United States Claims Tribunal in Short. Iran was not held internationally responsible for the allegedly wrongful expulsion of the claimant. The Claims Tribunal found that the Iranian “revolutionaries” (armed but not comprising an organised group) who ordered the claimant’s departure from Iran were not State organs, nor did Ayatollah Khomeini’s declarations amount to specific incitement to the “revolutionaries” to expel foreigners.

136. It should be added that State practice also seems to clearly support the approach under discussion.

137. In sum, the Appeals Chamber holds the view that international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a de facto organ of the State. The extent of the requisite State control varies. Where the question at issue is whether a single private individual or a group that is not militarily organised has acted as a de facto State organ when performing a

160 The Court stated the following: “No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognised ‘agents’ or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation. The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of the State” (ibid., p. 30, para 58; emphasis added).
161 Ibid., pp. 30-33 (paras. 60-68).
162 The Court stated the following: “The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was compiled with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State and the decision to perpetuate them translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible[…]” (ibid., p. 35, para 74; emphasis added).
163 See Nicaragua, para 75.
164 Ibid., para 80.

165 Alfred W. Short v. Islamic Republic of Iran, Award No. 312-11335-3, 16 Iran-U.S. Claims Tribunal Reports 1987, p. 76.
166 After finding that the acts of the revolutionaries could not be attributed to Iran, the Claims Tribunal noted the following: “The Claimant’s reliance on the declarations made by the leader of the Revolution, Ayatollah Khomeini, and other spokesmen of the revolutionary movement, also lack the essential ingredient as being the cause for the Claimant’s departure in circumstances amounting to an expulsion.” (ibid., para 35).
167 For examples of State practice apparently adopting this approach to the question of attribution, see for instance the relevant documents in the Cesare Rossi case (an Italian antifascist staying in Switzerland who was lured by two other Italians acting on behalf of the Italian authorities into crossing the border with Italy, where he was arrested: see 1 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 1929, pp. 280-294; the Jacob Salomon case (a German national was kidnapped by another German national in Switzerland and taken to Germany: see the relevant documents mentioned in 29 American Journal of International Law 1935, pp. 502-507, 36 American Journal of International Law 1936, pp.123-124). See further the Sabotage cases decided by the United States-Germany Mixed Claims Commission & High Valley Railroad Co., Agency of Canadian Can and Foundry Co., Ltd., and various underwriters (United States) v. Germany, Reports of International Arbitral Awards, vol. VIII, pp. 84 ff. (especially pp. 84-87) and pp. 225 ff. (especially 457-460).
168 In these cases, in July 1916 some individuals, at the request of the German authorities intent on bringing about sabotage in the United States, had set fire to a terminal in New York harbour and to a plant of a company in New Jersey. Mention can also be made of the Eichmann case (Attorney-General of the Government of Israel v. Adolf Eichmann, 36 International Law Reports 1968, pp. 277-344): see for instance Security Council resolution 4349 of 23 June 1960 and the debates in the Security Council; see in particular the statements of Argentina (SCOR, 865th Meeting of 22 June 1960, paras. 25-27), of Israel (SCOR of the 866th Meeting on 22 June 1960, para. 41), of Italy (SCOR of the 867th Meeting of 23 June 1960, para. 32-34), of Ecuador (ibid., para. 47-49), of Tunisia (ibid., para. 73) and of Ceylon (SCOR of the 868th Meeting of 23 June 1960, paras. 12-13).
specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved ex post facto by the State at issue. By contrast, control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.

138. Of course, if, as in Nicaragua, the controlling State is not the territorial State where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions.

139. The same substantial evidence is required when, although the State in question is the territorial State where armed clashes occur, the general situation is one of turmoil, civil strife and weakened State authority.

140. Where the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold.

141. It should be added that international law does not provide only for a test of overall control applying to armed groups and that of specific instructions (or subsequent public approval), applying to single individuals or militarily unorganised groups. The Appeals Chamber holds the view that international law also embraces a third test. This test is the assimilation of individuals to State organs on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions). Such a test is best illustrated by reference to certain cases that deserve to be mentioned, if only briefly.168

142. The first case is Joseph Kramer et al. (also called the Belsen case), brought before a British military court sitting at Luneburg (Germany).169 The Defendants comprised not only some German staff members of the Belsen and Auschwitz concentration camps but also a number of camp inmates of Polish nationality and an Austrian Jew "elevated by the camp administrators to positions of authority over the other internees". They were interalia accused of murder and other offences against the camp inmates. According to the official report on this case:

In meeting the argument that no war crime could be committed by Poles against other Allied nationals, the Prosecutor said that by identifying themselves with the authorities the Polish accused had made themselves as much responsible as the S.S. themselves. Perhaps it could be claimed that by the same process they could be regarded as having approximated to membership of the armed forces of Germany.170

143. Another case is more recent. This is the judgement handed down by the Dutch Court of Cassation on 29 May 1978 in the Menten case.171 Menten, a Dutch national who was not formally a member of the German forces, had been accused of war crimes and crimes against humanity for having killed a number of civilians, mostly Jews, in Poland, on

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In many of these cases, the need for specific instructions by the State concerning the commission of the specific act with which the individual had been charged, or the ex post facto public endorsement of that act, can be inferred from the facts of the case.

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168 These cases, although they concern war crimes (the notion of "grave breaches" had not yet come into existence at the time), are nevertheless relevant to our discussion. Indeed, they provide useful indications concerning the conditions on which civilians may be assimilated to State officials.


170 Ibid., p. 152 (emphasis added) (the Austrian civilian, Schlomowicz, was not found guilty). See also ibid., p. 109. Most of the accused civilians were found guilty and sentenced to imprisonment. It is clear from this case that according to the court, by acting as de facto members of the German apparatus running the Belsen concentration camp, the Polish civilians could be assimilated to German State officials.
behalf of German special forces (SD or Einsatzkommandos). The court found\textsuperscript{172} that Menten in fact behaved as a member of the German forces and consequently was criminally liable for these crimes.\textsuperscript{173}

144. Other cases also prove that private individuals acting within the framework of, or in connection with, armed forces, or in collusion with State authorities may be regarded as de facto State organs.\textsuperscript{174} In these cases it follows that the acts of such individuals are attributed to the State, as far as State responsibility is concerned, and may also generate individual criminal responsibility.\textsuperscript{175}

\textsuperscript{172} Public Prosecutor v. Menten, 75 International Law Reports 1987, pp. 331 ff.

\textsuperscript{173} Menten was sentenced to ten years’ imprisonment by the District Court of Rotterdam (Judgement of 9 July 1980, ibid., p. 361). It should be pointed out that the Dutch Court of Cassation had been obliged to investigate whether Menten was “in military, state or public service of or with the enemy” as this was an ingredient of the relevant Dutch law (ibid., p. 346). The Appeals Chamber holds, however, that the Menten case is in line with the rules of general international law concerning the assimilation of private individuals to State officials.

\textsuperscript{174} See, e.g., the Daley case, where the Iran U.S. Claims Tribunal attributed international responsibility to Iran for acts of five Iranian “Revolutionary Guards” in “army type uniforms” (18 Iran-U.S. Claims Tribunal Reports, 1988, p. 238, at para. 19).

\textsuperscript{175} In this connection mention can be made of the Stoclet case brought before the European Commission of Human Rights. A German national fled from Germany to Switzerland and then to France to avoid arrest in Germany for alleged tax offences. He was then tricked into re-entering Germany by a police informant and was arrested. He then claimed before the European Commission of Human Rights that he had been arrested in violation of Article 5(1) of the ECHR. The Commission held that: “[i]n the case of collusion between State authorities, i.e. any State official irrespective of his hierarchical position, and a private individual for the purpose of returning against his will a person living abroad, without consent of his State of residence, to the territory where he is prosecuted, the High Contracting Party concerned incurs responsibility for the acts of the private individual who de facto acts on its behalf. The Commission considers that such circumstances may render this person’s arrest and detention unlawful within the meaning of article 5(1) of the Convention” (Stoclet v. Federal Republic of Germany, Eur. Court H. R., judgement of 19 March 1991, Series A, no 199, para. 168 (Opinion of the Commission).

4. The Factual Relationship Between the Bosnian Serb Army and the Army of the FRY

146. The Appeals Chamber has concluded that in general international law, three tests may be applied for determining whether an individual is acting as a de facto State organ. In the case of individuals forming part of armed forces or military units, as in the case of any other hierarchically organised group, the test is that of overall control by the State.

147. It now falls to the Appeals Chamber to establish whether, in the circumstances of the case, the Yugoslav Army exercised in 1992 the requisite measure of control over the Bosnian Serb Army. The answer must be in the affirmative.

148. The Appeals Chamber does not see any ground for overturning the factual findings made in this case by the Trial Chamber and relies on the facts as stated in the Judgement. The majority and Judge McDonald do not appear to disagree on the facts, which Judge McDonald also takes as stated in the Judgement.

149. Since, however, the Appeals Chamber considers that the Trial Chamber applied an incorrect standard in evaluating the legal consequences of the relationship between the FRY...
and Bosnian Serb forces, the Appeals Chamber must now apply its foregoing analysis to the facts and draw the necessary legal conclusions therefrom.

150. The Trial Chamber clearly found that even after 19 May 1992, the command structure of the JNA did not change after it was renamed and redesignated as the VJ. Furthermore, and more importantly, it is apparent from the decision of the Trial Chamber and more particularly from the evidence as evaluated by Judge McDonald in her Separate and Dissenting Opinion, that even after that date the VJ continued to control the Bosnian Serb Army in Bosnia and Herzegovina, that is the VRS. The VJ controlled the political and military objectives, as well as the military operations, of the VRS. Two "factors" emphasised in the Judgement need to be recalled: first, "the transfer to the 1st Krajina Corps, as with other units of the VRS, of former JNA Officers who were not of Bosnian Serb extraction from their equivalent postings in the relevant VRS unit's JNA predecessor" and second, with respect to the VRS, "the continuing payment of salaries, to Bosnian Serb and non-Bosnian Serb officers alike, by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)". According to the Trial Chamber, these two factors did not amount to, or were not indicative of, effective control by Belgrade over the Bosnian Serb forces. The Appeals Chamber shares instead the views set out by Judge McDonald in her Separate and Dissenting Opinion, whereby these two factors, in addition to others shown by the Prosecution, did indicate control.

151. What emerges from the facts which are both uncontested by the Trial Chamber and mentioned by Judge McDonald (concerning the command and control structure that persisted after the redesignation of the VRS and the continuous payment of salaries to officers of the Bosnian Serb army by the FRY) is that the VRS and VJ did not, after May 1992, comprise two separate armies in any genuine sense. This is further evidenced by the following factors:

(i) The re-organization of the JNA and the change of name did not point to an alteration of military objectives and strategies. The command structure of the JNA and the re-designation of a part of the JNA as the VRS, while undertaken to create the appearance of compliance with international demands, was in fact designed to ensure that a large number of ethnic Serb armed forces were retained in Bosnia and Herzegovina.

(ii) Over and above the extensive financial, logistical and other assistance and support which were acknowledged to have been provided by the VJ to the VRS, it was also uncontested by the Trial Chamber that as a creation of the FRY/VJ, the structures and ranks of the VJ and VRS were identical, and also that the FRY/VJ directed and supervised the activities and operations of the VRS. As a result, the VRS reflected the strategies and tactics devised by the FRY/JNA/VJ.

177 Judgement, para. 601.
178 Ibid., paras. 601-602.
179 As Judge McDonald noted:
"[the creation of the VRS on 19 May 1992] was a legal fiction. The only changes made after the 15 May 1992 Security Council resolution were the transfer of troops, the establishment of a Main Staff of the VRS, a change in the name of the military organisation and individual units, and a change in the insignia. There remained the same weapons, the same equipment, the same officers, the same commanders, largely the same troops, the same logistics centres, the same suppliers, the same infrastructure, the same source of payments, the same goals and mission, the same tactics, and the same operations. Importantly, the objective remained the same. [...] The VRS clearly continued to operate as an integrated and instrumental part of the Serbian war effort. [...] The VRS Main Staff, the members of which had all been generals in the JNA and many of whom were appointed to their positions by the JNA General Staff, maintained direct communications with the VJ General Staff via a communications link from Belgrade. [...] Moreover, the VRS continued to receive supplies from the same suppliers in the Federal Republic of Yugoslavia (Serbia and Montenegro) who had contracted with the JNA, although the requests after 19 May 1992 went through the Chief of Staff of the VRS who then sent them on to Belgrade." (Separate and Dissenting Opinion of Judge McDonald, paras. 7-8).

181 In the light of the demand of the Security Council on 15 May 1992 that all interference from outside Bosnia and Herzegovina by units of the JNA cease immediately, the Trial Chamber characterised the dilemma posed for the JNA by increasing international scrutiny from 1991 onwards in terms of the way in which the JNA could: "be converted into an army of what remained of Yugoslavia, namely Serbia and Montenegro, yet continue to retain in Serb hands control of substantial portions of Bosnia and Herzegovina while appearing to comply with international demands that the JNA quit Bosnia and Herzegovina. [...] The solution as far as Serbia was concerned was found by transferring to Bosnia and Herzegovina all Bosnian Serb soldiers serving in JNA units elsewhere while sending all non-Bosnian soldiers out of Bosnia and Herzegovina. This ensured seeming compliance with international demands while effectively retaining large ethnic Serb armed forces in Bosnia and Herzegovina" (Judgement, paras. 113-114).

Additionally, the U.N. Secretary-General, in commenting on its purported withdrawal from Bosnia and Herzegovina, concluded in his report of 3 December 1992 that '[t]hough JNA has withdrawn completely from Bosnia and Herzegovina, former members of Bosnian Serb origin have been left behind with their equipment and constitute the Army of the Serb Republic' (Report of the Secretary-General concerning the situation in Bosnia and Herzegovina, U.N. Doc. A/47/747, para. 10).

182 Judgement, para. 115:
"The VRS was in effect a product of the dissolution of the old JNA and the withdrawal of its non-Bosnian elements into Serbia. However, most, if not all, of the commanding officers of units of the old JNA who found themselves stationed with their units in Bosnia and Herzegovina on 18 May 1992, nearly all Serbs, remained in command of those units throughout 1992 and 1993 [...]." See further ibid., para. 590: "The attack on Kozarac was carried out by elements of an army Corps based in Banja Luka. This Corps, previously a Corps of the old JNA, became part of the VRS and was renamed the 'Banja Luka' or '1st Krajina' Corps after 19 May 1992 but retained the same commander." See also ibid., paras. 114-116, 118-121, 594.
(iii) Elements of the FRY/VJ continued to directly intervene in the conflict in Bosnia and Herzegovina after 19 May 1992, and were fighting with the VRS and providing critical combat support to the VRS. While an armed conflict of an international character was held to have existed only up until 19 May 1992, the Trial Chamber did nevertheless accept that thereafter “active elements” of the FRY’s armed forces, the Yugoslav Army (VJ), continued to be involved in an armed conflict with Bosnia and Herzegovina. Much de facto continuity, in terms of the ongoing hostilities, was therefore observable and there seems to have been little factual basis for the Trial Chamber’s finding that by 19 May 1992, the FRY/VJ had lost control over the VRS.

(iv) JNA military operations under the command of Belgrade that had already commenced by 19 May 1992 did not cease immediately and, from a purely practical point of view, it is highly unlikely that they would have been able to cease overnight in any event.

The creation of the VRS by the FRY/VJ, therefore, did not indicate an intention by Belgrade to relinquish the control held by the FRY/VJ over the Bosnian Serb army. To the contrary, in fact, the establishment of the VRS was undertaken to continue the pursuit of the FRY’s own political and military objectives, and the evidence demonstrates that these objectives were implemented by military and political operations that were controlled by Belgrade and the JNA/VJ. There is no evidence to suggest that these objectives changed on 19 May 1992.

152. Taken together, these factors suggest that the relationship between the VJ and VRS cannot be characterised as one of merely coordinating political and military activities. Even if less explicit forms of command over military operations were practised and adopted in response to increased international scrutiny, the link between the VJ and VRS clearly went far beyond mere coordination or cooperation between allies and in effect, the renamed Bosnian Serb army still comprised one army under the command of the General Staff of the VJ in Belgrade. It was apparent that even after 19 May 1992 the Bosnian Serb army continued to act in pursuance of the military goals formulated in Belgrade. In this regard, clear evidence of a chain of military command between Belgrade and Pale was presented to the Trial Chamber and the Trial Chamber accepted that the VRS Main Staff had links and regular communications with Belgrade. In spite of this, and although the Trial Chamber acknowledged the possibility that certain members of the VRS may have been specifically...
charged by the FRY authorities to commit particular acts or to carry out particular tasks of some kind, it concluded that “without evidence of orders having been received from Belgrade which circumvented or overrode the authority of the Corps Commander, those acts cannot be said to have been carried out ‘on behalf of’ the Federal Republic of Yugoslavia (Serbia and Montenegro).” 190

153. The Appeals Chamber holds that to have required proof of specific orders circumventing or overriding superior orders not only applies the wrong test but is also questionable in this context. A distinguishing feature of the VJ and the VRS was that they possessed shared military objectives. As a result, it is inherently unlikely that orders from Belgrade circumventing or overriding the authority of local Corps commanders would have ever been necessary as these forces were of the same mind; a point that appears to have been virtually conceded by the Trial Chamber. 191

154. Furthermore, the Trial Chamber, noting that the pay of all 1st Krajina Corps officers and presumably of all senior VRS Commanders as former JNA officers continued to be received from Belgrade after 19 May 1992, acknowledged that a possible conclusion with regard to individuals, is that payment could well “be equated with control”. 192 The Trial Chamber nevertheless dismissed such continuity of command structures, logistical organization, strategy and tactics as being “as much matters of convenience as military necessity” and noted that such evidence “establishes nothing more than the potential for control inherent in the relationship of dependency which such financing produced.” 193 In the Appeals Chamber’s view, however, and while the evidence may not have disclosed the exact details of how the VRS related to the main command in Belgrade, it is nevertheless important to bear in mind that a clear intention existed to mask the commanding role of the FRY; a point which was amply demonstrated by the Prosecution. 194 In the view of the Appeals Chamber, the finding of the Trial Chamber that the relationship between the FRY/VJ and VRS amounted to cooperation and coordination rather than overall control suffered from having taken largely at face value those features which had been put in place intentionally by Belgrade to make it seem as if their links with Pale were as partners acting only in cooperation with each other. Such an approach is not only flawed in the specific circumstances of this case, but also potentially harmful in the generality of cases. Undue emphasis upon the ostensible structures and overt declarations of the belligerents, as opposed to a nuanced analysis of the reality of their relationship, may tacitly suggest to groups who are in de facto control of military forces that responsibility for the acts of such forces can be evaded merely by resort to a superficial restructuring of such forces or by a facile declaration that the reconstituted forces are henceforth independent of their erstwhile sponsors.

155. Finally, it must be noted that the Trial Chamber found the various forms of assistance provided to the armed forces of the Republika Srpska by the Government of the FRY to have been “crucial” to the pursuit of their activities and that “those forces were almost completely dependent on the supplies of the VJ to carry out offensive operations.” 195 Despite this finding, the Trial Chamber declined to make a finding of overall control. Much was made of the lack of concrete evidence of specific instructions. Proof of “effective” control was also held to be insufficient, 196 on the grounds, once again, that the Trial Chamber lacked explicit evidence of direct instructions having been issued from

communications link for everyday use was established and maintained between VRS Main Staff Headquarters and the VJ Main Staff in Belgrade […] 198

190 The Trial Chamber noted that: “It is clear from the evidence that the military and political objectives of the Republika Srpska and of the Federal Republic of Yugoslavia (Serbia and Montenegro) were largely complementary. […] The political leadership of the Republika Srpska and their senior military commanders no doubt considered the success of the overall Serbian war effort as a prerequisite to their stated political aim of joining with Serbia and Montenegro as part of a Greater Serbia. […] In that sense, there was little need for the VJ and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) to attempt to exercise any real degree of control over, as distinct from coordination with, the VRS. So long as the Republika Srpska and the VRS remained committed to the shared strategic objectives of the war, and the Main Staffs of the two armies coordinated their activities at the highest levels, it was sufficient for the Federal Republic of Yugoslavia (Serbia and Montenegro) and the VJ to provide the VRS with logistical supplies and, where necessary, to supplement the Bosnian elements of the VRS officer corps with non-Bosnian VJ or former JNA officers, to ensure that this process was continued” (ibid., paras. 603-604).

191 Ibid, para 601.

192 Ibid, para 602. On this point, the Trial Chamber noted, further, that: “given that the Federal Republic of Yugoslavia (Serbia and Montenegro) had taken responsibility for the financing of the VRS, most of which consisted of former JNA soldiers and officers, it is a fact not to be wondered at that such financing would not only include payments to soldiers and officers but that existing administrative mechanisms for financing those soldiers and their operations would be relied on after 19 May 1992 […]” (ibid.).

193 Ibid.

194 See in this regard the testimony of the expert witness Dr. James Gow, transcript of hearing in The Prosecutor v. Duško Tadić, Case No.: IT-94-1-T, 10 May 1996, pp. 308-309; ibid., 13 May 1996, pp. 330-338.

195 Judgment, paras. 605.

196 It was deemed insufficient by the Trial Chamber that the VJ “made use of the potential for control inherent in that dependence”, or was otherwise given effective control over those forces […]” (ibid.; emphasis added).
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As the Appeals Chamber has already pointed out, international law does not require

However, this finding was based upon the Trial Chamber having applied the

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unified delegation would negotiate at Dayton. This delegation would consist of six persons,
three from the FRY and three from the Republika Srpska. The Delegation was to be chaired

between 1992 and 1995) the FRY wielded general control over the Republika Srpska in the

political and military spheres can be found in the process of negotiation and conclusion of

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The Trial Chamber noted that:
“the Federal Republic of Yugoslavia (Serbia and Montenegro), through the dependence of the VRS on
the supply of matériel by the VJ, had the capability to exercise great influence and perhaps even control
over the VRS … ?Howeverg there is no evidence on which this Trial Chamber can conclude that the
Federal Republic of Yugoslavia (Serbia and Montenegro) and the VJ ever directed or, for that matter,
ever felt the need to attempt to direct, the actual military operations of the VRS …” (ibid.).

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shaped by, and thus reflect, the actual power structures which persisted in Bosnia and

was ongoing during the key period under examination. To the extent that its contours were

political process leading up to Dayton commenced soon after the outbreak of hostilities and

continuous response to the shifting military and political fortunes of these forces. The

military forces wielding actual power on the ground (whether de facto or de iure) and a

culmination of a long process. This process necessitated a dialogue with all political and

issue of control in this period. Nevertheless, the Dayton-Paris Accord may be seen as the

Bosnian Serb and FRY armies after May 1992 and hence it is by no means decisive as to the

1995 cannot constitute direct proof of the nature of the link that existed between the

the Dayton-Paris Accord of 1995. Of course, the conclusion of the Dayton-Paris Accord in

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See Report of the Co-Chairmen of the Steering Committee of the International Conference on the Former
Yugoslavia on the establishment and commencement of operations of an International Conference on the
Former Yugoslavia Mission to the Federal Republic of Yugoslavia (Serbia and Montenegro), S/1994/1074,
19 September 1996, p. 3, where it is noted that as of 4 August 1994, the Government of the Federal Republic
of Yugoslavia (Serbia and Montenegro) ordered, inter alia, the breaking off of political and economic
relations with the Republika Srpska and the closure of the border between the Republika Srpska and the FRY
to all transport towards the Republika Srpska, except food, clothing and medicine. International observers
were deployed to monitor compliance with these measures, and it was reported by the Co-Chairmen that the
Government of the FRY appeared to be “meeting its commitment to close the border between the Federal
Republic of Yugoslavia (Serbia and Montenegro) and the areas of the Republic of Bosnia and Herzegovina
under the control of the Bosnian Serb forces.” (Report of the Co-Chairmen of the Steering Committee of the
International Conference on the Former Yugoslavia on the state of implementation of the border closure
measures taken by the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro),
199
As outlined below, this process culminated in the agreement of the Republika Srpska to be represented at
the Dayton conference by the FRY (below, at paragraph 159). This appears to have been in spite of intense
opposition, within the Republika Srpska, to the peace settlements proposed by the international community, as
is evidenced by the overwhelming rejection by the Bosnian Serbs of the international community’s peace plan
for Bosnia and Herzegovina in a referendum which took place in Bosnian Serb-held territory on 27 – 28
August 1994 (See Report of the Secretary-General on the Work of the Organization, UNGAOR, 49th sess.,
supp. no. 1 (A/49/1), 2 September 1994, p. 95).

Srpska and referred to in the preamble of the Dayton-Paris Accord, it was provided that a

By an agreement concluded on 29 August 1995 between the FRY and the Republika

An ex post facto confirmation of the fact that over the years (and in any event

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159.

Accord that are of relevance to this inquiry.

of the activities and operations of the VRS. This sort of control is sufficient for the

The Appeals Chamber will now turn to examine the specific features of the Dayton

control continued to be exercised over the Bosnian Serb army by the FRY army thereafter.

and the VJ were ostensibly delinked, and may also assist the evaluation of whether or not

command and control structure that existed over the Bosnian Serb army at the time the VRS

FRY.199 Thus, the Dayton-Paris Accord may indirectly shed light upon the realities of the

Republika Srpska realised that it had little choice but to succumb to the authority of the

Republika Srpska by the FRY, for, soon after this cessation of support from the FRY, the

“delinking” served to emphasise the high degree of overall control exercised over the

former had misgivings about the authorities in the latter is not insignificant. 198 Indeed, this

FRY appeared to cut off its support to the Republika Srpska because the leadership of the

Herzegovina up to 1995, and including May 1992. The fact that from 4 August 1994 the

insight into the political, strategic and military realities which prevailed in Bosnia and

158.

purposes of the legal criteria required by international law.

70
Herzegovina over the course of the conflict, the Dayton-Paris Accord provides a particular

importantly, in terms of participation in the general direction, coordination and supervision

not only in financial, logistical and other assistance and support, but also, and more

has been made by the Prosecution before the Trial Chamber. Such control manifested itself

show that this Army exercised overall control over the Bosnian Serb Forces. This showing

Prijedor) had been specifically ordered or planned by the Yugoslav Army. It is sufficient to

which were the object of the trial (the attacks on Kozarac and more generally within opština

not necessary to show that those specific operations carried out by the Bosnian Serb forces

acting as de facto organs of that State. It follows that in the circumstances of the case it was

by a foreign State to certain armed forces in order for these armed forces to be held to be

that the particular acts in question should be the subject of specific instructions or directives

156.

wrong test.

Belgrade.

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by President Milos (evi), who would have a casting vote in case of divided votes. Later on, when it came to the signing of the various agreements made at Dayton, it emerged again that it was the FRY that in many respects acted as the international subject wielding authority over the Republika Srpska. The General Framework Agreement, by which Bosnia and Herzegovina, Croatia and the FRY endorsed the various annexed Agreements and undertook to respect and promote the fulfilment of their provisions, was signed by President Milos (evi). This signature had the effect of guaranteeing respect for these commitments by the Republika Srpska. Furthermore, by a letter of 21 November 1995 addressed to various States (the United States, Russia, Germany, France and the United Kingdom), the FRY pledged to take “all necessary steps, consistent with the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, to ensure that the Republika Srpska fully respects and complies with the provisions” of the Agreement on Military Aspects of the Peace Settlement (Annex 1A to the Dayton-Paris Accord). In addition, the letter by which the Republika Srpska undertook to comply with the aforementioned Agreement was signed on 21 November 1995 by the Foreign Minister of the FRY, Mr. Milutinovi (e). For the Republika Srpska, 202

All this would seem to bear out the proposition that in actual fact, at least between 1992 and 1995, overall political and military authority over the Republika Srpska was held by the FRY (control in this context included participation in the planning and supervision of ongoing military operations). Indeed, the fact that it was the FRY that had the final say regarding the undertaking of international commitments by the Republika Srpska, and in addition pledged, at the end of the conflict, to ensure respect for those international commitments by the Republika Srpska, confirms that (i) during the armed conflict the FRY exercised control over that entity, and (ii) such control persisted until the end of the conflict.

This agreement stipulated that the delegation of the Republika Srpska was to be “headed by the President of the Republic of Serbia Mr. Slobodan Milosevic” (Article 2). Pursuant to this agreement, the leadership of the Republika Srpska agreed “to adopt the binding decisions of the delegation, regarding the Peace Plan, in plenary sessions, by simple majority. In the case of divided votes, the vote of the President, Mr. Slobodan Milosevic, shall be decisive” (Article 3). That Mr. Milosevic was head of the joint delegation was confirmed by Mr. Milosevic himself in his letter of 21 November 1995 to President Izetbegovic (Agreement on file with the International Tribunal’s Library). 203

This letter had been signed by Mr. Milutinovic, Foreign Minister of the FRY, following a request of 20 November 1995 of the three members of the “Delegation of Republika Srpska” to Mr. Milosevic. 204


161. This would therefore constitute yet another (albeit indirect) indication of the subordinate role played vis-à-vis the FRY by the Republika Srpska and its officials in the aforementioned period, including 1992.

162. The Appeals Chamber therefore concludes that, for the period material to this case (1992), the armed forces of the Republika Srpska were to be regarded as acting under the overall control of and on behalf of the FRY. Hence, even after 19 May 1992 the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an international armed conflict.

5. The Status of the Victims

163. Having established that in the circumstances of the case the first of the two requirements set out in Article 2 of the Statute for the grave breaches provisions to be applicable, namely, that the armed conflict be international, was fulfilled, the Appeals Chamber now turns to the second requirement, that is, whether the victims of the alleged offences were “protected persons”.

(a) The Relevant Rules

164. Article 4(1) of Geneva Convention IV (protection of civilians), applicable to the case at issue, defines “protected persons” - hence possible victims of grave breaches - as those “in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. In other words, subject to the provisions of Article 4(2), the Convention intends to protect civilians (in enemy territory, occupied territory or the combat zone) who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons. In addition, as is apparent from the preparatory work, the

203 Article 4(2) of Geneva Convention IV provides as follows:

“National of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a non-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”.

204 The preparatory works of the Convention suggests an intent on the part of the drafters to extend its application, inter alia, to persons having the nationality of a Party to the conflict who have been expelled by that Party or who have fled abroad, acquiring the status of refugees. If these persons subsequently happen to
Convention also intends to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection (consider, for instance, a situation similar to that of German Jews who had fled to France before 1940, and thereafter found themselves in the hands of German forces occupying French territory).

165. Thus already in 1949 the legal bond of nationality was not regarded as crucial and allowance was made for special cases. In the aforementioned case of refugees, the lack of both allegiance to a State and diplomatic protection by this State was regarded as more important than the formal link of nationality. In the cases provided for in Article 4(2), in addition to nationality, account was taken of the existence or non-existence of diplomatic protection: nationals of a neutral State or a co-belligerent State are not treated as “protected persons” unless they are deprived of or do not enjoy diplomatic protection. In other words, those nationals are not “protected persons” as long as they benefit from the normal diplomatic protection of their State; when they lose it or in any event do not enjoy it, the Convention automatically grants them the status of “protected persons”.

166. This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention’s object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.

(b) Factual Findings

167. In the instant case the Bosnian Serbs, including the Appellant, arguably had the same nationality as the victims, that is, they were nationals of Bosnia and Herzegovina. However, it has been shown above that the Bosnian Serb forces acted as de facto organs of another State, namely, the FRY. Thus the requirements set out in Article 4 of Geneva Convention IV are met: the victims were “protected persons” as they found themselves in the hands of armed forces of a State of which they were not nationals.

168. It might be argued that before 6 October 1992, when a “Citizenship Act” was passed in Bosnia and Herzegovina, the nationals of the FRY had the same nationality as the citizens of Bosnia and Herzegovina, namely the nationality of the Socialist Federal Republic of Yugoslavia. Even assuming that this proposition is correct, the position would not alter from a legal point of view. As the Appeals Chamber has stated above, Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. Its primary purpose is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlative to them, to the allegiance and control, of the State in whose hands they may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.

169. Hence, even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable. Indeed, the victims did not owe allegiance to (and did not receive the diplomatic protection of) the State (the FRY) on whose behalf the Bosnian Serb armed forces had been fighting.
C. Conclusion

170. It follows from the above that the Trial Chamber erred in so far as it acquitted the Appellant on the sole ground that the grave breaches regime of the Geneva Conventions of 1949 did not apply.

171. The Appeals Chamber accordingly finds that the Appellant was guilty of grave breaches of the Geneva Conventions on Counts 8, 9, 12, 15, 21 and 32.

V. THE SECOND GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE FINDING OF INSUFFICIENT EVIDENCE OF PARTICIPATION IN THE KILLINGS IN JASKI

A. Submissions of the Parties

1. The Prosecution case

172. The Prosecution’s second ground of cross-appeal is:

The Trial Chamber, at page 132 para 373 [of the Judgement], erred when it decided that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part of the killing of the five men or any of them, from the village of Jaski.  

173. The Prosecution fully accepts the findings of fact of the Trial Chamber, but makes two submissions. First, it submits that, on the basis of the said facts, the Trial Chamber has misdirected itself on the application of the law on the standard of proof beyond reasonable doubt. Secondly, it contends that in determining that the Prosecution did not meet the burden of proof, the Trial Chamber misdirected itself on the application of the common purpose doctrine.

174. In relation to the first error, the Prosecution submits that the only reasonable conclusion to be drawn from the facts found by the Trial Chamber is that of guilt. The test for proof beyond reasonable doubt is that “the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt.” According to the Prosecution, the Trial Chamber’s hypothesis that it was a “distinct possibility that the killing of the five victims may have been the act of a quite distinct group of armed men” is not fair or

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206 Cross-Appellant’s Brief, para. 3.6.
207 T. 169 (20 April 1999).
208 T. 170 (20 April 1999).
209 T. 176 (20 April 1999).
210 Cross-Appellant’s Brief, para 3.12.
211 Judgement, para. 373.
rational.\textsuperscript{212} The use of such terms as "bare possibility"\textsuperscript{213} and "could suggest"\textsuperscript{214} indicates the misapplication of the test of proof beyond reasonable doubt.\textsuperscript{215}

175. As to the second error, the Prosecution submits that the gist of the common purpose doctrine is that if a person knowingly participates in a criminal activity with others, he or she will be liable for all illegal acts that are natural and probable consequences of that common purpose.\textsuperscript{216} The Trial Chamber found that the Appellant's participation in the attack on Sivci and Jaski\={i} was part of the armed conflict in the territory of Prijedor municipality between May and December 1992. A central aspect of the attack was a policy to rid the region of the non-Serb population by committing inhumane and violent acts against them in order to achieve the creation of a Greater Serbia. According to the Prosecution, the only conclusion reasonably open from all the evidence is that the killing of the five victims was entirely predictable as part of the natural and probable consequences of the attack on the villages of Sivci and Jaski\={i} on 14 June 1992.\textsuperscript{217} It is the Prosecution's submission that this policy of ethnic cleansing was carried out throughout opština Prijedor against non-Serbs by various illegal means, including killings.\textsuperscript{218} In this regard, the Appellant's actions and presence did directly and substantially assist that policy. It follows that, regardless of which member or members of the Serb forces actually killed the five victims, the Appellant should have been found guilty under Article 7(1) of the Statute.\textsuperscript{219}

2. The Defence Case

176. The Defence submits that, in light of its finding that nobody was killed in Sivci on 14 June 1992, the Trial Chamber correctly found that it was a possibility that the five victims in Jaski\={i} were killed by another, distinct group of armed men, especially as nothing is known as to who shot the victims or in what circumstances.\textsuperscript{220} Accordingly, the standard of proof beyond reasonable doubt was correctly applied.\textsuperscript{221}

177. In relation to the Prosecution's common purpose submission, the Defence contends that it would have to be shown that the common purpose in which the Appellant allegedly took part included killing as opposed to ethnic cleansing by other means.\textsuperscript{222} On the basis of the distinction between the operation in Jaski\={i} and the operation in Sivci where nobody was killed, the Trial Chamber was correct in concluding that it was not possible to find beyond reasonable doubt that the Appellant was involved in a criminal enterprise with the design of killing.\textsuperscript{223}

B. Discussion

1. The Armed Group to Which the Appellant Belonged Committed the Killings

178. The Trial Chamber found, amongst other facts, that on 14 June 1992, the Appellant, with other armed men, participated in the removal of men, who had been separated from women and children, from the village of Sivci to the Keraterm camp, and also participated in the calling-out of residents, the separation of men from women and children, and the beating and taking away of men in the village of Jaski\={i}.\textsuperscript{224} It also found that five men were killed in the latter village.\textsuperscript{225}

179. In support of its finding that there was no proof beyond reasonable doubt that the Appellant had any part in the killing of the five men, the Trial Chamber stated:

The fact that there was no killing at Sivci could suggest that the killing of villagers was not a planned part of this particular episode of ethnic cleansing of the two villages, in

\textsuperscript{212} Skeleton Argument of the Prosecution, para. 42.
\textsuperscript{213} Judgement, para. 373: "The bare possibility that the deaths of the Jaski\={i} villagers were the result of encountering a part of that large force would be enough [...] to prevent satisfaction beyond reasonable doubt that the accused was involved in those deaths."
\textsuperscript{214} Ibid., para. 373: "The fact that there was no killing at Sivci could suggest that the killing of villagers was not a planned part of this particular episode of ethnic cleansing of the two villages, in which the accused took part [...]."
\textsuperscript{215} T. 172 (20 April 1999).
\textsuperscript{216} Cross-Appellant's Brief, para. 3.29.
\textsuperscript{217} Ibid., paras. 3.8-3.10; Defence's Skeleton Argument on the Cross-Appeal, para. 2(c).
\textsuperscript{218} Ibid., paras. 3.24, 3.27.
\textsuperscript{219} Cross-Appellant's Brief, paras. 3.27-3.29; T. 179-180 (20 April 1999).
\textsuperscript{220} Cross-Appellant's Brief, para. 3.29.
\textsuperscript{221} Defence's Substituted Response to Cross-Appellant's Brief, paras. 3.8-3.10; Defence's Skeleton Argument on the Cross-Appeal, para. 2(c).
\textsuperscript{222} T. 251 (21 April 1999).
\textsuperscript{223} Defence's Substituted Response to Cross-Appellant's Brief, para. 3.19; Defence's Skeleton Argument on the Cross-Appeal, para. 2(d).
\textsuperscript{224} Ibid., paras. 3.19, 3.21; Defence's Skeleton Argument on the Cross-Appeal, para. 2(d).
\textsuperscript{225} Ibid., paras. 3.9-3.10; Defence's Skeleton Argument on the Cross-Appeal, para. 2(d).
which the accused took part; it is accordingly a distinct possibility that it may have been
the act of a quite distinct group of armed men, or the unauthorized and unforeseen act of
one of the force that entered Sivci, for which the accused cannot be held responsible, that
cause their death.\textsuperscript{226}

180. In relation to the possibility that the killings may have been carried out by another
armed group, the Trial Chamber found the following. An armed group of men, including
the Appellant, entered Jaski.\textsuperscript{i} The group separated most of the men from the rest of
the villagers, beat and then forcibly removed the men to an unknown location. The Appellant
played an active role in the activities of this violent group. The group fired shots as they
approached and left the village.

181. It has already been pointed out that the Trial Chamber also found that five men were
found killed in Jaski\textsuperscript{i} after the armed group had left; four of them were shot in the head.
Nothing else as to who might have killed them or in what circumstances was known. The Trial
Chamber referred, however, to the large force of Serb soldiers, of which the Appellant
was a member, that invaded the nearby village of Sivci on the same day, without any
villager there being killed. It then stated that the:

[b]are possibility that the deaths of the Jaski\textsuperscript{i} villagers were the result of encountering a
part of that large force of Serb soldiers that invaded Sivci would be enough, in the state
of the evidence, or rather, the lack of it, relating to their deaths, to preclude satisfaction
beyond reasonable doubt that the accused was involved in those deaths.\textsuperscript{227}

182. The Trial Chamber did not allude to any witness suggesting that another group of
armed men might have been responsible for the killing of the five men. In fact, none of the
witnesses suggested anything to that effect.

183. In the light of the facts found by the Trial Chamber, the Appeals Chamber holds
that, in relation to the possibility that another armed group killed the five men, the Trial
Chamber misapplied the test of proof beyond reasonable doubt. On the facts found, the
only reasonable conclusion the Trial Chamber could have drawn is that the armed group to
which the Appellant belonged killed the five men in Jaski.

184. In the light of the above finding, the Appeals Chamber need not consider the second
possibility advanced by the Trial Chamber, namely, that the killing of the five men in
Jaski\textsuperscript{i} could have been the “unauthorized and unforeseen act of one of the force that
entered Sivci”.

2. The Individual Criminal Responsibility of the Appellant for the Killings

(a) Article 7(1) of the Statute and the Notion of Common Purpose

185. The question therefore arises whether under international criminal law the Appellant
can be held criminally responsible for the killing of the five men from Jaski even though
there is no evidence that he personally killed any of them. The two central issues are:

(i) whether the acts of one person can give rise to the criminal culpability of another
where both participate in the execution of a common criminal plan; and

(ii) what degree of \textit{mens rea} is required in such a case.

186. The basic assumption must be that in international law as much as in national
systems, the foundation of criminal responsibility is the principle of personal culpability:
obody may be held criminally responsible for acts or transactions in which he has not
personally engaged or in some other way participated (\textit{nulla poena sine culpa}). In national
legal systems this principle is laid down in Constitutions,\textsuperscript{228} in laws,\textsuperscript{229} or in judicial
decisions.\textsuperscript{230} In international criminal law the principle is laid down, \textit{inter alia}, in Article
7(1) of the Statute of the International Tribunal which states that:

\begin{quote}
A person who planned, instigated, ordered, committed or otherwise aided and abetted in
the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the
present Statute, shall be individually responsible for the crime. (emphasis added)
\end{quote}

This provision is aptly explained by the Report of the Secretary-General on the
establishment of the International Tribunal, which states the following:

\begin{quote}
An example is provided by Article 27 para. 1 of the Italian Constitution ("La responsibilità penale è
personale.") ("Criminal responsibility is personal.") (unofficial translation).
\end{quote}

\begin{quote}
See for instance Article 121-1 of the French Code pénaux ("Nul n'est responsable pénalement que de son
propre fait.") para. 4 of the Austrian Straftatbestau ("Sträfbar ist nur, wer schuldhaft handelt") ("Only he
who is culpable may be punished") (unofficial translation).
\end{quote}

This rather basic proposition is usually tacitly assumed rather than explicitly acknowledged. For an
example of where it was expressly stated, however, see, for Great Britain, R. v. Dalloway (1847) 3 Cox CC
273. See also the various decisions of the German Constitutional Court, e.g., BverfGE 6, 388 (1993) and 50,
125 (1933), as well as decisions of the German Federal Court of Justice (e.g., BGHSt 2, 194 (200)).

\textsuperscript{228} See the various decisions of the German Constitutional Court, e.g., BverfGE 6, 388 (1993) and 50,
125 (1933), as well as decisions of the German Federal Court of Justice (e.g., BGHSt 2, 194 (200)).
An important element in relation to the competence ratione personae (personal jurisdiction) of the International Tribunal is the principle of individual criminal responsibility. As noted above, the Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.\textsuperscript{231}

Article 7(1) also sets out the parameters of personal criminal responsibility under the Statute. Any act falling under one of the five categories contained in the provision may entail the criminal responsibility of the perpetrator or whoever has participated in the crime in one of the ways specified in the same provision of the Statute.

187. Bearing in mind the preceding general propositions, it must be ascertained whether criminal responsibility for participating in a common criminal purpose falls within the ambit of Article 7(1) of the Statute.

188. This provision covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission of one of the crimes envisaged in Articles 2, 3, 4, or 5 of the Statute might also occur through participation in the realisation of a common design or purpose.

189. An interpretation of the Statute based on its object and purpose leads to the conclusion that the Statute intends to extend the jurisdiction of the International Tribunal to all those “responsible for serious violations of international humanitarian law” committed in the former Yugoslavia (Article 1). As is apparent from the wording of both Article 7(1) and the provisions setting forth the crimes over which the International Tribunal has jurisdiction (Articles 2 to 5), such responsibility for serious violations of international humanitarian law is not limited merely to those who actually carry out the actus reus of the enumerated crimes but appears to extend also to other offenders (see in particular Article 2, which refers to committing or ordering to be committed grave breaches of the Geneva Conventions and Article 4 which sets forth various types of offences in relation to genocide, including conspiracy, incitement, attempt and complicity).

190. It should be noted that this notion is spelled out in the Secretary General’s Report, according to which:

The Secretary-General believes that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.\textsuperscript{232}

Thus, all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions, which are specified below.

191. The above interpretation is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.

192. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all


\textsuperscript{232}Ibid., para 54 (emphasis added).
those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understatement the degree of their criminal responsibility.

193. This interpretation, based on the Statute and the inherent characteristics of many crimes perpetrated in wartime, warrants the conclusion that international criminal responsibility embraces actions perpetrated by a community of persons in furtherance of a common criminal design. It may also be noted that – as will be mentioned below – international criminal rules on common purpose are substantially rooted in, and to a large extent reflect, the position taken by many States of the world in their national legal systems.

194. However, the Tribunal’s Statute does not specify (either expressly or by implication) the objective and subjective elements (actus reus and mens rea) of this category of collective criminality. To identify these elements one must turn to customary international law. Customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation.

195. Many post-World War II cases concerning war crimes proceed upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group. Close scrutiny of the relevant case law shows that broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality.

196. The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effect the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.

197. With regard to this category, reference can be made to the Georg Otto Sandrock et al. case (also known as the Almelo Trial).233 There a British court found that three Germans who had killed a British prisoner of war were guilty under the doctrine of “common enterprise”. It was clear that they all had had the intention of killing the British soldier, although each of them played a different role. They therefore were all co-perpetrators of the crime of murder.234 Similarly, in the Hoelzer et al. case, brought before a Canadian military court, in his summing up the Judge Advocate spoke of a “common enterprise” with regard to the murder of a Canadian prisoner of war by three Germans, and emphasised that the three all knew that the purpose of taking the Canadian to a particular area was to kill him.235

198. Another instance of co-perpetratorship of this nature is provided by the case of Jepsen and others.236 A British court had to pronounce upon the responsibility of Jepsen (one of several accused) for the deaths of concentration camp internees who, in the few weeks leading up to the capitulation of Germany in 1945, were in transit to another concentration camp. In this regard, the Prosecutor submitted (and this was not rebutted by the Judge Advocate) that:

[If Jepsen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act]237

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234 The accused were German non-commissioned officers who had executed a British prisoner of war and a Dutch civilian in the house of whom the British airman was hiding. On the occasion of each execution on one of the Germans had fired the lethal shot, another had given the order and a third had remained by the car used to go to a wood on the outskirts of the Dutch town of Almelo, to prevent people from coming near while the shooting took place. The Prosecutor stated that “the analogy which seemed to him most fitting in this case was that of a gangster crime, every member of the gang being equally responsible with the man who fired the actual shot” (ibid., p. 37). In his summing up the Judge Advocate pointed out that:

“There is no dispute, as I understand it, that all three [Germans] knew what they were doing and had gone there for the very purpose of having this officer killed; and, as you know, if people are all present together at the same time taking part in a common enterprise which is unlawful, each one in their (sic) own way assisting the common purpose of all, they are all equally guilty in point of law” (see official transcript, Public Record Office, London, WO 235/8, p. 70; copy on file with the International Tribunal’s Library; the report in the UNWCC, vol. I, p. 40 is slightly different).

All the accused were found guilty, but those who had ordered the shooting or carried out the shooting were sentenced to death, whereas the others were sentenced to fifteen years imprisonment (ibid., p. 43).
235 Hoelzer et al., Canadian Military Court, Aurich, Germany, Record of Proceedings 25 March-6 April 1946, vol. I, pp. 341, 347, 349 (RCAF Binder 181.009 (D2474); copy on file with the International Tribunal’s Library).
236 Trial of Gustav Alfred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany (13-23 August, 1946), judgement of 24 August 1946 (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal’s Library).
237 Ibid., p. 241.
In a similar vein, the Judge Advocate noted in Schonfeld that:

if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them in carrying out that purpose, kills a man, it is murder in all who are present […] provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly. 238

199.  It can be noted that some cases appear broadly to link the notion of common purpose to that of causation. In this regard, the Ponzano case, 239 which concerned the killing of four British prisoners of war in violation of the rules of warfare, can be mentioned. Here, the Judge Advocate adopted the approach suggested by the Prosecutor, 240 and stressed:

[...] the requirement that an accused, before he can be found guilty, must have been concerned in the offence. [To be concerned in the commission of a criminal offence [...] does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation [...]. In other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means [...].]

Further on, the Judge Advocate submitted that while the defendant's involvement in the criminal acts must form a link in the chain of causation, it was not necessary that his participation be a sine qua non, or that the offence would not have occurred but for his participation. 242 Consonant with the twin requirements of criminal responsibility under this category, however, the Judge Advocate stressed the necessity of knowledge on the part of the accused as to the intended purpose of the criminal enterprise. 243

238 Trial of Franz Schonfeld and others, British Military Court, Essen, June 11th-26th, 1945, UNWCC, vol. XI, p. 68 (summa Judge Advocate).


240 The Prosecutor had stated the following:

"It is an opening principle of English law, and indeed of all law, that a man is responsible for his acts and is to intend the natural and normal consequences of his acts and if these men [...] set the machinery in motion by which the four men were shot, then they are guilty of the crime of killing these men. It does not – it never has been essential for any one of these men to have taken those soldiers out themselves, and to have personally executed them or personally dispatched them. That is not at all necessary; all that is necessary to make them responsible is that they set the machinery in motion which ended in the volleys that killed the four men we are concerned with" (ibid., p. 4).

241 I bid, summing up of the Judge Advocate, p. 7.

242 In this regard, the Judge Advocate noted that: "[o]f course, it is quite possible that it [the criminal offence] might have taken place in the absence of all these accused here, but that does not mean the same thing as saying [...] that the accused could not be a chain in the link of causation [...]" (ibid., pp. 7-8).

243 In particular, it was held that in order to be "concerned in the commission of a criminal offence," it was necessary to prove:

244 A final case worthy of mention with regard to this first category is the Einsatzgruppen case.

"that when he did take part in it he knew the intended purpose of it. If any accused were to have given an order for this execution, believing that it was a perfectly legal execution, that these four soldiers had been sentenced to death by a properly constituted court and that therefore an order for the execution was no more than an order to carry out the decision of the court, then that accused would not be guilty because he would not have any guilty knowledge. But where [...] a person was in fact concerned, and [...] he knew the intended purpose of these acts, then that accused is guilty of the offence in the charge" (ibid., p. 8).

The requisite knowledge of each participant, even if deducible only by implication, was also stressed in the Stalag Luft III case, Trial of Max Ernst Friedrich Gustav Wielen and Others, Proceedings of the Military Court at Hamburg, (3-3 July 1947) (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal's Library), p. 711. (unofficial translation).

"everybody, particularly every policeman of whatever sort it may be, knew quite well that there had been a mass escape of prisoners of war on the 25th March 1944 [...] such that every policeman knew that prisoners of war were at large. I think that is important to remember, and particularly with regard to some of the minor members of the Gestapo who are charged before you that is important to remember because they may say they did not know who these people were. They may say they did not know they were escaped prisoners of war but [in fact] they all knew [...]" (ibid., p. 276).

Furthermore, in two cases concerning an accused's participation in the Kristallnacht riots, the Supreme Court for the British zone stressed that it was not required that the accused knew about the rioting in the entire Reich. It was sufficient that he was aware of the local action, that he approved it, and that he wanted it "as his own" (unofficial translation). The fact that the accused participated consciously in the arbitrary measures directed against the Jews was sufficient to hold him responsible for a crime against humanity (Case no. 66, Strassenf. Urteil vom 8 Febr. 1949 gegen S. STS 120/48, p. 284-290, 286, vol. II). See also Case no. 17, vol. I, 94-98, 96, where the Supreme Court held that it was irrelevant that the scale of ill-treatment, deportation and destruction that happened in other parts of the country on that night were not undertaken in this village. It sufficed that the accused participated intentionally in the action and that he was "not unaware of the fact that the local action was a measure designed to instil terror which formed a part of the nation-wide persecution of the Jews" (unofficial translation).


246 The tribunal went on to say:

"Even though these men [Radetsky, Ruehli, Schubert and Graf] were not in command, they cannot escape the fact that they were members of Einsatz units whose express mission, well known to all the members, was to carry out a large scale program of murder. Any member who assisted in enabling these units to function, knowing what was being done, is guilty of the crimes committed by the unit. The cook in the galley of a pirate ship does not escape the yardarm merely because he himself does not..."
201. It should be noted that in many post-World War II trials held in other countries, courts took the same approach to instances of crimes in which two or more persons participated with a different degree of involvement. However, they did not rely upon the notion of common purpose or common design, preferring to refer instead to the notion of co-perpetration. This applies in particular to Italian and German cases.

202. The second distinct category of cases is in many respects similar to that set forth above, and embraces the so-called “concentration camp” cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan. Cases illustrative of this category are Dachau Concentration Camp, decided by a United States court sitting in Germany and Belsen, decided by a British military court sitting in Germany. In these cases the accused held some position of authority within the hierarchy of the concentration camps. Generally speaking, the charges against them were that they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes. In his summing up in the Belsen case, the Judge Advocate adopted the three requirements identified by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organised system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused’s awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e., encouraged, aided and abetted or in any case participated in the realisation of the common criminal design. The convictions of several of the accused appear to have been explicitly based upon these criteria.

203. This category of cases (which obviously is not applicable to the facts of the present case) is really a variant of the first category, considered above. The accused, when they were found guilty, were regarded as co-perpetrators of the crimes of ill-treatement, because of their objective “position of authority” within the concentration camp system and because they had “the power to look after the inmates and make their life satisfactory” but failed to do so. It would seem that in these cases the required \textit{actus reus} was the active
participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The mens rea element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. It is important to note that, in these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual’s high rank or authority would have, in and of itself, indicated an awareness of the common design and an intent to participate therein. All those convicted were found guilty of the war crime of ill-treatment, although of course the penalty varied according to the degree of participation of each accused in the commission of the war crime.

204. The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect “ethnic cleansing”) with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk. Another example is that of a common plan to forcibly evict civilians belonging to a particular ethnic group by burning their houses; if some of the participants in the plan, in carrying out this plan, kill civilians by setting their houses on fire, all the other participants in the plan are criminally responsible for the killing if these deaths were predictable.

205. The case-law in this category has concerned first of all cases of mob violence, that is, situations of disorder where multiple offenders act out a common purpose, where each of them commit offences against the victim, but where it is unknown or impossible to ascertain exactly which acts were carried out by which perpetrator, or when the causal link between each act and the eventual harm caused to the victims is similarly indeterminate. Cases illustrative of this category are Essen Lynching and Borkum Island.

206. As is set forth in more detail below, the requirements which are established by these authorities are two-fold: that of a criminal intention to participate in a common criminal design and the foreseeability that criminal acts other than those envisaged in the common criminal design are likely to be committed by other participants in the common design.

207. The Essen Lynching (also called Essen West) case was brought before a British military court, although, as was stated by the court, it “was not a trial under English law”. 255 Given the importance of this case, it is worth reviewing it at some length. Three British prisoners of war had been lynched by a mob of Germans in the town of Essen-West on 13 December 1944. Seven persons (two servicemen and five civilians) were charged with committing a war crime in that they were concerned in the killing of the three prisoners of war. They included a German captain, Heyer, who had placed the three British airmen under the escort of a German soldier who was to take the prisoners to a Luftwaffe unit for interrogation. While the escort with the prisoners was leaving, the captain had ordered that the escort should not interfere if German civilians should molest the prisoners, adding that they ought to be shot, or would be shot. This order had been given to the escort from the steps of the barracks in a loud voice so that the crowd, which had gathered, could hear and would know exactly what was going to take place. According to the summary given by the United Nations War Crimes Commission:

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"[The view] that everybody who had been involved in the destruction program of the [KZ] Auschwitz and acted in any manner whatsoever in connection with this program participated in the murders and is responsible for all that happened is not correct. It would mean that even acts which did not further the main offence in any concrete manner would be punishable. In consequence even the physician who was in charge of taking care of the guard personnel and who restricted himself to doing only that would be guilty of aiding and abetting murder. The same would even apply to the doctor who treated prisoners in the camp and saved their lives. Not even those who in their place put little obstacles in the way of this program of murder, albeit in a subordinate position and without success, would escape punishment. That cannot be right." (unofficial translation).

[When the prisoners of war were marched through one of the main streets of Essen, the crowd around grew bigger, started hitting them and throwing sticks and stones at them. An unknown German corporal actually fired a revolver at one of the airmen and wounded him in the head. When they reached the bridge, the airmen were eventually thrown over the parapet of the bridge; one of the airmen was killed by the fall; the others were not dead when they landed, but were killed by shots from the bridge and by members of the crowd who beat and kicked them to death.]

208. The Defence laid stress on the need to prove that each of the accused had the intent to kill. The Prosecution took a contrary view. Major Tayleur, the Prosecutor, stated the following:

My friend [the Defence Counsel] has spoken to you about the intent which is necessary and he says that no evidence of intent to kill has been brought before you. In my submission there has been considerable evidence of intent to kill; but even if there were not, in my submission to prove this charge you do not have to prove an intent to kill. If you prove an intent to kill you would prove murder; but you can have an unlawful killing, which would be manslaughter, where there is not an intent to kill but merely the doing of an unlawful act of violence. A person might slap another’s face with no intent to kill at all but if through some misfortune, for example that person having a weak skull, that person died, in my submission the person striking the blow would be guilty of manslaughter and that would be such killing as would come within the words of this charge. In my submission therefore what you have to be satisfied of—and the onus of proof is of course on the prosecution—is that each and everyone of the accused, before you can convict him, was concerned in the killing of these three unidentified airmen in circumstances which the British law would have amounted to either murder or manslaughter.

The Prosecutor then went on to add:

the allegation of the prosecution is that every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any one of these three airmen is guilty in that he is concerned in the killing. It is impossible to separate any one of these from another; they all make up what is known as lynching. In my submission from the moment they left those barracks those men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow is both morally and criminally responsible for the deaths of those three men.

Since Heyer was convicted, it may be assumed that the court accepted the Prosecution arguments as to the criminal liability of Heyer (no Judge Advocate had been appointed in this case). As for the soldier escorting the airmen, he had a duty not only to prevent the prisoners from escaping but also of seeing that they were not molested; he was sentenced to imprisonment for five years (even though the Prosecutor had suggested that he was not criminally liable). According to the Report of the United Nations War Crimes Commission,

three civilians “were found guilty [of murder] because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims, though against none of the accused had it been exactly proved that they had individually shot nor given the blows which caused the death.”

209. It would seem warranted to infer from the arguments of the parties and the verdict that the court upheld the notion that all the accused who were found guilty took part, in various degrees, in the killing; not all of them intended to kill but all intended to participate in the unlawful ill-treatment of the prisoners of war. Nevertheless they were all found guilty of murder, because they were all “concerned in the killing”. The inference seems therefore justified that the court assumed that the convicted persons who simply struck a blow or implicitly incited the murder could have foreseen that others would kill the prisoners; hence they too were found guilty of murder.

210. A similar position was taken by a United States military court in Kurt Goebbelt al. (also called the Borkum Island case). On 4 August 1944, a United States Flying Fortress was forced down on the German island of Borkum. Its seven crew members were taken prisoner and then forced to march, under military guard, through the streets of Borkum. They were first made to pass between members of the Reich’s Labour Corps, who beat them with shovels, upon the order of a German officer of the Reichsarbeitsdienst. They were then struck by civilians on the street. Later on, while passing through another street, the mayor of Borkum shouted at them inciting the mob to kill them “like dogs”. They were

256 UNWCC, vol. 1, p. 91. In addition to Heyer and the escort (Koenen), three civilians were also convicted. The first of the accused civilians, Boddenberg, admitted to have struck one of the airmen on the bridge, after one of them had already been thrown over the bridge, knowing “that the motives of the crowd against them [the airmen] were deadly, and yet he joined in” (Transcript in Public Record Office, London, WO 235/58, p. 67; copy on file with International Tribunal’s Library); the second, Kaufer, was found to have “beaten the airmen” and taken “an active part” in the mob violence against them. Additionally, it was alleged that he tried to pull the rifle away from a subordinate officer to shoot the airmen below the bridge and that he called out words to the effect that the airmen deserved to be shot (ibid., pp. 66-67). The third, Braschoss, was seen hitting one of the airmen on the bridge, descending beneath the bridge to throw the airmen, who was still alive, into the stream. He and an accomplice were further alleged to have thrown another of the airmen from the bridge (ibid., p. 68). Two of the accused civilians, Sambold and Hartung, were acquitted; the former because the blows he was alleged to have inflicted were neither particularly severe nor proximate to the airmen’s death (comprising one of the earliest to be inflicted) and the latter because it was not proved beyond reasonable doubt that he actually took part in the affray (ibid., pp. 66-67, UNWCC, vol. 1, p. 93).

257 Ibid., p. 89.


259 Ibid., p. 66 (emphasis added).
then beaten by civilians while the escorting guards, far from protecting them, fostered the assault and took part in the beating. When the airmen reached the city hall one was shot and killed by a German soldier, followed by the others a few minutes later, all shot by German soldiers. The accused included a few senior officers, some privates, the mayor of Borkum, some policemen, a civilian and the leader of the Reich Labour Corps. All were charged with war crimes, in particular both with “wilfully, deliberately and wrongfully encouraging, aiding, abetting and participating in the killing” of the airmen and with “wilfully, deliberately and wrongfully encouraging, aiding, abetting and participating in assaults upon” the airmen.\textsuperscript{261} In his opening statement the Prosecutor developed the doctrine of common design. He stated the following:

It is important, as I see it, to determine the guilt of each of these accused in the light of the particular role that each one played. They did not all participate in exactly the same manner. Members of mobs seldom do. One will undertake one special or particular action and another will perform another particular action. It is the composite of the actions of all that results in the commission of the crime. Now, all legal authorities agree that where a common design of a mob exists and the mob has carried out its purpose, then no distinction can be drawn between the finger man and the trigger man (sic). No distinction is drawn between the one who, by his acts, caused the victims to be subjected to the pleasure of the mob or the one who incited the mob, or the one who dealt the fatal blow. This rule of law and common sense must, of necessity, be so. Otherwise, many of the true instigators of crime would never be punished.

Who can tell which particular act was the most responsible for the final shooting of these flyers? Can it not be truly said that any one of the acts of any one of these accused may have been the very act that produced the ultimate result? Although the ultimate act might have been something in which the former actor did not directly participate [\textdaggerbrace], every time a member of a mob takes any action that is inclined to encourage, that is inclined to give heart to someone else who is present to participate, then that person has lent his aid to the accomplishment of the final result.\textsuperscript{262}

In short, noted the Prosecutor, the accused were “cogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs”.\textsuperscript{263} As a consequence, according to the Prosecutor, if it were proved beyond a reasonable doubt “that each one of these accused played his part in mob violence which led to the unlawful killing of the seven American flyers, […] under the law each and every one of the accused [was] guilty of murder”.\textsuperscript{264}

211. It bears emphasising that by taking the approach just summarised, the Prosecutor substantially propounded a doctrine of common purpose which presupposes that all the participants in the common purpose shared the same criminal intent, namely, to commit murder. In other words, the Prosecutor adhered to the doctrine of common purpose mentioned above with regard to the first category of cases. It is interesting to note that the various defence counsel denied the applicability of this common design doctrine, not, however, on principle, but merely on the facts of the case. For instance, some denied the existence of a criminal intent to participate in the common design, claiming that mere presence was not sufficient for the determination of the intent to take part in the killings.\textsuperscript{265} Other defence counsel claimed that there was no evidence that there was a conspiracy among the German officers,\textsuperscript{266} or they argued that, if there had been such a plot, it did not involve the killing of the airmen.\textsuperscript{267}

212. In this case too, no Judge Advocate stated the law. However, it may be fairly assumed that in the event, the court upheld the common design doctrine, but in a different form, for it found some defendants guilty of both the killing and assault charges\textsuperscript{268} while others were only found guilty of assault.\textsuperscript{269}

213. It may be inferred from this case that all the accused found guilty were held responsible for pursuing a criminal common design, the intent being to assault the prisoners of war. However, some of them were also found guilty of murder, even where there was no evidence that they had actually killed the prisoners. Presumably, this was on the basis that the accused, whether by virtue of their status, role or conduct, were in a position to have predicted that the assault would lead to the killing of the victims by some of those participating in the assault.

\textsuperscript{264} Ibid., p. 1190 (emphasis added). See also pp. 1191-1194.
\textsuperscript{265} See ibid., pp. 1201, 1203-1206.
\textsuperscript{266} See ibid., pp. 1234, 1241, 1243.
\textsuperscript{267} See ibid., pp. 1268-1270.
\textsuperscript{268} The accused Akkerman, Krolikowski, Schmitz, Wentzel, Seiler and Goebbels were all found guilty on both the killing and assault charges and were sentenced to life imprisonment (ibid., pp. 1280-1286).
\textsuperscript{269} The accused Pointner, Witzke, Geyer, Albrecht, Weber, Rommel, Mamenga and Heinemann were found guilty only of assault and received terms of imprisonment ranging between 2 and 25 years (ibid.).
Mention must now be made of some cases brought before Italian courts after World War II concerning war crimes committed either by civilians or by military personnel belonging to the armed forces of the so-called “Repubblica Sociale Italiana” (“RSI”), a de facto government under German control established by the Fascist leadership in central and northern Italy, following the declaration of war by Italy against Germany on 13 October 1943. After the war several persons were brought to trial for crimes committed between 1943 and 1945 against prisoners of war, Italian partisans or members of the Italian army fighting against the Germans and the RSI. Some of these trials concerned the question of criminal culpability for acts perpetrated by groups of persons where only one member of the group had actually committed the crime.

In D’Ottavio et al., on appeal from the Assize Court of Teramo, the Court of Cassation on 12 March 1947 pronounced upon one of these cases. Some armed civilians had given unlawful pursuit to two prisoners of war who had escaped from a concentration camp, in order to capture them. One member of the group had shot at the prisoners without intending to kill them, but one had been wounded and had subsequently died as a result.

The trial court held that all the other members of the group were accountable not only for the crime of attempted “illegal restraint” (sequestro di persona) but also for manslaughter (omicidio preterintenzionale). The Court of Cassation upheld this finding. It held that for this type of criminal liability to arise, it was necessary that there exist not only a material but also a psychological “causal nexus” between the result the members of the group intended to bring about and the different actions carried out by an individual member of that group. The court went on to point out that:

Indeed the responsibility of the participant (concorrente) […] is not founded on the notion of objective responsibility […] but on the fundamental principle of the concurrence of interdependent causes […] by virtue of this principle all the participants are accountable for the crime both where they directly cause it and where they indirectly cause it, in keeping with the well-known canon causa causae est causa causans.270

The court then noted that in the case at issue:

There existed a nexus of material causality, as all the participants had directly cooperated in the crime of attempted “illegal restraint” […] by surrounding and pursuing two prisoners of war on the run, armed with a gun and a rifle, with a view to illegally capturing them. This crime was the indirect cause of a subsequent and different event, namely the shooting (by D’Ottavio alone) at one of the fugitives, resulting in wounding followed by death. Furthermore, there existed psychological causality, as all the participants had the intent to perpetrate and knowledge of the actual perpetration of an attempted illegal restraint, and foresaw the possible commission of a different crime. This foresight (previsione) necessarily followed from the use of weapons: it being predictable (dovendo prevedersi) that one of the participants might shoot at the fugitives to attain the common purpose (lo scopo comune) of capturing them.271

In another case (Aratano et al.) the Court of Cassation dealt with the following circumstances: a group of RSI militiamen had planned to arrest some partisans, without intending to kill them; however, to frighten the partisans, one of the militiamen fired a few shots into the air. As a result the partisans shot back; a shoot-out ensued and in the event one of the partisans was killed by a member of the RSI militia. The court held that the trial court had erred in convicting all members of the militia of murder. In its view, as the trial court had found that the militiamen had not intended to kill the partisans:

It was clear that the murder of one of the partisans was an unintended event (evento non voluto) and consequently could not be attributed to all the participants: the crime committed was more serious than that intended and it proves necessary to resort to categories other than that of voluntary homicide. This Supreme Court has already had the opportunity to state the same principle, where it noted that in order to find a person responsible for a homicide perpetrated in the course of a mopping-up operation carried out by many persons, it was necessary to establish that, in participating in this operation, a voluntary activity also concerning homicide had been brought into being (fosse stata spiegata un’attività volontaria in relazione anche all’omicidio) (judgment of 27 August 1947 in re: Beraschi).272

Other cases relate to the applicability of the amnesty law passed by the Presidential Decree of 22 June 1946 no. 4. The amnesty applied among other things to crimes of “collaboration with the occupying Germans” but excluded offences involving murder. In Tossani the question was whether the law on amnesty covered a person who had taken part in a mopping-up operation against civilians in the course of which a German soldier had killed a partisan. The Court of Cassation found that the amnesty should apply. It emphasised that the appellant participating in the operation had not taken any active part in it and did not carry weapons; in addition, the killing was found to have been “an exceptional and

270 See handwritten text of the (unpublished) judgement, p. 6 (unofficial translation; kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal’s Library). See also Giustizia penale, 1948, Part II, col. 66, no. 71 (containing a headnote on the judgement).

271 See handwritten text of the (unpublished) judgement, pp. 5-7 (unofficial translation; emphasis added).

272 See handwritten text of the (unpublished) judgement, pp. 13-14 (kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal’s Library). For a headnote on this case see Archivio penale, 1949, p. 472.
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A similar position was taken by the

In these cases courts indisputably applied the notion that a person may be held

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See handwritten text of the (unpublished) judgement of 5 July 1946, p. 19 (kindly provided by the Italian
Public Record Office, Rome; on file with the International Tribunal’s Library). See also Giustizia penale,
1945-46, Part II, cols. 530-532.
For cases where the Court of Cassation concluded that the participant was guilty of the more serious crime not
envisaged in the common criminal design, see Torrazzini, judgement of 18 August 1946, in Archivio penale
1947, Part II, p. 89; Palmia, judgement of 20 September 1946, ibid.

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The relationship of material causality by virtue of which the law makes some of the
participants liable for the crime other than that envisaged, must be correctly understood from
the viewpoint of logic and law and be strictly differentiated from an incidental relationship
(rapporto di occasionalita’). Indeed, the cause, whether immediate or mediate, direct or
indirect, simultaneous or successive, can never be confused with mere coincidence. For there
to be a relationship of material causality between the crime willed by one of the participants
and the different crime committed by another, it is necessary that the latter crime should
constitute the logical and predictable development of the former (il logico e prevedibile
sviluppo del primo). Instead, where there exists full independence between the two crimes,
one may find, depending upon the specific circumstances, a merely incidental relationship
(un rapporto di mera occasionalita’), but not a causal relationship. In the light of these
criteria, he who requests somebody else to wound or kill cannot answer for a robbery
perpetrated by the other person, for this crime does not constitute the logical development of

the required causal nexus as follows:

judgement of the Court of Cassation of 20 July 1949 in Mannelli, where the court explained

the event must have been predictable.

In this connection it suffices to mention the

although not relating to war crimes, it may nevertheless be assumed that courts required that

However, in light of other judgements handed down in the same period on the same matter,

member of the group to be held responsible for such an action was not clearly spelled out.

envisaged in the criminal plan. Admittedly, in some of the cases the mens rea required for a

criminally responsible for a crime committed by another member of a group and not

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(concorrenti), it “was in any case a consequence, albeit indirect, of his participation”. 275

Although this crime was more grave than that intended by some of the participants

Court of Cassation rejected the appeal, holding that the appellant was also guilty of murder.

group of persons concerned, had been perpetrated by another member of that group. The

him. 274 In Bonati et al. the appellant argued that the crime of murder, not envisaged by the

found that he was not guilty of murder; the law on amnesty was therefore applicable to

mopping-up operation in the course of which some partisans had been killed. The court

same court in Ferrida. The appellant had participated, “only in his capacity as a nurse,” in a

detained and had been shot at by the German soldier.

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unforeseen (imprevisto) event”, for during a search a civilian had escaped to avoid being

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That this was the basic notion upheld by the court seems to be borne out by the

The same notion was enunciated by the same Court of Cassation in many other
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In sum, the Appeals Chamber holds the view that the notion of common design as a

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See Giustizia penale, 1950, Part II, cols. 696-697 (emphasis added).
See e.g. Court of Cassation, 15 March 1948, Peveri case, in Archivio penale, 1948, pp. 431-432; Court of
Cassation, 20 July 1949, Mannelli case, in Giustizia penale, 1949, Part II, col. 906, no.599; Court of
1950, Montagnino, ibid., col.821; 19 April 1950, Solesio et al., ibid., col. 822. By contrast, in a judgement of
23 October 1946 the same Court of Cassation, in Minapò et al., held that it was immaterial that the participant
in a crime had or had not foreseen the criminal conduct carried out by another member of the criminal group
(Giustizia penale, 1947, Part II, col. 483, no. 382).
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In the Antonini case (judgement of the Court of Cassation of 29 March 1949), the trial court had found the
accused guilty not only of illegally arresting some civilians but also of their subsequent shooting by the
Germans, as a “reprisal” for an attack on German troops in Via Rasella, in Rome. According to the trial court
the accused, in arresting the civilians, had not intended to bring about their killing, but knew that he thus
brought into being a situation likely to lead to their killing. The Court of Cassation reversed this finding,

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only where the following requirements concerning mens rea are fulfilled: (i) the intention to

to the third category of cases, it is appropriate to apply the notion of “common purpose”

nature of the accused’s authority within the camp or organisational hierarchy. With regard

treatment. Such intent may be proved either directly or as a matter of inference from the

nature of the system of ill-treatment and intent to further the common design of ill-

“concentration camp” cases, where the requisite mens rea comprises knowledge of the

one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called

participants in the common design possess the same criminal intent to commit a crime (and

applied to three distinct categories of cases. First, in cases of co-perpetration, where all

objective and subjective elements of the crime, the case law shows that the notion has been

addition is upheld, albeit implicitly, in the Statute of the International Tribunal. As for the

form of accomplice liability is firmly established in customary international law and in

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(culpa).

attenuated form of intent (dolus eventualis) or required a high degree of carelessness

purpose but not envisaged in the criminal design, that court either applied the notion of an

required for the criminal responsibility of a person for acts committed within a common

conspicuous. 278 Accordingly, it would seem that, with regard to the mens rea element

fact that the one instance where the same court adopted a different approach is somewhat

cases.

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the intended offence, but a new fact, having its own causal autonomy, and linked to the
conduct willed by the instigator (mandante) by a merely incidental relationship (emphasis
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added).

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take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to predict this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called dolus eventualis is required (also called “adverted recklessness” in some national legal systems).

221. In addition to the aforementioned case law, the notion of common plan has been upheld in at least two international treaties. The first of these is the International Convention for the Suppression of Terrorist Bombing, adopted by consensus by the United Nations General Assembly through resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998. Pursuant to Article 2(3)(c) of the Convention, offences envisaged in the Convention may be committed by any person who:

[i]n any other way [other than participating as an accomplice, or organising or directing others to commit an offence] contributes to the commission of one or more offences as set forth in paragraphs 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

The negotiating process does not shed any light on the reasons behind the adoption of this text.279 This Convention would seem to be significant because it upholds the notion of a “common criminal purpose” as distinct from that of aiding and abetting (couched in the terms of “participating as an accomplice [in an offence”]). Although the Convention is not yet in force, one should not underestimate the fact that it was adopted by consensus by all the members of the General Assembly. It may therefore be taken to constitute significant evidence of the legal views of a large number of States.

222. A substantially similar notion was subsequently laid down in Article 25 of the Statute of the International Criminal Court, adopted by a Diplomatic Conference in Rome on 17 July 1998 (“Rome Statute”).280 At paragraph 3(d), this provision upholds the doctrine under discussion as follows:

[In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person …]

(d) In any other way [other than aiding and abetting or otherwise assisting in the commission or attempted commission of a crime] contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

ii. Be made in the knowledge of the intention of the group to commit the crime.

223. The legal weight to be currently attributed to the provisions of the Rome Statute has been correctly set out by Trial Chamber II in Furundžija281 There the Trial Chamber pointed out that the Statute is still a non-binding international treaty, for it has not yet entered into force. Nevertheless, it already possesses significant legal value. The Statute was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly. This shows that that text is supported by a great number of States and may be taken to express the legal position i.e. opinio iuris of those States. This is consistent

279 The Report of the Sixth Committee (25 November 1997, A/52/653) and the Official Records of the General Assembly session in which this Convention was adopted made scant reference to Article 2 and did not elaborate upon the doctrine of common purpose (see UNGAOR, 72nd plenary meeting, 52nd sess., Mon. 15 December 1997, U.N. Doc. A/52/PV.72). The Japanese delegate during the 33rd meeting of the Sixth Committee nevertheless noted that “some terms used in the Convention such as […] such contribution” (Article 2, para. 3(c) were ambiguous” (33rd Meeting of the Sixth Committee, 2 December 1997, UNGAOR A/C.6/52/SR.33, p. 8, para. 77). He concluded that his Government would therefore “interpret such contribution […] to mean abetment, assistance or other similar acts as defined by Japanese legislation” (ibid).


with the view that the mode of accomplice liability under discussion is well-established in international law and is distinct from aiding and abetting.282

224. As pointed out above, the doctrine of acting in pursuance of a common purpose is rooted in the national law of many States. Some countries act upon the principle that where multiple persons participate in a common purpose or common design, all are responsible for the ensuing criminal conduct, whatever their degree or form of participation, provided all had the intent to perpetrate the crime envisaged in the common purpose. If one of the participants commits a crime not envisaged in the common purpose or common design, he alone will incur criminal responsibility for such a crime. These countries include Germany283 and the Netherlands.284 Other countries also uphold the principle whereby if persons take part in a common plan or common design to commit a crime, all of them are criminally responsible for the crime, whatever the role played by each of them. However, in these countries, if one of the persons taking part in a common criminal plan or enterprise perpetuates another offence that was outside the common plan but nevertheless foreseeable, those persons are all fully liable for that offence. These countries include civil law systems, such as that of France285 and Italy.286

The United States,287 Canada,288 the United States,289 Australia290 and Zambia.291

offenses whether by aiding or abetting, is party to it. Furthermore, any person who offers gifts, makes promises, gives orders or abuses his position of authority or power to instigate a criminal act or gives instructions for its commission is equally party to it. (unofficial translation)"

In addition to responsibility for crimes committed by more persons, the Court of Cassation has envisaged criminal responsibility for acts committed by an accomplice going beyond the criminal plan. In this connection the Court has distinguished between crimes bearing no relationship to the crime envisaged (e.g. a person hands again to an accomplice in the context of a hold-up, but the accomplice causes the gun to kill one of his relatives), and crimes where the conduct bears some relationship to the planned crime (e.g. theft is carried out in the form of robbery). In the former category of cases French case law does not hold the person concerned responsible, while in the latter it does, under certain conditions (as held in a judgment of 31 December 1947, Bulletin desarrêt criminels de la Cour de Cassation 1947, no. 270, the accomplice "devait prévoir toutes les qualifications dont le fait était susceptible, toutes les circonstances dont il pouvait être accompagné" ("should expect to be charged on all counts that the law allows for and all consequences that might result from the crime" (unofficial translation)). See also the decision of 19 June 1984, Bulletin, ibid., 1984, no. 231.

286 The principles of common purpose are delineated in substance, in the following provisions of the Codice Pénal:

"Article 110: Pena per coloro che concurrono nel reato.- Quando più persone concorrono nel medesimo reato, ciascuna è soggiogata alla pena per questo stabilito, salvo le disposizioni degli articoli seguenti." (Penalties for those who take part in a crime.- Where multiple persons participate in the same crime, each of them is liable to the penalty established for that crime, subject to the provisions of the following Articles.)

"Article 116: Reato diverso da quello voluto da taluno dei concorrenti.- Qualora il reato commisso si diverso da quello voluto da taluno dei concorrenti, anche questi ne risponda, se l’evento e conseguenza della sua azione od omissione." ("Crimes other than that intended by some of the participants.- Where the crime committed is different from that intended by one of the participants, he too shall answer for that crime if the event is a consequence of his act or omission." (unofficial translation)).

It should be noted that Italian courts have increasingly interpreted Article 116 as providing for criminal responsibility in cases of foreseeability. See in particular the judgement of the Constitutional Court of 13 May 1965, no. 42, Rivista penale, 1965, part II, pp. 430 ff. In some cases courts require so-called abstract foreseeability (prevedibilità astratta) (see, e.g., instance, Court of Cassation, 3 March 1978, Cassazione penale, 1980, pp. 45 ff; Court of Cassation, 4 March 1988, Cassazione penale, 1990, pp. 35 ff); others require concrete (or specific) foreseeability (prevedibilità concreta) (see, e.g., Court of Cassation, 11 October 1985, Rivista penale, 1986, p. 421; and Court of Cassation, 18 February 1998, Rivista penale, 1998, p. 1200).

287 See R. v. Hyde 73991 QB 134, R. v. Anderson R. v. Morris [1966] 2 QB 110, in which Lord Parker CJ held that "where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, than that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise". However, liability for such unusual consequences is limited to those offences that the accused knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence."

It should be noted that the objective and subjective elements of the crime, laid down in Article 25 (3) of the Rome Statute refer to some extent from those required by the case law cited above, the consequences of this departure may only be appreciable in the long run, once the Court is established. This is due to the inapplicability to Article 25(3) of Article 10 of the Statute, which provides that "nothing in this Part shall be incompatible with the principles of law established by the International Court of Justice (unofficial translation)". The German case law has clearly established the principle whereby if an offence is perpetrated that had not been envisaged in the common criminal plan, only the author of this offence is criminally responsible for it. See BGH GA 85, 270. According to the German Federal Court (in BGH GA 85, 270):

"Mittäterschaft ist anzunehmen, wenn und soweit das Zusammenwirken der mehreren Beteiligten auf gegenseitigem Einverständnis beruht, während jede rechtsverletzende Handlung eines Mittäters, die über diesem Einverständnis hinausgeht, nur diesem allein zuzurechnen ist." ("There is co-perpetration (Mittäterschaft) when and to the extent that the joint action of the several participants is founded on a reciprocal agreement (Einverständnis), whereas any criminal action of a participant (Mittäter) going beyond this agreement can only be attributed to that participant." (unofficial translation)).

289 In the Netherlands, the term designated for this form of criminal liability is "madeplegen". (See HR 6 December 1943, NJ 1944, 245; HR 17 May 1943, NJ 1943, 576; and HR 6 April 1925, NJ 1925, 723, W11393.)

286 See Article 121-7 of the Code pénal, which reads:

"Est complice d’un crime ou d’un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la conservation. Est également complice la personne qui par don, promesse, menace, ordre, abus d’autorité ou pouvoir aura provoqué une infraction ou donné des instructions pour la commettre." ("Any person who knowingly has assisted in planning or committing a crime or...
It should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case. Nor can reference to national law have, in this case, the scope and purport adumbrated in general terms by the United Nations Secretary-General in his Report, where it is pointed out that “suggestions have been made that the international tribunal should apply domestic law in so far as it incorporates customary international humanitarian law”.

In the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation.

The Appeals Chamber considers that the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law.

In sum, the objective elements (actus reus) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows:

i. A plurality of persons. They need not be organised in a military, political or administrative structure, as is clearly shown by the Essen Lynching and the Kurt Goebbels cases.

ii. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

iii. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.

By contrast, the mens rea element differs according to the category of common design under consideration. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the

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290 Under Australian law, when two parties embark on a joint criminal enterprise, a party will be liable for an act which he contemplates may be carried out by the other party in the course of the enterprise, even if he has not explicitly or tacitly agreed to the commission of that act (McAuliffe v. R. (1995) 183 CLR 108 at 114).

The test for determining whether a crime falls within the scope of the relevant joint enterprise is the subjective test of contemplation: "in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one, and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose" (ibid.).

291 Article 22 of the Penal Code states:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

292 See Report of the Secretary-General, para. 36 (emphasis added).
circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.

229. In light of the preceding propositions it is now appropriate to distinguish between acting in pursuance of a common purpose or design to commit a crime, and aiding and abetting.

(i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

(ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice’s contribution.

(iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

(iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.

(b) The Culpability of the Appellant in the Present Case

230. In the present case, the Trial Chamber found that the Appellant participated in the armed conflict taking place between May and December 1992 in the Prijedor region. An aspect of this conflict was a policy to commit inhumane acts against the non-Serb civilian population of the territory in the attempt to achieve the creation of a Greater Serbia.293 It was also found that, in furtherance of this policy, inhumane acts were committed against numerous victims and “pursuant to a recognisable plan”.294 The attacks on Sivci and Jaskići on 14 June 1992 formed part of this armed conflict raging in the Prijedor region.

231. The Appellant actively took part in the common criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts. The common criminal purpose was not to kill all non-Serb men; from the evidence adduced and accepted, it is clear that killings frequently occurred in the effort to rid the Prijedor region of the non-Serb population. That the Appellant had been aware of the killings accompanying the commission of inhumane acts against the non-Serb population is beyond doubt. That is the context in which the attack on Jaskići and his participation therein, as found by the Trial Chamber as well as the Appeals Chamber above, should be seen. That nobody was killed in the attack on Sivci on the same day does not represent a change of the common criminal purpose.

232. The Appellant was an armed member of an armed group that, in the context of the conflict in the Prijedor region, attacked Jaskići on 14 June 1992. The Trial Chamber found the following:

Of the killing of the five men in Jaskići, the witnesses Draguna Jaskić, Zemka Ahbar and Senija Elkasović saw their five dead bodies lying in the village when the women were able to leave their houses after the armed men had gone. Senija Elkasović saw that four of them had been shot in the head. She had heard shooting after the men from her house were taken away.295

The Appellant actively took part in this attack, rounding up and severely beating some of the men from Jaskići. As the Trial Chamber further noted:

293 See Judgement, paras. 127-179, which outlines the background to the conflict in the opština Prijedor.
[t]hat the armed men were violent was not in doubt, a number of these witnesses were themselves threatened with death by the armed men as the men of the village were being taken away. Apart from that, their beating of the men from the village, in some cases beating them into insensibility, as they lay on the road, is further evidence of their violence. 296

Accordingly, the only possible inference to be drawn is that the Appellant had the intention to further the criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them. That non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the present case, foreseeable. The Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk.

3. The Finding of the Appeals Chamber

233. The Trial Chamber erred in holding that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the Appellant had any part in the killing of the five men from the village of Jaskići. The Appeals Chamber finds that the Appellant participated in the killings of the five men in Jaskići, which were committed during an armed conflict as part of a widespread or systematic attack on a civilian population. The Appeals Chamber therefore holds that under the provisions of Article 7(1) of the Statute, the Trial Chamber should have found the Appellant guilty.

234. The Appeals Chamber finds that this ground of the Prosecution’s Cross-Appeal succeeds.

235. In light of the Appeals Chamber’s finding that Article 2 of the Statute is applicable, the Appellant is found guilty on Count 29 (grave breach in terms of Article 2(a) (wilful killing) of the Statute) and Article 7(1) of the Statute.

236. The Trial Chamber’s finding on Count 30 is set aside. The Appellant is found guilty on Count 30 (violation of the laws or customs of war in terms of Article 3(1)(a) (murder) of the Statute) and Article 7(1) of the Statute.

237. The Trial Chamber’s finding on Count 31 is set aside. The Appellant is found guilty on Count 31 (crime against humanity in terms of Article 5(a) (murder) of the Statute) and Article 7(1) of the Statute.

294 Judgement, para. 660.
295 Ibid., para 370.
296 Ibid.
VI. THE THIRD GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE TRIAL CHAMBER’S FINDING THAT CRIMES AGAINST HUMANITY CANNOT BE COMMITTED FOR PURELY PERSONAL MOTIVES

238. In the Judgement, the Trial Chamber identified, from among the elements which had to be satisfied before a conviction for crimes against humanity could be recorded, the need to prove the existence of an armed conflict and a nexus between the acts in question and the armed conflict.

239. As to the nature of the nexus required, the Trial Chamber found that, subject to two caveats, it is sufficient for the purposes of crimes against humanity that the act occurred “in the course or duration of an armed conflict”.297 The first caveat was “that the act be linked geographically as well as temporally with the armed conflict”.298 The second caveat was that the act and the conflict must be related or, at least, that the act must “not be unrelated to the armed conflict”.299 The Trial Chamber further held that the requirement that the act must “not be unrelated” to the armed conflict involved two aspects. First, the perpetrator must know of the broader context in which the act occurs.300 Secondly, the act must not have been carried out for the purely personal motives of the perpetrator.301

A. Submissions of the Parties

1. The Prosecution Case

240. The Prosecution submits that there is nothing in Article 5 of the Statute which suggests that it contains a requirement that crimes against humanity cannot be committed for purely personal motives. In the submission of the Prosecution, no such requirement can be inferred from the requirement that the crime must have a nexus to the armed conflict. In fact, to read the armed conflict requirement as requiring that the perpetrator’s motives not be purely personal “would transform this merely jurisdictional limitation under Article 5 into a substantive element of the mens rea of crimes against humanity”.302

241. The Prosecution concedes that this finding did not affect the verdict against the Appellant. However, it submits that the finding involves a significant question of law that is of general importance to the Tribunal’s jurisprudence and should therefore be corrected on appeal.303

242. The Prosecution argues that the weight of authority supports the proposition that crimes against humanity can be committed for purely personal reasons and that the sole authority relied on by the Trial Chamber in support of its finding in fact suggests that, even where perpetrators may have been personally motivated to commit the acts in question, their conduct can still be characterised as a crime against humanity.304 Subsequent decisions of the United States military tribunals under Control Council Law No.10 and of national courts are also consistent with the view that a perpetrator of crimes against humanity may act out of purely personal motives.305

243. Finally, the Prosecution contends that the object and purpose of the Tribunal’s Statute support the interpretation that crimes against humanity may be committed for purely personal reasons, arguing that the objective of the Statute in providing a broad scope for humanitarian law would be defeated by a narrow interpretation of the category of offences falling within the ambit of Article 5. Furthermore, if proof of a non-personal motive was required, many perpetrators of crimes against humanity could evade conviction by the International Tribunal simply by invoking purely personal motives in defence of their conduct.306

297 Judgement, para. 633.
298 Ibid.
299 Ibid, para. 634.
300 Ibid, paras. 656-657.
301 Ibid, paras. 658-659.
302 Cross-Appellant’s Brief, para. 4.9.
303 Skeleton Argument of the Prosecution, para. 26.
304 Cross-Appellant’s Brief, para. 4.11; T. 150 (20 April 1999).
305 Cross-Appellant’s Brief, paras. 4.15 – 4.18.
306 Ibid, paras. 4.22; T. 152 (20 April 1999).
2. The Defence Case

244. In contrast to the Prosecution's Cross-Appeal, the Defence argues that the Trial Chamber's ruling that a crime against humanity cannot be committed for purely personal reasons is correct. Although it concedes that Article 5 of the Statute does not expressly stipulate that crimes against humanity cannot be committed for purely personal reasons, in its submission, the Trial Chamber nevertheless interpreted Article 5 correctly when it found that crimes against humanity cannot be committed for purely personal motives. 307

245. The Defence contests the interpretation given to the applicable case law by the Prosecution, arguing that in all the cases cited, the defendants were linked to the system of extermination which formed the underlying predicate of crimes against humanity, and therefore did not commit their crimes for purely personal motives. 308 In other words, the activities of the defendants were linked to the general activities comprising the pogroms against the Jews and thus the Defence submits that the acts of the defendants were not acts committed for purely personal reasons.

246. The Defence also contests the Prosecution's submissions regarding the object and purpose of the Statute of the International Tribunal, arguing, to the contrary, that policy suggests that it would be unjust if a perpetrator of a criminal act guided solely by personal motives was instead to be prosecuted for a crime against humanity. 309

B. Discussion

247. Neither Party asserts that the Trial Chamber's finding that crimes against humanity cannot be committed for purely personal motives had a bearing on the verdict in terms of Article 25(1) of the Statute. 310 Nevertheless this is a matter of general significance for the Tribunal's jurisprudence. It is therefore appropriate for the Appeals Chamber to set forth its views on this matter.

248. The Appeals Chamber agrees with the Prosecution that there is nothing in Article 5 to suggest that it contains a requirement that crimes against humanity cannot be committed for purely personal motives. The Appeals Chamber agrees that it may be inferred from the words "directed against any civilian population" in Article 5 of the Statute that the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population 311 and that the accused must have known that his acts fit into such a pattern. There is nothing in the Statute, however, which mandates the imposition of a further condition that the acts in question must not be committed for purely personal reasons, except to the extent that this condition is a consequence or a re-statement of the other two conditions mentioned.

249. The Appeals Chamber would also agree with the Prosecution that the words "committed in armed conflict" in Article 5 of the Statute require nothing more than the existence of an armed conflict at the relevant time and place. The Prosecution is, moreover, correct in asserting that the armed conflict requirement is a jurisdictional element, not "a substantive element of the mens rea of crimes against humanity" 312 (i.e., not a legal ingredient of the subjective element of the crime).

250. This distinction is important because, as stated above, if the exclusion of "purely personal" behaviour is understood simply as a re-statement of the two-fold requirement that the acts of the accused form part of a context of mass crimes and that the accused be aware of this fact, then there is nothing objectionable about it; indeed it is a correct statement of the law. It is only if this phrase is understood as requiring that the motives of the accused ("personal reasons", in the terminology of the Trial Chamber) not be unrelated to the armed

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307 Appellant’s Amended Brief on judgement, para. 4.9; T. 227 (20 April 1999).
308 Appellant’s Amended Brief on judgement, para. 4.12; T. 229 (20 April 1999).
309 Appellant’s Amended Brief on judgement, para. 4.17 – 4.18.
310 Article 25(1) of the Statute reads as follows: “The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice”.
311 This requirement had already been recognised by this Tribunal in the Vukovar Hospital Rule 61 Decision: "Crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is an link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above ("Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", The Prosecutor v. Mile Mrkzik et al., Case No.: IT-95-13-R61, Trial Chamber I, 3 April 1996, para. 30)."
conflict that it is erroneous. Similarly, that phrase is unsound if it is taken to require proof of
the accused’s motives, as distinct from the intent to commit the crime and the knowledge of
the context into which the crime fits.

251. As to what the Trial Chamber understood by the phrase “purely personal motives”, it
is clear that it conflated two interpretations of the phrase: first, that the act is unrelated to the
armed conflict; and, secondly, that the act is unrelated to the attack on the civilian
population. In this regard, paragraph 659 of the Judgement held:

659. Thus if the perpetrator has knowledge, either actual or constructive, that these acts
were occurring on a widespread or systematic basis and does not commit his act for
purely personal motives completely unrelated to the attack on the civilian population,
that is sufficient to hold him liable for crimes against humanity. Therefore the
perpetrator must know that there is an attack on the civilian population, know that his act
fits in with the attack and the act must not be taken for purely personal reasons unrelated
to the armed conflict. (emphasis added)

Thus the “attack on the civilian population” is here equated to “the armed conflict”. The two
concepts cannot, however, be identical because then crimes against humanity would, by
definition, always take place in armed conflict, whereas under customary international law
these crimes may also be committed in times of peace. So the two – the “attack on the
civilian population” and “the armed conflict” – must be separate notions, although of course
under Article 5 of the Statute the attack on “any civilian population” may be part of an
“armed conflict”. A nexus with the accused’s acts is required, however, only for the attack
on “any civilian population”. A nexus between the accused’s acts and the armed conflict is
not required, as is instead suggested by the Judgement. The armed conflict requirement is
satisfied by proof that there was an armed conflict; that is all that the Statute requires, and in
so doing, it requires more than does customary international law.

252. The Trial Chamber seems additionally to have conflated the notion of committing an
act for purely personal motives and the notion that the act must not be unrelated to the
armed conflict. The Trial Chamber appears to have viewed the proposition that “the act
must not be unrelated to the armed conflict” as being synonymous with the statement that
the act must “not be done for the purely personal motives of the perpetrator”. These two
concepts, neither of which is a prerequisite for criminal culpability under Article 5 of the
Statute, are, in any case, not coextensive. It may be true that if the act is related to the
armed conflict, then it is not being committed for purely personal motives. But it does not
follow from this that, if the act is unrelated to the armed conflict, it is being committed for
purely personal reasons. The act may be intimately related to the attack on a civilian
population, that is, it may fit precisely into a context of persecution of a particular group,
and yet be unrelated to the armed conflict. It would be wrong to conclude in these
circumstances that, since the act is unrelated to the armed conflict, it is being committed for
purely personal reasons. The converse is also true: that is, merely because personal
motivations can be identified in the defendant’s carrying out of an act, it does not
necessarily follow that the required nexus with the attack on a civilian population must also
inevitably be lacking.

2. The Object and Purpose of the Statute

253. The Prosecution has submitted that “the object and purpose of the Statute support
the interpretation that crimes against humanity can be committed for purely personal
reasons”. The Prosecution cites the Tadi Decision on Jurisdiction, to the effect that “the
‘primary purpose’ of the establishment of the International Tribunal ‘is not to leave
unpunished any person guilty of [a] serious violation of international humanitarian law],
whatever the context within which it may have been committed’”.

This begs the question, however, whether a crime committed for purely personal reasons is a crime
against humanity, and therefore a serious violation of international humanitarian law under
Article 5 of the Statute.

254. The Appeals Chamber would also reject the Prosecution’s submission concerning
the onerous evidentiary burden which would be imposed on it in having to prove that the
accused did not act from personal motives, as equally question-begging and inapposite. It is question-begging because if, arguendo, under international criminal law, the fact that
the accused did not act from purely personal motives was a requirement of crimes against humanity, then the Prosecution would have to prove that element, whether it was onerous for it to do so or not. The question is simply whether or not there is such a requirement under international criminal law.

3. Case-law as Evidence of Customary International Law

255. Turning to the further submission of the Prosecution, the Appeals Chamber agrees that the weight of authority supports the proposition that crimes against humanity can be committed for purely personal reasons, provided it is understood that the two aforementioned conditions – that the crimes must be committed in the context of widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts, in the words of the Trial Chamber, “fitted into such a pattern” – are met.

256. In this regard, it is necessary to review the case-law cited by the Trial Chamber and the Prosecution, as well as other relevant case law, to establish whether this case-law is indicative of the emergence of a norm of customary international law on this matter.

257. The Prosecution is correct in stating that the 1948 case cited by the Trial Chamber supports rather than negates the proposition that crimes against humanity may be committed for purely personal motives, provided that the acts in question were knowingly committed as “part and parcel of all the mass crimes committed during the persecution of the Jews”. As the Supreme Court for the British Zone stated, “in cases of crimes against humanity by taking the form of political denunciations, only the perpetrator’s consciousness and intent to deliver his victim through denunciation to the forces of arbitrariness or terror are required”.

258. The case involving the killing of mentally disturbed patients, decided by the same court and cited by the Prosecution, is also a persuasive authority concerning the irrelevance of personal motives with regard to the constituent elements of crimes against humanity.

259. The Prosecution’s submission finds further support in other so-called denunciation cases rendered after the Second World War by the Supreme Court for the British Zone and by German national courts, in which private individuals who denounced others, albeit for personal reasons, were nevertheless convicted of crimes against humanity.

260. In Sch., the accused had denounced her landlord solely “out of revenge and for the purpose of rendering him harmless” after tensions in their tenancy had arisen. The denunciation led to investigation proceedings by the Gestapo which ended with the landlord’s conviction and execution. The Court of First Instance convicted Sch. and sentenced her to three years’ imprisonment for crimes against humanity.

The accused appealed against the decision, arguing that “crimes against humanity were limited to participation in mass crimes and … did not include all those cases in which someone took action against a single person for personal reasons”. The Supreme Court dismissed the appeal, holding that neither the Nuremberg Judgement nor the statements of the Prosecutor

319  Ibid., p. 499.
320  OGHFZ, Supreme Court for the British Zone (Criminal Chamber) (5 March 1949, S. StS 1949, in Entscheidungen des Obersten Gerichtshofes für die Britische Zone 1, 1949, pp. 323-343. The Accused, Dr. P. and others, were medical doctors and a jurist working in a hospital for mentally disturbed patients. Pursuant to Hitler’s directive which ordered the transfer of mentally ill persons to other institutions (where the patients were secretly killed in gas chambers), the Defendants in a few cases participated in the transfer of patients. In most cases, however, they objected to these instructions and tried to save their patients’ lives by releasing them from hospital or by classifying them in categories which were not subject to Hitler’s directive. The Defendants, charged with aiding and abetting murder, were acquitted by the Court of First Instance because it could not be proven that they had acted with the requisite mens rea with regard to participation in the killing of the patients. The Court of First Instance did not take into consideration whether the Defendants’ behaviour could constitute a crime against humanity. This was criticised by the Supreme Court for the British Zone, which ordered the re-opening of the trial before the Court of First Instance to ascertain whether the Accused could be found guilty of a crime against humanity. The Supreme Court stated that a “perpetrator” [of a crime against humanity] is indeed also anyone who contributes to the realisation of the elements of the offence without at the same time wishing to promote National Socialist rule, […] but who acts perhaps out of fear, indifference, hatred for the victim or to receive some gain. [This is] because even when one acts from these motives (“Beweggründe”), the action remains linked to this violent and oppressive system (“Gewaltherrschaft”)” (ibid., p. 341). The Defendants, ultimately, were not convicted of crimes against humanity for procedural reasons unrelated to the definition of the offence.
321  Decision of Flensburg District Court dated 30 March 1948 in Justiz und NS-Verbrechen, vol. II, pp. 397-402. See this decision for the findings of the District Court to the effect that the denunciation was made for personal reasons.
before the International Military Tribunal indicated that Control Council Law No. 10 had to be interpreted in such a restrictive way. The Supreme Court stated:

"[T]he International Military Tribunal and the Supreme Court considered that a crime against humanity as defined in CCL 30, Article 11.1 (g) is committed whenever the victim suffers prejudice as a result of the National Socialist rule of violence and tyranny ("Gewalt- oder Willkürherrschaft") to such an extent that mankind itself was affected thereby. Such prejudice can also arise from an attack committed against an individual victim for personal reasons. However, this is only the case if the victim was not only harmed by the perpetrator - this would not be a matter which concerned mankind as such - but if the character, duration or extent of the prejudice were determined by the National Socialist rule of violence and tyranny or if a link between them existed. If the victim was harmed in his or her human dignity, the incident was no longer an event that did not concern mankind as such. If an individual's attack against an individual victim for personal reasons is connected to the National Socialist rule of violence and tyranny and if the attack harms the victim in the aforementioned way, it too, becomes one link in the chain of the measures which under the National Socialist rule were intended to persecute large groups of persons. There is an apparent reason to exonerate the accused only because he acted against an individual victim for personal reasons."

262. A further example is the V. case. In 1943, Nu. denounced Ste. for her repeated utterances against Hitler, the national-socialist system and the SS, made in Nu.'s house in 1942. Ste. was the natural mother of Nu.'s adoptive son. In fact, Nu. had denounced Ste. in the hope of regaining her son who had become increasingly estranged from his adoptive parents and had developed a closer relationship with his natural mother. Upon the denunciation, a special court sentenced Ste. to two years in prison. This court had envisaged her eventual transfer to a concentration camp, but she was released by the allied occupation forces before the transfer took place. In prison, Ste. suffered serious bodily harm and lost sight in one eye. After the war, a District Court sentenced Nu. to six months' imprisonment for her denunciation of Ste. Although Nu.'s act of denunciation was motivated by personal reasons, the court considered that her denunciation constituted a crime against humanity.

263. Turning to the decisions of the United States military tribunals under Control Council Law No. 10 cited by the Prosecution, it must be noted that they appear to be less pertinent. These cases involve Nazi officials of various ranks whose acts were, therefore, by that token, already readily identifiable with the Nazi regime of terror. The question whether they acted "for personal reasons" would, therefore, not arise in a direct manner, since their acts were carried out in an official capacity, negating any possible "personal"

264 Decision of the Braunschweig District Court dated 22 June 1950, in Justiz und NS-Verbrechen, vol. VI, pp. 631-644, at p. 639. Note, in particular, the findings of the District Court to the effect that the denunciation was motivated by personal concerns. Mention can also be made of the Decision of Schwurgericht Hannover, dated 30 November 1948, in the B. case. S. StS 68/48 (in Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen, vol. III, pp. 186-190). B., an inspector of state church offices, informed his superior that one of his colleagues, P., had repeatedly expressed his doubts about the political situation in Germany and voiced his disapproval of the persecution of the Jews, the official propaganda, cultural policy and anti-clerical attitude of National Socialism. This information reached the Gestapo, who arrested P. A special court sentenced P. to one year and three months in prison. B., charged with crimes against humanity, was acquitted at first instance because the verdict of the Court of First Instance (Schwurgericht Hannover), having extensively examined the accused's motives ("Beweggründe"), could not determine whether the denunciation had been motivated by politics or religion. The Supreme Court for the British Zone dismissed the judgement of the District Court, stating that "It was erroneous and in contradiction to the consistent jurisprudence of the [Supreme Court] to consider the motives of the accused as important."

265 Decision of the Supreme Court for the British Zone dated 22 June 1948, S. StS 5/48, in Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen, vol. I, pp. 122-126 at p. 124 (unofficial translation). The essence of this statement was reiterated in the Decision of the Supreme Court dated 8 January 1949 against G. (S. StS 109/48, ibid., pp. 246-249). G., a member of the SA (Stormtroopers), had participated in the mistreatment of a political opponent for apparently purely personal motives, namely personal rancour between his family and the family of the victim. Nevertheless, G. was found guilty of a crime against humanity. The Supreme Court dismissed G.'s appeal against his conviction, stating that the motive for an attack was immaterial and that an attack against a single victim for personal reasons can be considered a crime against humanity if there is a nexus between the attack and the National Socialist rule of violence and tyranny (ibid., p. 247).

266 The Court of First Instance referred to the Decision of the Supreme Court of the British Zone dated 17 August 1948, S. StS 43/48, ibid., pp. 60-62 and Decision dated 13 November 1948, S. StS 68/48, ibid., pp. 186-190. See also Decision of the Supreme Court of the British Zone dated 20 April 1949, S. StS 120/49, ibid., pp. 385-391, at p. 388.

267 The Court of First Instance referred to the Decision of the Supreme Court of the British Zone dated 17 August 1948, S. StS 43/48, ibid., pp. 60-62 and Decision dated 13 November 1948, S. StS 68/48, ibid., pp. 186-190. See also Decision of the Supreme Court of the British Zone dated 20 April 1949, S. StS 120/49, ibid., pp. 385-391, at p. 388.

268 See Cross-Appellant's Brief, paras. 4.15, 4.16.
defence which has as its premise “non-official acts”. The question whether an accused acted for purely personal reasons can only arise where the accused can claim to have acted as a private individual in a private or non-official capacity. This is why the issue arises mainly in denunciation cases, where one neighbour or relative denounces another. This paradigm is, however, inapplicable to trials of Nazi ministers, judges or other officials of the State, particularly where they have not raised such a defence by admitting the acts in question whilst claiming that they acted for personal reasons. Any plea that an act was done for “purely personal” motives and that it therefore cannot constitute a crime against humanity is pre-empted entirely for the defence to raise and one would not expect the court to rule on the issue proprio motu and as obiter dictum.

264. The two sections of the Ministries case, referred to by the Prosecution, are also not strictly relevant, as those sections restate the law of complicity — “[…] he who participates or plays a consenting part therein is guilty of a crime against humanity” — rather than dealing with the importance or otherwise of whether the accused acted from personal motives. Equally, in the Justice case, the defendants do not appear to have raised the defence that they acted for personal motives.

265. The Prosecution also refers to the Eichmann and Finta cases. The Eichmann case is inappropriate as the defendant in that case specifically denied that he ever acted from a personal motive, claiming that he did what he did “not of his own volition but as one of numerous links in the chain of command”. Moreover the court found Eichmann, who was the Head of the Jewish Affairs and Evacuation Department and one of the persons who attended the infamous Wannsee Conference, to be “no mere ‘cog’, small or large, in a machine propelled by others; he was, himself, one of those who propelled the machine.” Such a senior official would not be one to whom the “purely personal reasons” consideration could conceivably apply.

266. The Finta case is more on point, not least since the accused was a minor official, a captain in the Royal Hungarian Gendarmerie. He was thus better placed than senior officials to raise an issue as to his exclusively “personal” motives. That case is indeed authority for the proposition that the sole requirements for crimes against humanity in this regard are that:

[...] there must be an element of subjective knowledge on the part of the accused of the factual conditions which render the actions a crime against humanity. [...] The mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crime against humanity.

267. According to Finta, nothing more seems to be required beyond this and there is no mention of the relevance or otherwise of the accused’s personal motives.

268. One reason why the above cases do not refer to “motives” may be, as the Defence has suggested, that “the issue in these cases was not whether the Defendants committed the acts for purely personal motives”. The Appeals Chamber believes, however, that a further reason why this was not in issue is precisely because motive is generally irrelevant in criminal law, as the Prosecution pointed out in the hearing of 20 April 1999:

For example, it doesn’t matter whether or not an accused steals money in order to buy Christmas presents for his poor children or to support a heroin habit. All we’re concerned with is that he stole and he stole. Equally, in the Eichmann case, the defendants do not appear to have raised the defence that they acted from personal motives.

269. The Appeals Chamber approves this submission, subject to the caveat that motive becomes relevant at the sentencing stage in mitigation or aggravation of the sentence (for example, the above mentioned thief might be dealt with more leniently if he stole to give presents to his children than if he were stealing to support a heroin habit). Indeed the inscrutability of motives in criminal law is revealed by the following reductio ad absurdum. Imagine a high-ranking SS official who claims that he participated in the genocide of the Jews and Gypsies for the “purely personal” reason that he had a deep-seated hatred of Jews and Gypsies and wished to exterminate them, and for no other reason. Despite this

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330 Ibid., p. 331.
331 R. v. Finta, 71994g 1 SCR 781.
332 Ibid., at p 819, majority judgement delivered by Cory J.
333 Defence’s Substituted Response to Cross-Appellant’s Brief, para 4.16.
334 T. 152-153 (20 April 1999).
quintessentially genocidal frame of mind, the accused would have to be acquitted of crimes against humanity because he acted for “purely personal” reasons. Similarly, if the same man said that he participated in the genocide only for the “purely personal” reason that he feared losing his job, he would also be entitled to an acquittal. Thus, individuals at both ends of the spectrum would be acquitted. In the final analysis, any accused that played a role in mass murder purely out of self-interest would be acquitted. This shows the meaninglessness of any analysis requiring proof of “non-personal” motives. The Appeals Chamber does not believe, however, that the Trial Chamber meant to reach such a conclusion. Rather, the requirement that the accused’s acts be part of a context of large-scale crimes, and that the accused knew of this context, was misstated by the Trial Chamber as a negative requirement that the accused not be acting for personal reasons. The Trial Chamber did not, the Appeals Chamber believes, wish to import a “motive” requirement; it simply duplicated the context and mens rea requirement, and confused it with the need for a link with an armed conflict, and thereby seemed to have unjustifiably and inadvertently added a new requirement.

270. The conclusion is therefore warranted that the relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, “purely personal motives” do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated.

C. Conclusion

271. The Trial Chamber correctly recognised that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime. Thus to convict an accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population (occurring during an armed conflict) and that the accused knew that his crimes were so related.

272. For the above reasons, however, the Appeals Chamber does not consider it necessary to further require, as a substantive element of mens rea, a nexus between the specific acts allegedly committed by the accused and the armed conflict, or to require proof of the accused’s motives. Consequently, in the opinion of the Appeals Chamber, the requirement that an act must not have been carried out for the purely personal motives of the perpetrator does not form part of the prerequisites necessary for conduct to fall within the definition of a crime against humanity under Article 5 of the Tribunal’s Statute.
VII. THE FOURTH GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE TRIAL CHAMBER’S FINDING THAT ALL CRIMES AGAINST HUMANITY REQUIRE A DISCRIMINATORY INTENT

A. Submissions of the Parties

1. The Prosecution Case

273. The Prosecution submits that the Trial Chamber erred in finding that all crimes against humanity must be committed with a discriminatory intent. It is the submission of the Prosecution that the requirement of a discriminatory intent applies only to “persecution type” crimes and not to all crimes against humanity. 335

274. The Prosecution notes that Article 5 of the Statute contains no express requirement of a discriminatory intent for all crimes against humanity. The requirement for such an intent is present in Article 3 of the Statute of the ICTR. The absence of a similar provision in Article 5 of this Tribunal’s Statute implies a contrario that at the time of drafting the Statute of this Tribunal, there was no intention to include a similar requirement. 336

275. A requirement of discriminatory intent for all crimes against humanity is also absent from customary international law. The Prosecution notes that the Nuremberg Charter and Control Council Law No. 10, upon which Article 5 is based, distinguish between “murder type” crimes such as murder, extermination, enslavement, etc., and “persecution type” crimes committed on political, racial, or religious grounds. Discriminatory intent need only be shown in relation to “persecution” crimes. The Prosecution submits that the Trial Chamber erred in relying upon a statement in paragraph 48 of the Report of the Secretary-General 337 and statements made in the Security Council by three of its fifteen Members to conclude that Article 5 of the Statute was to be interpreted as requiring that all crimes against humanity be committed with a discriminatory intent. In the Prosecution’s submission, these sources do not purport to reflect customary international law and thus should not be given undue, authoritative weight in interpreting Article 5. 338 It is the view of the Prosecution that Article 5 does not contain any ambiguity. Thus, to accord weight to these sources to resolve an ambiguity which, in the Prosecution’s submission, does not exist, would lead to considerable uncertainty with regard to the scope and content of Article 5 of the Statute. 339

276. The Prosecution submits that the rules of statutory interpretation also militate against requiring a discriminatory intent for all crimes against humanity. If discriminatory intent were required for all crimes against humanity, the Prosecution submits that this would relegate the crime of “persecutions” under Article 5(h) to a residual provision and make “other inhumane acts” in Article 5(i) redundant. The Prosecution submits that the Statute should be interpreted in order to give proper effect to all of its provisions. 340

277. Finally, the Prosecution submits that the requirement of discriminatory intent for all crimes against humanity is inconsistent with the humanitarian object and purpose of the Statute and international humanitarian law. The Prosecution argues that requiring a discriminatory intent for all crimes against humanity would create a significant normative lacuna by failing to protect civilian populations not encompassed by the listed grounds of discrimination. 341

2. The Defence Case

278. The Defence submits that the Trial Chamber’s decision that all crimes against humanity require a discriminatory intent should be upheld.

335 Cross-Appellant’s Brief, para. 5.5; T. 161 (20 April 1999).
336 Cross-Appellant’s Brief, para. 5.6; T. 162 (20 April 1999).
337 The statement reads as follows: “Crimes against humanity refer to inhumane acts of a very serious nature [...] committed as part of a widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds.”
338 Cross-Appellant’s Brief, paras. 5.7, 5.8; T. 162, 163 (20 April 1999).
339 Cross-Appellant’s Brief, paras. 5.20, 5.22.
340 Cross-Appellant’s Brief, para. 5.24 T. 165 (20 April 1999).
341 Cross-Appellant’s Brief, para. 5.26 T. 165 (20 April 1999).
279. The inclusion of discriminatory intent in the ICTR Statute does not indicate that discriminatory intent need not be shown in order for Article 5 of the Statute of this Tribunal to apply. Rather, the Defence submits that it shows the intention of the Security Council to embrace discriminatory intent as a requirement for crimes against humanity. 342

280. The Defence submits that the silence in Article 5 as to whether discriminatory intent is required for crimes against humanity creates an uncertainty. To resolve this uncertainty, the Appeals Chamber should look to sources such as the preparatory work of the Statute as it interprets Article 5 of the Statute. Thus, the Defence submits that the Trial Chamber was correct in looking to the Report of the Secretary-General and to statements of members of the Security Council in determining that discriminatory intent must be shown in respect of all crimes under Article 5 of the Statute. 343

B. Discussion

281. The Prosecution submits that the Trial Chamber erred in finding that all crimes against humanity enumerated under Article 5 require a discriminatory intent. It alleges, further, that because of this finding, the Trial Chamber “restricted the scope of persecutions under subparagraph (h) only to those acts not charged elsewhere in the Indictment rather than imposing additional liability for all acts committed on discriminatory grounds. In doing so, it would appear that the sentence against the accused was significantly reduced.” 344 However, the Prosecution does not appeal the sentence imposed by the Trial Chamber in respect of the crimes against humanity counts, or seek to overturn the Trial Chamber’s verdict or findings of fact in this regard. Thus, this ground of appeal does not, prima facie, appear to fall within the scope of Article 25(1). 345 Nevertheless, and as with the previous ground of appeal, the Appeals Chamber finds that this issue is a matter of general significance for the Tribunal’s jurisprudence. It is therefore appropriate for the Appeals Chamber to set forth its views on this matter.

1. The Interpretation of the Text of Article 5 of the Statute

282. Notwithstanding the fact that the ICTY Statute is legally a very different instrument from an international treaty, in the interpretation of the Statute it is nonetheless permissible to be guided by the principle applied by the International Court of Justice with regard to treaty interpretation in its Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations: “The first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur”. 346

283. The ordinary meaning of Article 5 makes it clear that this provision does not require all crimes against humanity to have been perpetrated with a discriminatory intent. Such intent is only made necessary for one sub-category of those crimes, namely “persecutions” provided for in Article 5 (h).

284. In addition to such textual interpretation, a logical construction of Article 5 also leads to the conclusion that, generally speaking, this requirement is not laid down for all crimes against humanity. Indeed, if it were otherwise, why should Article 5(h) specify that “persecutions” fall under the Tribunal’s jurisdiction if carried out “on political, racial and religious grounds”? This specification would be illogical and superfluous. It is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless: the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements.

285. As rightly submitted by the Prosecution, the interpretation of Article 5 in the light of its object and purpose bears out the above propositions. The aim of those drafting the Statute was to make all crimes against humanity punishable, including those which, while fulfilling all the conditions required by the notion of such crimes, may not have been perpetrated on political, racial or religious grounds as specified in paragraph (h) of Article 5. In light of the humanitarian goals of the framers of the Statute, one fails to see why they should have seriously restricted the class of offences coming within the purview of “crimes against humanity”, thus leaving outside this class all the possible instances of serious and widespread or systematic crimes against civilians on account only of their...
lacking a discriminatory intent. For example, a discriminatory intent requirement would prevent the penalization of random and indiscriminate violence intended to spread terror among a civilian population as a crime against humanity. A fortiori, the object and purpose of Article 5 would be thwarted were it to be suggested that the discriminatory grounds required are limited to the five grounds put forth by the Secretary-General in his Report and taken up (with the addition, in one case, of the further ground of gender) in the statements made in the Security Council by three of its members. Such an interpretation of Article 5 would create significant lacunae by failing to protect victim groups not covered by the listed discriminatory grounds. The experience of Nazi Germany demonstrated that crimes against humanity may be committed on discriminatory grounds other than those enumerated in Article 5 (h), such as physical or mental disability, age or infirmity, or sexual preference. Similarly, the extermination of “class enemies” in the Soviet Union during the 1980s (admittedly, as in the case of Nazi conduct before the Second World War, an occurrence that took place in times of peace, not in times of armed conflict) and the deportation of the urban educated of Cambodia under the Khmer Rouge between 1975-1979, provide other instances which would not fall under the ambit of crimes against humanity based on the strict enumeration of discriminatory grounds suggested by the Secretary-General in his Report.

286. It would be pointless to object that in any case those instances would fall under the category of war crimes or serious “violations of the laws or customs of war” provided for in Article 3 of the Statute. This would fail to explain why the framers of the Statute provided not only for war crimes but also for crimes against humanity. Indeed, those who drafted the Statute deliberately included both classes of crimes, thereby illustrating their intention that those war crimes which, in addition to targeting civilians as victims, present special features such as the fact of being part of a widespread or systematic practice, must be classified as crimes against humanity and deserve to be punished accordingly.

287. The same conclusion is reached if Article 5 is construed in light of the principle whereby, in case of doubt and whenever the contrary is not apparent from the text of a statutory or treaty provision, such a provision must be interpreted in light of, and in conformity with, customary international law. In the case of the Statute, it must be presumed that the Security Council, where it did not explicitly or implicitly depart from general rules of international law, intended to remain within the confines of such rules.

288. A careful perusal of the relevant practice shows that a discriminatory intent is not required by customary international law for all crimes against humanity.

289. First of all, the basic international instrument on the matter, namely, the London Agreement of 8 August 1945, clearly allows for crimes against humanity which may be unaccompanied by such intent. Article 6 (c) of that Agreement envisages two categories of crimes. One of them is that of “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population”, hence a category for which no discriminatory intent is required, while the other category (“persecutions on political, racial, or religious grounds”) is patently based on a discriminatory intent. An identical provision can be found in the Statute of the Tokyo International Tribunal (Article 5 (c)). Similar language can also be found in Control Council Law No. 10 (Article II (1) (c)).

290. The letter of these provisions is clear and indisputable. Consequently, had customary international law developed to restrict the scope of those treaty provisions which are at the very origin of the customary process, uncontroverted evidence would be needed. In other words, both judicial practice and possibly evidence of consistent State practice, including national legislation, would be necessary to show that customary law has deviated from treaty law by adopting a narrower notion of crimes against humanity. Such judicial and other practice is lacking. Indeed, the relevant case-law points in the contrary direction.

348 See paragraphs 294-300 below.
349 Article II (1) (c) of Control Council Law No. 10 provides:
"Crimes against Humanity: Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any
Generally speaking, customary international law has gradually expanded the notion of crimes against humanity. As a result, crimes against humanity did not necessarily consist of persecutory or discriminatory actions.

291. It is interesting to note that the necessity for discriminatory intent was considered but eventually rejected by the International Law Commission in its Draft Code of Offences Against the Peace and Security of Mankind. Similarly, while the inclusion of a discriminatory intent was mooted in the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom), Article 7 of the Rome Statute embodied the drafters’ rejection of discriminatory intent.

292. This warrants the conclusion that customary international law, as it results from the gradual development of international instruments and national case-law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity.

sentencing the marines to death, the members of the court-martial had inflicted an injury upon humanity as a whole. The same broad interpretation of Control Council Law No. 10 may be found, finally, in a Decision of 18 October 1949 (S. StS 309/49) in the H. case (Entscheidungen des Obersten Gerichtshofes für die Britische Zone, vol. II, pp. 231-246). There, the court dealt with a case where a German judge had presided over two trials by a naval court-martial (Bordkriegsgericht) against two officers of the German Navy, a submarine commander, charged in 1944 with criticizing Hitler, and the other a lieutenant-commander of the German naval forces, charged in 1944 with procuring two foreign identity cards for himself and his wife. The judge had voted for sentencing both officers to death (the first had been executed, while the sentence against the second had been commuted by Hitler to 10 years’ imprisonment). The Supreme Court held that the judge could be found guilty of crimes against humanity even if he had not acted for political reasons, to the extent that his action was deliberately taken in connection with the Nazi system of violence and terror (Entscheidungen des Obersten Gerichtshofes für die Britische Zone, ibid., vol. II, pp. 233, 239).

Article 7(1) of the Rome Statute provides: “For the purposes of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against the civilian population, with knowledge of the attack: (a) murder […]” Article 7(1) of the Rome Statute articulates a definition of crimes against humanity based solely upon the interplay between the mens rea of the defendant and the existence of a widespread or systematic attack directed against a civilian population.
3. The Report of the Secretary-General

293. The interpretation suggested so far is not in keeping with the Report of the Secretary-General and the statements made by three members of the Security Council before the Tribunal’s Statute was adopted by the Council. The Appeals Chamber is nevertheless of the view that these two interpretative sources do not suffice to establish that all crimes against humanity need be committed with a discriminatory intent.

294. We shall consider first the Report of the Secretary-General, which stated that the crimes under discussion are those “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”

295. It should be noted that the Secretary-General’s Report has not the same legal standing as the Statute. In particular, it does not have the same binding authority. The Report as a whole was “approved” by the Security Council (see the first operative paragraph of Security Council resolution 827(1993)), while the Statute was “adopted” (see operative paragraph 2). By “approving” the Report, the Security Council clearly intended to endorse its purpose as an explanatory document to the proposed Statute. Of course, if there appears to be a manifest contradiction between the Statute and the Report, it is beyond doubt that the Statute must prevail. In other cases, the Secretary-General’s Report ought to be taken to provide an authoritative interpretation of the Statute.

296. Moreover, the Report of the Secretary-General does not purport to be a statement as to the position under customary international law. As stated above, it is open to the Security Council - subject to respect for peremptory norms of international law (jus cogens) - to adopt definitions of crimes in the Statute which deviate from customary international law. Nevertheless, as a general principle, provisions of the Statute defining the crimes within the jurisdiction of the Tribunal should always be interpreted as reflecting customary international law, unless an intention to depart from customary international law is expressed in the terms of the Statute, or from other authoritative sources. The Report of the Secretary-General does not provide sufficient indication that the Security Council did so intend Article 5 to deviate from customary international law by requiring a discriminatory intent for all crimes against humanity. Indeed, in the case under consideration it would seem that, although the discrepancy between the Report and the Statute is conspicuous, the wording of Article 5 is so clear and unambiguous as to render it unnecessary to resort to secondary sources of interpretation such as the Secretary-General’s Report. Hence, the literal interpretation of Article 5 of the Statute, outlined above, must necessarily prevail.

297. Furthermore, it may be argued that, in his Report, the Secretary-General was merely describing the notion of crimes against humanity in a general way, as opposed to stipulating a technical, legal definition intended to be binding on the Tribunal. In other words, the statement that crimes against humanity are crimes “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds” amounts to the observation that crimes against humanity as a matter of fact usually are committed on such discriminatory grounds. It is not, however, a legal requirement that such discriminatory grounds be present. That is, at least, another possible interpretation. It is true that in most cases, crimes against humanity are waged against civilian populations which have been specifically targeted for national, political, ethnic, racial or religious reasons.

4. The Statements Made by Some States in the Security Council

298. Let us now turn to the statements made in the Security Council, after the adoption of the Statute, by three States, namely, France, the United States and the Russian Federation.

299. Before considering what the legal meaning of these statements may be, one important point may first be emphasised. Although they were all directed at importing, as it were, into Article 5 the qualification concerning discriminatory intent set out in paragraph 48 of the Secretary-General’s Report, these statements varied as to their purport. The statement by the French representative was intended to be part of “a few brief comments” on the Statute. By contrast, the remarks of the United States representative

356 For instance, the express requirement in Article 5 of a nexus with an armed conflict creates a narrower sphere of operation than that provided for crimes against humanity under customary international law.

357 He stated the following: “[W]ith regard to Article 5, that Article applied to all the acts set out therein when committed in violation of the law during a period of armed conflict on the territory of the former Yugoslavia, within the context of a widespread or systematic attack against a civilian population for national, political, ethnic, racial or religious reasons” (U.N. Doc. S/PV. 3217, p.11).
were expressly couched as an “interpretative statement”; furthermore, that representative added a significant comment: “[W]e understand that other members of the Council share our view regarding the following clarifications related to the Statute:358 including the “clarification” concerning Article 5.359 With regard to the representative of the Russian Federation, his statement concerning Article 5 was expressly conceived of as an interpretative declaration.360 Nevertheless, this declaration was made in such terms as to justify the proposition that for the Russian Federation, Article 5 “encompasses” crimes committed with a “discriminatory intent” without, however, being limited to these acts alone.

300. The Appeals Chamber, first of all, rejects the notion that these three statements - at least as regards the issue of discriminatory intent - may be considered as part of the “context” of the Statute, to be taken into account for the purpose of interpretation of the Statute pursuant to the general rule of construction laid down in Article 31 of the Vienna Convention on the Law of the Treaties.361 In particular, those statements cannot be regarded as an “agreement” relating to the Statute, made between all the parties in connection with the adoption of the Statute. True, the United States representative pointed out that it was her understanding that the other members of the Security Council shared her views regarding the “clarifications” she put forward. However, in light of the wording of the other two statements on the specific point at issue, and taking into account the lack of any comment by the other twelve members of the Security Council, it would seem difficult to conclude that there emerged an agreement in the Security Council designed to qualify the scope of Article 5 with respect to discriminatory intent. In particular, it must be stressed that the United States representative, in enumerating the discriminatory grounds required, in her view, for crimes against humanity, included one ground (“gender”) that was not mentioned in the Secretary-General’s Report and which was, more importantly, referred to neither by the French nor the Russian representatives in their declarations on Article 5. This, it may be contended, is further evidence that no agreement emerged within the Security Council as to the qualification concerning discriminatory intent.

301. Arguably, in fact, the main purpose of those statements was to stress that it is the existence of a widespread or systematic practice which constitutes an indispensable ingredient of crimes against humanity. This ingredient, absent in Article 5, had already been mentioned in paragraph 48 of the Secretary-General’s Report.362 In spelling out that this ingredient was indispensable, the States in question took up the relevant passage of the Secretary-General’s Report and in the same breath also mentioned the discriminatory intent which may, in practice, frequently accompany such crimes.

302. The contention may also be warranted that the intent of the three States which made these declarations was to stress that in the former Yugoslavia most atrocities had been motivated by ethnic, racial, political or religious hatred. Those States therefore intended to draw the attention of the future Tribunal to the need to take this significant factor into account. One should not, however, confuse what happens most of the time with the strict requirements of law.

303. Be that as it may, since at least with regard to the issue of discriminatory intent those statements may not be taken to be part of the “context” of the Statute, it may be argued that they comprise a part of the travaux préparatoires. Even if this were so, these statements would not be indispensable aids to interpretation, at least insofar as they relate to the particular issue of discriminatory intent under Article 5. Under customary international law, as codified in Article 32 of the Vienna Convention referred to above, the travaux constitute

359 On Article 5 the United States representative said that: “[i]t is understood that Article 5 applies to all acts listed in that Article, when committed contrary to law during a period of armed conflict in the territory of the former Yugoslavia, as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, religious or other grounds” (U.N. Doc. S/PV. 3217, p.16).
360 He said the following: “While believing that the text of the Statute addresses the tasks that face the Tribunal, and for that reason supporting it, we deem it appropriate to note that, according to our understanding, Article 5 of the Statute encompasses criminal acts committed on the territory of the former Yugoslavia during an armed conflict - acts which were widespread or systematic, were aimed against the civilian population and were motivated by that population’s national, political, ethnic, religious or other affiliation” (U.N. Doc. S/PV. 3217, p. 45).
361 Article 31(1) and (2) provide:
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   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.
a supplementary means of interpretation and may only be resorted to when the text of a
treaty or any other international norm-creating instrument is ambiguous or obscure. As the
w wording of Article 5 is clear and does not give rise to uncertainty, at least as regards the
issue of discriminatory intent, there is no need to rely upon those statements. Excluding
from the scope of crimes against humanity widespread or systematic atrocities on the sole
ground that they were not motivated by any persecutory or discriminatory intent would be
justified neither by the letter nor the spirit of Article 5.

304. The above propositions do not imply that the statements made in the Security
Council by the three aforementioned States, or by other States, should not be given
interpretative weight. They may shed light on the meaning of a provision that is
ambiguous, or which lends itself to differing interpretations. Indeed, in its Tadi} Decision
on Jurisdiction the Appeals Chamber repeatedly made reference to those statements as well
as to statements made by other States. It did so, for instance, when interpreting Article 3 of
the Statute 363 and when pronouncing on the question whether the International Tribunal
could apply international agreements binding upon the parties to the conflict.364

C. Conclusion

305. The Prosecution was correct in submitting that the Trial Chamber erred in finding
that all crimes against humanity require a discriminatory intent. Such an intent is an
indispensable legal ingredient of the offence only with regard to those crimes for which this
is expressly required; that is, for Article 5 (h), concerning various types of persecution.

363 See Tadi} Decision on Jurisdiction, paras 75, 88 (where reference was also made to the statements of the
representatives of the United Kingdom and Hungary).
364 See ibid., para 143 (where reference was made to the statements of the representatives of the United States,
the United Kingdom and France).

VIII. THE FIFTH GROUND OF CROSS-APPEAL BY THE
PROSECUTION: DENIAL OF THE PROSECUTION’S MOTION FOR
DISCLOSURE OF DEFENCE WITNESS STATEMENTS

A. Submissions of the Parties

1. The Prosecution Case

306. Ground five of the Cross-Appeal by the Prosecution is as follows:

This ground of appeal arose out of the Decision on Prosecution Motion for Production of
Defence Witness Statements of the Trial Chamber delivered on 27 November 1996. By a
majority (Judge McDonald dissenting), the Trial Chamber rejected the Prosecution’s motion
for disclosure of a prior statement of a Defence witness after he had testified. This decision
was reached on the basis that such statements are subject to a legal professional privilege,
which protects the Defence from any obligation to disclose them. The Prosecution submits
that the Trial Chamber erred in the application of the substantive law in the Witness
Statements Decision.365

307. The Prosecution submits that a Trial Chamber has the power to order the production
of prior statements of Defence witnesses pursuant to Rule 54, unless they are protected by
some express or implied privilege in the Statute or Rules.366 This power ensures that a Trial
Chamber, entrusted with the duty of making factual findings on the evidence adduced, is
presented with evidence which has been fully tested.367 It is submitted that a Trial Chamber
should have the benefit of weighing any inconsistencies between statements made by
witnesses in arriving at its determinations.368

308. According to the Prosecution, if regard is had to Article 21(4)(g) of the Statute and
to Sub-rules 70(A), 90(F) and 97 of the Rules, no express privilege exempts Defence

365 Cross-Appellant’s Brief, para. 6.3.
366 Ibid., para. 6.6; T. 190 (20 April 1999).
367 Ibid., paras. 6.6-6.24.
368 T. 186 (20 April 1999).
witness statements from disclosure. The privilege adopted by the International Tribunal in Rule 97 of the Rules does not cover third party statements given to Defence counsel, at least not once the Defence decides to present evidence by calling a particular witness. Once the Defence calls a witness, that evidence should be subjected to the same scrutiny as that of the Prosecution.

The Prosecution also submits that no implied privilege exempting Defence witness statements from disclosure can be inferred from the Rules (as Judge Stephen found, with Judge Vrahah concurring). In its view, there is no ambiguity in the Rules in this regard, and Judge Stephen’s reference to the legal professional privilege found in national jurisdictions is incorrect. The Prosecution submits that, even if an ambiguity exists, it is incorrect to resolve it by referring to the most common practice in adversarial jurisdictions, despite the obvious influence of adversarial systems on the Rules. Sub-rule 89(B) of the Rules expressly requires the application of “rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law”. In line with this provision, the Trial Chamber should have favoured an interpretation allowing it to order disclosure of Defence witness statements “where it considers that this would enable it to reach a verdict based on all pertinent evidence”. The Prosecution relies in particular upon the restrictions set out by the U.S. Supreme Court in United States v. Nobles.

The Prosecution also submits that the disclosure of prior statements of Defence witnesses is not otherwise inconsistent with the principles of a fair trial. In particular, the principle of equality of arms does not require that the Defence be allowed to call witnesses under conditions more favourable than those afforded to the Prosecution. If the Defence decides to call a witness at trial, that witness should in principle be subject to the same scrutiny as Prosecution witnesses.

2. The Defence Case

The Defence submits that the Trial Chamber’s Witness Statements Decision was correctly decided.

The Trial Chamber was correct in holding that the Statute and Rules do not specifically deal with the problem at issue. The Defence also submits that, in light of the essentially adversarial system under which the Tribunal operates, the term “the general principles of law” in Sub-rule 89(B) should be interpreted as meaning “the general principles of law emerging from adversarial systems”.

The Defence submits that the general principles referred to may be summarised as follows. To begin with, the burden of proving the allegation is on the Prosecution. The Prosecution must inform the accused of the charges and the evidence against him. The accused has the right to remain silent and to require the Prosecution to prove its case. There is no duty similar to that imposed on the Prosecution for the Defence to disclose its evidence, and the privilege attaching to Defence witness statements is not waived when the witness in question gives evidence.

It is also submitted that to allow such disclosure would increase the inequality of arms between the parties. Furthermore, the Defence emphasises that because privilege can be claimed for communications between the client and third parties when litigation is ongoing in most adversarial jurisdictions, such disclosure would be incorrect. The Defence also submits that such a disclosure requirement might deter witnesses from
testifying because of a loss of confidentiality, which in turn would impact on the right of a defendant to call witnesses.385

B. Discussion

1. The Reason for Dealing with this Ground of the Cross-Appeal

While neither party asserts that the Witness Statements Decision had a bearing on the verdicts on any of the counts or that an appeal lies under Article 25(1),386 they both agree that this is a matter of general importance which affects the conduct of trials before the Tribunal and therefore deserves the attention of the Appeals Chamber. The Prosecution further submits that the Witness Statements Decision, as it stands, remains persuasive authority that the Defence cannot be ordered to disclose prior witness statements.387

The Appeals Chamber has no power under Article 25 of the Statute to pass, one way or another, on the decision of the Trial Chamber as if the decision was itself under appeal. But the point of law which is involved is one of importance and worthy of an expression of opinion by the Appeals Chamber. The question posed as to whether or not a Trial Chamber has the power to order the disclosure of prior Defence witness statements after the witness has testified, must be placed in its proper context. Further, it is the view of the Appeals Chamber that this question impinges upon the ability of a Trial Chamber to meet its obligations in searching for the truth in all proceedings under the jurisdiction of the International Tribunal, with due regard to fairness. The judicial mandate of the International Tribunal is carried out by the Chambers, in this case a Trial Chamber, as this is a matter that arose during the trial process.

It is therefore necessary that the Appeals Chamber clarify the context in which the question posed is discussed. This is a matter that touches upon the duty of a Trial Chamber to ascertain facts, deal with credibility of witnesses and determine the innocence or guilt of the accused person. However, before answering the question posed, it is desirable to examine the implications of disclosure.

2. The Power to Order the Disclosure of Prior Defence Witness Statements

The Appeals Chamber is of the view that the Defence witness statement referred to would be a recorded description of events touching upon the indictment, made and, normally, signed by a person with a view to the preparation of the Defence case.

There is no blanket right for the Prosecution to see the witness statement of a Defence witness. The Prosecution has the power only to apply for disclosure of a statement after the witness has testified, with the Chamber retaining the discretion to make a decision based on the particular circumstances in the case at hand.

The power of a Trial Chamber to order the disclosure of a prior Defence witness statement relates to an evidentiary question. Strictly speaking, the principle of equality of arms is not relevant to the problem. Also, since the Statute and the Rules do not expressly cover the problem at hand, the broad powers conferred by Sub-rule 89(B) may come into play.388 The question to be addressed is whether those powers include the power of a Trial Chamber to order the disclosure of a prior Defence witness statement.

The mandate of the International Tribunal, as set out in Article 1 of the Statute, is to prosecute persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia. To fulfill its mandate, a Trial Chamber has to ascertain the credibility of all the evidence brought before it. A Trial Chamber must also take account of the following provisions of the Statute: Article 20(1), concerning the need to ensure a fair and expeditious trial; Article 21 dealing with the rights of the accused; and Article 22, dealing with the protection of victims and witnesses. Further guidance may be taken from Article 14 of the International Covenant on Civil and Political Rights389 and

385 Skeleton Argument of the Prosecution, para. 5(h).
386 Article 25(1) provides: "The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice."
387 T. 185 (20 April 1999).
388 Sub-rule 89(B) provides: "In cases not otherwise provided for in this Section, a Chamber shall apply Rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."
389 Article 14 provides in part
Article 6 of the European Convention on Human Rights, which are similar to Article 21 of the Statute.

322. With regard to the present case, once a Defence witness has testified, it is for a Trial Chamber to ascertain the credibility of his or her testimony. If he or she has made a prior statement, a Trial Chamber must be able to evaluate the testimony in the light of this statement, in its quest for the truth and for the purpose of ensuring a fair trial. Rather than deriving from the sweeping provisions of Sub-rule 89(B), this power is inherent in the jurisdiction of the International Tribunal, as it is within the jurisdiction of any criminal court, national or international. In other words, this is one of those powers mentioned by the Appeals Chamber in the Bla{ki (Subpoena) decision which accrue to a judicial body even if not explicitly or implicitly provided for in the statute or rules of procedure of such a body, because they are essential for the carrying out of judicial functions and ensuring the fair administration of justice.

323. It would be erroneous to consider that such disclosure amounts to having the Defence assist the Prosecution in trying the accused. Nor does such disclosure undermine the essentially adversarial nature of the proceedings before the International Tribunal,

“[1] All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by an independent and impartial tribunal established by law. [ … ]
(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; [ … ]; (b) to be tried without undue delay; (c) to be tried in his presence, and to defend himself in person or through legal assistance [ … ]; (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [ … ]; (g) not to be compelled to testify against himself or to confess guilt. [ … ]”

390 Article 6 provides in part: “(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [ … ].
(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
(3) Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands, of the nature and cause of the accusation against him; [ … ]; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [ … ].”


including the basic notion that the Prosecution has to prove its case against the accused. Although this provision was not in force at the time relevant to the present enquiry, it is worth noting that Sub-rule 73ter(B) provides that should a Pre-Defence Conference be held:

[…] the Trial Chamber may order that the defence, before the commencement of its case but after the close of the case for the prosecution, file the following:

(iii) a list of witnesses the defence intends to call with:
(a) the name or pseudonym of each witness;
(b) a summary of the facts on which each witness will testify;

[ … ]

This Sub-rule does not require that the Defence file its witness statements. But the substance is not far removed: the provision has been designed to assist a Trial Chamber in preparing for hearing the Defence case, and the Prosecution in preparing for cross-examination of the witnesses.

324. As stated above, once the Defence has called a witness to testify, it is for a Trial Chamber to ascertain his or her credibility. If there is a witness statement, in the sense referred to above, it would be subject to disclosure only if so requested by the Prosecution and if the Trial Chamber considers it right in the circumstances to order disclosure. The provisions of Rule 68 are limited to the Prosecution and do not extend to the Defence. Disclosure would follow only once the Prosecution’s case has been closed. Even then, Sub-rules 89(C), 392 (D), 393 and (E) 394 would still apply to such a disclosed witness statement, with the consequence that a Trial Chamber might still exclude it. Furthermore, the provisions of Sub-rule 90(F) relating to self-incrimination would of course apply.

325. The Appeals Chamber is also of opinion that no reliance can be placed on a claim to privilege. Rule 97 relates to lawyer-client privilege: it does not cover prior Defence witness statements.

392 Sub-rule 89(C) provides: “A Chamber may admit any relevant evidence which it deems to have probative value.”
393 Sub-rule 89(D) provides: “A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”
394 Sub-rule 89(E) provides: “A Chamber may request verification of the authenticity of evidence obtained out of court.”
395 Rule 97 provides in part: “All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial [ … ].”
C. Conclusion

For the reasons set out above, it is the opinion of the Appeals Chamber that a Trial Chamber may order, depending on the circumstances of the case at hand, the disclosure of Defence witness statements after examination-in-chief of the witness.

IX. DISPOSITION

For the foregoing reasons, THE APPEALS CHAMBER, UNANIMATELY

(1) DENIES the first ground of the Appellant’s Appeal against Judgement;

(2) DENIES the third ground of the Appellant’s Appeal against Judgement;

(3) RESERVES JUDGEMENT on the Appellant’s Appeal against Sentence until such time as the further sentencing proceedings referred to in sub-paragraph (6) below have been completed;

(4) ALLOWS the first ground of the Prosecution’s Cross-Appeal, REVERSES the Trial Chamber’s verdict in this part, AND FINDS the Appellant guilty on Counts 8, 9, 12, 15, 21 and 32 of the Indictment;

(5) ALLOWS the second ground of the Prosecution’s Cross-Appeal, REVERSES the Trial Chamber’s verdict in this part, AND FINDS the Appellant guilty on Counts 29, 30 and 31 of the Indictment;

(6) DEFERS sentencing on the Counts mentioned in sub-paragraphs (4) and (5) above to a further stage of sentencing proceedings;

(7) HOLDS that an act carried out for the purely personal motives of the perpetrator can constitute a crime against humanity within the meaning of Article 5 of the Tribunal’s Statute relating to such crimes;

(8) FINDS that the Trial Chamber erred in finding that all crimes against humanity require discriminatory intent and HOLDS that such intent is an indispensable legal ingredient of the offence only with regard to those crimes for which it is expressly required, that is, for the types of persecution crimes mentioned in Article 5(h) of the Tribunal’s Statute.
(9) HOLDS that a Trial Chamber may order, depending on the circumstances of the case at hand, the disclosure of Defence witness statements after examination-in-chief of the witness.

Done in both English and French, the English text being authoritative.

Mohamed Shahabuddeen
Antonio Cassese
Wang Tieya

Rafael Nieto-Navia
Florence Ndepele Mwachande Mumba

Dated this fifteenth day of July 1999
At: The Hague,
The Netherlands.

Judge Nieto-Navia appends a Declaration to this Judgement.

Judge Shahabuddeen appends a Separate Opinion to this Judgement.

X. DECLARATION OF JUDGE NIETO-NAVIA

1. I am appending a declaration because it is, in my view, necessary to say a few words about Article 25 of the Statute which provides the Prosecution or a convicted person the right to appeal on an error on a question of law invalidating the decision or an error of fact occasioning a miscarriage of justice. It would appear that the Prosecution's appeals against the acquittals on Counts 8, 9, 12, 15, 21 and 32, constituting ground 1 of the cross-appeal, and on Counts 29, 30 and 31, constituting the second ground of cross-appeal, fall within the ambit of Article 25. The civil law principle of non bis in idem, according to Black's Law Dictionary, means that the accused "shall not be twice tried for the same crime". The corresponding common law principle of double jeopardy entitles the accused "not to be twice put in jeopardy for the same offence". On the face of it, it would appear that Prosecution appeals against acquittals, though permissible under Article 25, might be in contravention of the legal tenet of non bis in idem. My concern is two-fold: (1) is non bis in idem a general principle of law; and (2) if so, is Article 25 consistent with the principle?

2. It is notable that the International Tribunal's own Statute recognises the maxim of non bis in idem. Article 10 protects a person tried by the Tribunal from subsequent prosecution by a national court. The corollary is also true: a person tried by a national court may not be tried subsequently by the International Tribunal unless the original charge was classified as a common crime, or the national court proceedings did not conform to the fundamental principles of criminal law (that is, the court proceedings were not independent and impartial, or were conducted to shield the accused from international criminal responsibility, or the charge was not prosecuted diligently).

3. Can a general principle of law be discerned from the practice of domestic courts? In the United States, the Supreme Court has interpreted the double jeopardy clause of the Fifth Amendment to mean that the Prosecution cannot appeal against a verdict, whether on an error on a question of law or fact. This finality accorded to criminal judgements is intended to protect the acquitted or convicted person against "prosecution oppression". Double jeopardy does not bar the convicted person from appealing because he/she chooses to put himself/herself at risk once more.

3. The Fifth Amendment of the U.S. Constitution reads: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb".

4. Similarly, in the United Kingdom, the application of the double jeopardy principle precludes the Prosecution from appealing against acquittals, except where the appeal challenges an acquittal tainted by bribery, threats or other interference with a witness or juror, or where the appeal is from acquittal in the magistrates' court by case stated to the Divisional Court of the Queen’s Bench Division on the ground that it was rendered in error of law or in excess of jurisdiction.

5. Thus, it seems that the common law gives special weight to acquittals. In the United Kingdom, the Prosecution does not have the right to appeal although appeals are allowed in certain clearly circumscribed instances. In the United States, there is a complete bar on appeals against acquittals. 6

6. I turn now to examine the position adopted by countries in the civil law tradition. Civil law generally allows appeals against decisions at first instance. However, decisions rendered by the second-tier courts can be appealed by way of cassation only on errors of law. In France, the Prosecution may lodge a pourvoi en cassation to challenge procedural irregularities, which inter alia, include an error in law made by the lower court. 5

7. In Germany, Prosecution appeals against acquittals are not considered to violate non bis in idem because the judgement at trial is not seen to constitute the end of the criminal proceeding. It seems that, in the German legal system, jeopardy attaches with the criminal charge and continues through all proceedings that arise from the original charge. Hence, a Prosecution appeal from acquittal is seen as another step in the criminal proceedings.

8. This brief survey of domestic practice, though far from comprehensive, reveals that no general principle of law can be drawn from domestic practice. Unlike the Anglo-American common law system, the civil law system does not construe Prosecution appeals against acquittals to compromise the principle of non bis in idem.

9. From the foregoing, I must conclude that there is no general principle of law that would prohibit Prosecution appeals against acquittals. Therefore, it is unnecessary to analyse whether Article 25 is consistent with non bis in idem.

10. It seems to me that this conclusion is buttressed by the fact that the rationale which underpins the common law’s vigorous approach is absent in the context of prosecutions before the International Tribunal. The impetus for the special weight given to acquittals is the desire to prevent the government, with its vast superior resources, from abusing its power to prosecute accused persons by re-prosecuting them until it manages to obtain convictions. In the International Tribunal, while the Prosecution prosecutes on behalf of the international community, it is not supported by a governmental apparatus with abundant resources. Like the Defence, it too must rely on the cooperation of external entities. Moreover, Articles 20(1) and 21(4) guarantee to each party equality of arms.

11. I accept that Prosecution appeals against acquittals conform to the requirements of Article 25. However, I think that the Appeals Chamber should analyse, at the sentencing stage, whether a successful Prosecution appeal should put the person in a worse position than that at the end of trial ("reformatio in pejus").

12. With respect to the fourth ground of cross-appeal, on the question of whether there exists a crime against humanity where the accused acted out of purely personal motives, I join in the reasoning and conclusion offered by my learned colleague, Judge Shahabuddeen, in his separate opinion. I would add only the following to elaborate my own position. The reason that a crime against humanity under Article 5 cannot be committed for purely personal motives completely unrelated to the attack on a civilian population is that, being a crime under international law, there must be a proximate connection between the underlying act(s) and the surrounding armed conflict. An unlawful act perpetrated in the context of an armed conflict, but unrelated to the hostilities, is a common crime under national law. The fact that such a crime was committed in the context of an armed conflict does not render it subject to international humanitarian law.

13. On the question of whether the Prosecution has a right to the production of Defence witness statements, constituting the fifth ground of cross-appeal, I agree with...
XI. SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. Some time ago, yet not far from where the events in this case happened, a “breakdown of law and order” occurred. There “were savage and pitiless actions into which men were carried not so much for the sake of gain as because they were swept away into an internecine struggle by their ungovernable passions”. The turmoil saw “the ordinary conventions of civilized life thrown into confusion”. Sadly, it seems, people took “it upon themselves to begin the process of repealing those general laws of humanity which are there to give a hope of salvation to all who are in distress, instead of leaving those laws in existence, remembering that there may come a time when they, too, will be in danger and will need their protection”.  

2. That last reflection of a great thinker of antiquity was later expressed in the saying by Westlake “that the mitigation of war must depend on the parties to it feeling that they belong to a larger whole than their respective tribes or states, a whole in which the enemy too is comprised, so that the duties arising out of that larger citizenship are owed even to him”. The development of a sense of that “larger citizenship” has been disappointingly slow. Since the ancient chronicler spoke of the “general laws of humanity”, then lacking legal force but still recognisable, it has taken over two thousand years for those “laws” to assume the shape of binding norms applying world-wide. To what extent did they govern in this case? And with what consequences?

3. I agree with the conclusions reached by the Appeals Chamber, and very largely with its arguments, subject to reservations on some aspects (including the relationship between the Rome Statute and the development of customary international law). I propose to explain my position on some of the points on which my reasoning may not be the same.

A. Whether There Was an International Armed Conflict

4. As is observed in paragraph 83 of the judgement of the Appeals Chamber, the “requirement that the conflict be international for the grave breaches regime to operate


pursuant to Article 2 of the Statute has not been contested by the parties". That point is not being considered.

5. As to the points which are being considered, I agree with the Appeals Chamber, and with Judge McDonald, that there was an international armed conflict in this case. I also appreciate the general direction taken by the judgement of the Appeals Chamber, but, so far as this case is concerned, I am unclear about the necessity to challenge Nicaragua (I.C.J. Reports 1986, p. 14). I am not certain whether it is being said that that much debated case does not show that there was an international armed conflict in this case. I think it does, and that on this point it was both right and adequate.

1. The Issue

6. The issue in this branch of the case is whether, after 19 May 1992, there was an "armed conflict" between the Federal Republic of Yugoslavia (Serbia and Montenegro) ("FRY") and Bosnia and Herzeogovina ("BH") within the meaning of Article 2, first paragraph, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention"). The provision states that "... the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties ...". There was no state of declared war. If also there was no "armed conflict" as between the FRY and BH (as the majority of the Trial Chamber seemingly thought), the Fourth Geneva Convention did not apply, and the question whether victims were protected persons within the meaning of Article 4, first paragraph, of the Convention did not arise, a question which the majority nevertheless answered. Persons could only be protected by the Convention if the Convention in the first instance applied to the armed conflict by which they were affected.

2. Nicaragua Shows That There Was an Armed Conflict Between the FRY, Acting Through the VRS, and BH

7. Ex hypothesi, an armed conflict involves a use of force. Thus, the question whether there was an armed conflict between the FRY and BH depended on whether the FRY was using force against BH through the Bosnian Serbian Army of the Republika Srpska ("VRS"). So, I turn to this question.

8. Nicaragua is not easy reading. Many issues were involved, and interpretations differ. A general understanding is that the Court said that the United States had no responsibility for delictual acts committed by the contras because, in its view, the former lacked the requisite degree of control over the latter. However, the Court was careful to say that this "conclusion ... does not of course suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the contras". (I.C.J. Reports 1986, p. 63, para. 110). One part of this unresolved question of responsibility was whether, as claimed by Nicaragua, "the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua". (Ibid., p. 19, para. 15(c)). In so far as it was sought to support this part of the claim by reference to funds being supplied by the United States to the contras, the Court held that "the mere supply of funds to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua, does not in itself amount to a use of force". (Ibid., p. 119, para. 228).

9. By contrast, the Court considered that, as distinguished from the mere supplying of funds, the United States had committed other acts in relation to the contras which amounted to a threat or use of force against Nicaragua. In paragraph 228 of its judgement, the Court put it this way:

As to the claim that United States activities in relation to the contras constitute a breach of the customary international law principle of the non-use of force, the Court finds that, subject to the question whether the action of the United States might be justified as an exercise of the right of self-defence, the United States has committed a prima facie violation of that principle by its assistance to the contras in Nicaragua, by "organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another State", and "participating in acts of civil strife ... in another State, in terms of General Assembly resolution 2625(XV)". According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to "involve a threat or use of force". In the view of the Court, while the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government.

The Court then mentioned "the mere supply of funds to the contras" as a form of assistance which did not amount to a use of force, although it amounted to intervention. Subject to that kind of exception, the Court considered that the arming and training of the contras in the circumstances of the case amounted to a use of force.

10. The Court adhered to this view in its formal disposition of the case. In paragraph 292(3) of its holding, it decided that the United States, by "training, arming, equipping, financing, and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua" intervened in the
affairs of Nicaragua. Then, in paragraph 292(4), it held that the United States, "by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State". The acts of intervention which involved a use of force included the arming and training of the contras, the Court having explicitly held that "the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua".

11. This is consistent with the Court's statement, in paragraph 238 of its judgement, that the United States, having no legal right to use force in the circumstances of the case, "has violated the principle prohibiting recourse to the threat or use of force ... by its assistance to the contras to the extent that this assistance 'involve[s] a threat or use of force' (paragraph 228 above)". Paragraph 228, to which the Court referred, is set out in relevant part above.

12. The contras were not using force exclusively on behalf of the United States; the case makes it clear that they were also using force on their own behalf against the Government of Nicaragua. This must be borne in mind in considering the following statement of the Court:

The conflict between the contras and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. (Ibid., p.114, para 219).

I do not think anything in this passage is opposed to the conclusion that the United States was using force through the contras against the Government of Nicaragua, a finding which the Court in fact made as, I think, the Appeals Chamber in this case recognises (see para 130 of the judgement). To judge whether that finding is applicable here, it is necessary to consider the facts of this case.

13. The Trial Chamber accepted that, having been itself in direct armed conflict with BH through the Yugoslav People's Army ("JNA"), the FRY established the VRS, trained it, equipped it, supplied it and maintained it. The establishment was done by the FRY, on 19 May 1992, by leaving in BH part of the JNA to function as the VRS, and doing that just days after the Security Council had called on the FRY to withdraw from BH. Senior military officers from the FRY were members of the staff of the VRS. The FRY paid the salaries (and pensions after retirement) of officers of the VRS who came over Yugoslavia Army, or VJ, as the Yugoslav portion of the old JNA was now known. The VRS was engaged in carrying out the FRY's plan of ethnic cleansing and of carving out territory of BH to be ultimately added to that of the FRY so as to realise the FRY's ambition to create a "Greater Serbia".

14. Thus, the FRY did more than provide general funds to the VRS. On the basis of Nicaragua, I have no difficulty in concluding that the findings of the Trial Chamber suffice to show that the FRY was using force through the VRS against BH, even if it is supposed that the facts were not sufficient to fix the FRY with responsibility for any delictual acts committed by the VRS. The FRY and BH were therefore in armed conflict within the meaning of Article 2, first paragraph, of the Fourth Geneva Convention, with the consequence that the Convention applied to that armed conflict.

3. The Position Taken by the Majority of the Trial Chamber

15. Citing Nicaragua, the majority of the Trial Chamber (Judge Stephen and Judge Vohrah) held that the test as to whether there was an international armed conflict was whether the FRY had effective control over the VRS, which it considered meant command and control. (Judgement of the Trial Chamber, paras 598 and 600). It found that the FRY did not have command and control over the VRS and so did not have effective control over the VRS; in its opinion, the relationship between them was one of coordination and cooperation as between allies (as to the legal implications of which I reserve my opinion). Consequently, in the view of the majority, the FRY was not a party to the armed conflict in BH after 19 May 1992. In effect, after that date, that conflict was not international.

16. With respect, it is too high a threshold to insist on proof of command and control for the purpose of determining whether a state was using force through a foreign military entity, as distinguished from whether the state was committing breaches of international humanitarian law through that entity. In Nicaragua, the Court held that the United States was using force through the contras by reason of the fact that, in the circumstances of that case, it was arming and training the contras. The Court did not say that these facts amounted to command and control; if they did, they should have given rise to state responsibility for breaches by the contras of international humanitarian law, which the Court said was not the case.

17. On the question whether the United States was responsible for the delictual acts of the contras, the Appeals Chamber considered that Nicaragua was not correct and reviewed the general question of the responsibility of a state for the delictual acts of another. It appears to me, however, that that question does not arise in this case. The question, a distinguishable one, is whether the FRY was using force through the VRS against BH, not whether the FRY was responsible for any breaches of international humanitarian law committed by the VRS.

18. To appreciate the scope of the question actually presented, it is helpful to bear in mind that there is a difference between the mere use of force and any violation of international humanitarian law. It is possible to use force without violating international humanitarian law. Proof of use of force, without more, does not amount to proof of violation of international humanitarian law, although, if unlawful, it could of course give rise to state responsibility. Correspondingly, what needs to be proved in order to establish a violation of international humanitarian law goes beyond what needs to be proved in order to establish a use of force. This is important because, under Article 2, first paragraph, of the Fourth Geneva Convention, all that had to be proved, in this case, was that an "armed conflict" had arisen between BH and the FRY acting through the VRS, not that the FRY committed breaches of international humanitarian law through the VRS.

19. The foregoing may be borne in mind in considering the Court's holding in Nicaragua that, by arming and training the contras in the circumstances of that case, the United States had used force. The Court did not declare the nature of any underlying theory. I should not be surprised, however, if it applied a test of effective control, but on the flexible basis that control which is effective for one purpose need not be effective for another, and would interpret the decision that way. Thus, in holding that the United States had used force in arming and training the contras, the Court did not rely on specific instructions, something on which it otherwise laid stress where state responsibility was sought to be founded on the delictual acts of another. In this case, the test of effective control, flexibly applied (as I believe the Court intended it to be), shows that the FRY was using force through the VRS against BH, even if such control did not rise to the level required to fix the FRY with state responsibility for any breaches of international humanitarian law committed by the VRS.

20. On the more general question whether Nicaragua was correct in its holding on the subject of the responsibility of a state for the delictual acts of a foreign military force, it may be that there is room for reviewing that case. The case may be interpreted to mean that a state could be using force through a foreign military entity without being responsible for any delictual acts committed by that entity otherwise than on the specific instructions of the state. In opposition to a theory based on the need for proof of specific instructions, it may be useful to consider whether there is merit in the argument that, by deciding to use force through an entity, a state places itself under an obligation of due diligence to ensure that such use does not degenerate into such breaches, as it can. However, I am not persuaded that it is necessary to set out on that inquiry for the purposes of this case, no issue being involved of state responsibility for another's breaches of international humanitarian law.

21. For these reasons, although I appreciate the general tendency of the judgement of the Appeals Chamber, I would respectfully reserve my position on the new test proposed.

5. The Position of the Prosecution on the Applicability of Nicaragua

22. The prosecution argues that Nicaragua is not relevant. It makes two points. First, it says that Nicaragua was concerned with the responsibility of a state for delictual acts of third parties, and not with the criminal responsibility of the individual. I am of the view, however, that, whatever the context, what constitutes a use of force (a necessary element of an "armed conflict") is so fundamental as to require constancy of principle. The distinction between the responsibility of a state and the criminal responsibility of the individual is interesting; but it is not of assistance on the question what constitutes a use of force. That is a concept of common currency in international law.

23. Second, the prosecution submits that Nicaragua did not enquire into whether the conflict was internal or international for the purposes of the Geneva Conventions of 1949. In its view, the Court found it unnecessary to do so, considering that, by virtue of common article 3 of the Geneva Conventions, the issues were determinable by reference to customary international law relating to the applicability of minimum humanitarian principles to the use of force, whether in the course of an international armed conflict or in the course of an internal one. That was so, with the consequence that it was not necessary for the Court to determine whether the Geneva Conventions, as such, were

24. But this does not mean that the Court did not have to consider whether there was a use of force, for, altogether apart from the question whether there was a breach of the Geneva Conventions, Nicaragua, as has been seen, had claimed that "the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua..." (I.C.J. Reports 1986, p. 19, para. 15(c)). That is the point involved here. In Nicaragua, the Court did not have to determine whether the conflict was internal or international; but it did have to determine whether the United States was using force against Nicaragua through the contras, and, on my interpretation, it did decide that there was such a use of force. If there was such a use of force by one state against another, ex definitione the conflict was international, whether or not it was necessary for the Court to decide that it was.

6. The Demonstrable Link Test Proposed by the Prosecution

25. As mentioned in paragraph 69 of the judgement of the Appeals Chamber, the prosecution submitted that the answer to the question whether the FRY was in armed conflict with BH through the VRS hinged on whether the conflict involved a "demonstrable link" between the VRS and the FRY or VJ, meaning, I believe, something less stringent than either of two tests which were discussed, namely, the agency test and the effective control test. The prosecution accepted that there was no authority to support the idea but thought that general jurisprudence would. In aid of the submission, recourse could be had to the character of the reference in Article 2, first paragraph, of the Fourth Geneva Convention to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties...". As it has been often observed, the expression "armed conflict" is a factual one, not intended to become burdened with legal technicalities; one respected commentator refers to it as "a de facto concept." 3

26. That is true. However, there is a difference between saying that the question whether there is an armed conflict between states is a factual one and saying that, for that reason, it is not necessary to determine whether there is an armed conflict between states. Factual as the criterion may be, it remains necessary to determine whether there is an armed conflict between states. This question is not a generalised one as to whether an armed conflict has become "internationalised" in any broad sense of the term: it is to be determined by reference to criteria of unmanageable plasticity. The question is a precise one as to whether there is an "armed conflict... between two or more of the High Contracting Parties..." to the Fourth Geneva Convention. Barring a "declared war" between them, it is only if there is such a conflict that the Convention applies. But whether or not there is such a conflict turns, ex hypothesi, on whether one state is using force against the other. A demonstrable link test has to result in showing whether or not force was being used by a state. If the test premises that it is not necessary to prove that a state was using force, it is not persuasive.

27. More pertinent, if the proposed test is meant to show whether or not force was being used by a state through a foreign army, it has to have the effect of connecting the state with the use of force by the foreign army; and I do not see how it can do this unless it has a degree of specificity commensurate with the gravity of a finding that one state was using force against another and with the serious implications of such a finding for individual criminal responsibility for, if the Convention applies, the individual becomes liable to conviction for certain serious crimes to which he would not otherwise be exposed. If the test has the requisite degree of specificity, I do not see the advantage which it possesses over the other tests concerned. Whatever may be said about the latter, they appear to have that quality. Thus, the proposed test is either unnecessary or inadequate.

7. The Test of Appellate Intervention

28. The Appeals Chamber is intervening in this part of the case because it holds that the Trial Chamber applied the wrong legal criterion. In another part of the case (and, in a sense, in this part also), the question of evaluation of facts is concerned. It may be convenient to say a word on the basis on which, I believe, the Appeals Chamber acts.

29. Assessment of facts is primarily a matter for the Trial Chamber. But appeals to the Appeals Chamber are by way of rehearing, though not involving a hearing de novo

3 J.S. Pictet, Humanitarian Law and the Protection of War Victims (Leyden, 1979), p. 50
in the Appeals Chamber. Thus, the Appeals Chamber is also a judge of fact, although it must take account of its disadvantage in that, unlike the Trial Chamber, it cannot assess the witnesses first hand. Further, the Appeals Chamber is in as good a position as the Trial Chamber to decide on the proper inferences to be drawn from undisputed facts, or from facts which, being disputed, are established by the findings of the Trial Chamber.

30. However, where there is a difference in assessments of facts, the Appeals Chamber will not simply substitute its assessment for that of the Trial Chamber. As it was said by Briefly, "different minds, equally competent, may and often do arrive at different and equally reasonable results". Similarly, it has been remarked that "[t]wo reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable ... Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable". In these respects, I agree with the corresponding remark made by the Appeals Chamber in paragraph 64 of the judgement.

31. Consequently, the Appeals Chamber will intervene where it can see that no reasonable person would have taken the view taken by the Trial Chamber. But, of course, the Appeals Chamber can also intervene if the Trial Chamber did not take into account relevant facts, or if it took account of irrelevant ones, or if it applied the wrong legal criterion to the determination of the legal significance of the facts.

32. With respect, I think that, as regards another part of this case (concerning Jaski), the decision of the Trial Chamber is not sustained by the criterion of reasonableness. More particularly, however, I consider that, as regards the question whether there was an international armed conflict, the wrong legal criterion was used.

B. Whether There is a Crime against Humanity Where the Accused Acted out of Purely Personal Motives

33. Motive is important to punishment. It is always relevant as evidence. In exceptional cases, not including this, it could be an element of the offence charged, as, in some countries, in the case of a prosecution for libel. But, more generally, it is not.

34. There are difficulties in the passage, but, read as a whole and in the context in which it occurred, I do not think it meant that, if the accused "knows that his act fits in with the attack", that attack being one "on the civilian population", the mere circumstance that he acted out of personal motives sufficed to exclude the commission of the crime. "Denunciation" type cases, in which the accused sought to avail himself of the arrangements relating to the attack on the civilian population in order to advance his personal motives, are crimes against humanity. And rightly so, for those are cases in which, however personal were the motives, the act fitted in with the attack on the civilian population, within the contemplation of the phrase used by the Trial Chamber.

35. What, I apprehend, the Trial Chamber had in mind was a distinguishable situation in which, although the accused knew of the attack on the civilian population, he did not in fact intend to link his act to the attack but acted "for purely personal motives completely unrelated to the attack on the civilian population". Thus, in the period of an attack on a certain civilian population, a jealous husband, being a member of the aggressor group, might kill his wife, being a member of the attacked civilian population, for exactly the same reasons, and no other, for which he would have killed her had she been a member of his own group. It does not appear to me that the mere fact that he knew of the attack on the civilian population could serve to classify his act as a crime against humanity in the absence of proof that he intended that his act should fit in with the arrangements for the attack. That proof is apparent in "denunciation" type cases it is absent in the example suggested the arrangements relating to the attack on the civilian population played no part in the commission of the act. Were the law as submitted by

Thus, if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict.

6 Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict.

6 (Emphasis added). "The intent (or motive) of the perpetrator in `murder'... must be linked to carrying out the `state action or policy'." See Cherif Bassiouni, Crimes against Humanity in International Criminal Law (Dordrecht, 1992), p.292.
the prosecution, whereas the killing of the wife who was a member of the aggressor group, would always be simple murder; that of the wife who was a member of the attacked civilian population, would always be a crime against humanity.

36. The hypothesis of the murder of the wife who was a member of the attacked civilian population, is accommodated by the necessity for the prosecution to prove, as an element of a crime against humanity, that the murder was "directed against any civilian population" as is required by the chapeau of Article 5 of the Statute. Such a murder would not have been directed against the civilian population. Where the evidence is of that kind, the prosecution has failed to prove that element of a crime against humanity.

37. The Trial Chamber seems to have regarded the non-existence of personal reasons as being itself an element of the crime to be proved by the prosecution. With respect, that was a mistake. The prosecution does not have to prove negatively that there were no personal reasons; it has to prove affirmatively that the crime was directed against the civilian population. However, the evidence may show that the act was not directed against the civilian population for any of several reasons, and one of these may be that it was done for purely personal reasons completely unrelated to the attack on the civilian population, as discussed above. That possibility may be disclosed either by the evidence for the prosecution or by that for the defence. If that is the evidence, failure by the prosecution to overcome it means that the prosecution has failed to prove a required element of a crime against humanity, namely, that the act was directed against the civilian population.

38. That is a far cry from suggesting, as the Trial Chamber seems to have done, that it is an element of the crime, having to be proved by the prosecution, that the act of the accused was not dictated by purely personal motives. But I do not think that the Trial Chamber was wrong in taking the position that, where the act was dictated by purely personal motives which were completely unrelated to the attack on the civilian population, no crime against humanity was committed, even if the accused was aware of that attack.

C. Whether the Prosecution has a Right to Disclosure of Defence Witness Statements

39. I respectfully agree with the decision of the Appeals Chamber on this point but would add something on the reasoning out of the matter and the scope of the result.

40. The provisions of the Statute of the Tribunal relating to evidence are sparse. That suggests that there is room for fashioning the rest of the needed system under Article 15 of the Statute and Rules 54 and 89(B) of the Rules of Procedure and Evidence. Barring amendment of the Rules, how far can the Chambers now go?

41. Rule 90(E) provides for a privilege against self-incrimination, and Rule 97 provides for a lawyer-client privilege. It may be argued that, by implication, these express provisions exclude what is called a litigation privilege, which would have the effect of denying to the prosecution a right of access to defence witness statements. The exclusion of that privilege would leave a Chamber free to order disclosure of such statements in pursuit of its search for truth. But the sparsity of the provisions relating to evidence counsels caution in adopting that approach.

42. I do not think that protection from disclosure is provided by Rule 70(A), which states:

Notwithstanding the provisions of Rules 66 and 67, reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.

It could be argued that the last phrase contemplated the pre-trial stage only; but I think that a better view is that the provision (as set out in the scheme of the Tribunal's Rules) was seeking, in part, to cancel out the effect of previous provisions which themselves assumed that, to the extent that such previous provisions did not control, "reports, memoranda or other internal documents" would not be subject to disclosure at any stage of the case. It would be odd if the protection afforded by Rule 70(A) was confined to the pre-trial stage, with the material being open to disclosure at any stage thereafter. No doubt, a similar provision is differently understood elsewhere. But it is good to recall that the transposition of a municipal text to the international plane does not necessarily take with it the technical environment in which the original text had its life. Otherwise,
one runs into those difficulties which are created "when a rule is removed from the
framework in which it was formed, to another of different dimensions, to which it
cannot adapt itself as easily as it did to its proper setting." On balance, I agree with
the prosecution that the protection referred to by Rule 70(A), as this provision occurs
within the framework of the Tribunal's Rules, is to be regarded as extending throughout
the case.

43. The question remains, however, as to what are the categories of material to
which the protection provided by Rule 70(A) attaches. The opening words of the
provision are not "Save as excepted in the provisions of Rules 66 and 67 ...". The
"notwithstanding" formula used means that, "notwithstanding the provisions of Rules
66 and 67, "reports, memoranda or other internal documents ... are not subject to
disclosure ...". If those categories include witness statements and thus deny the defence
access to prosecution witness statements, a conflict exists with Rule 66(A)(ii), under
which copies of prosecution witness statements must be made available to the defence.
The particularity of Rule 66(A)(ii) suggests that witness statements are not included in
the general reference to "reports, memoranda or other internal documents" in Rule
70(A). In the result, defence witness statements are not protected against disclosure by
virtue of Rule 70(A).

44. But what of the arrangements for reciprocal inspection of materials? Under Rule
66(B), at the request of the defence the Prosecutor is required to

permit the defence to inspect any books, documents, photographs and tangible
objects in his custody or control, which are material to the preparation of the defence,
or are intended for use by the Prosecutor as evidence at trial or were obtained from or
belonged to the accused.

If the defence avails itself of this right, the prosecutor has a reciprocal right under Rule
67(C), reading:

If the defence makes a request pursuant to Sub-rule 66(B), the Prosecutor shall be
entitled to inspect any books, documents, photographs and tangible objects, which
are within the custody or control of the defence and which it intends to use as
evidence at the trial.

45. These provisions refer to real evidence, not to proofs of testimonial evidence
which is expected to be given by a witness. A larger meaning may be suggested by the
words "which are material to the preparation of the defence", but those words occur in

Rule 66(B) and do not recur in Rule 67(C). Accordingly, even if they bear that larger
meaning, those words do not operate to entitle the prosecution to inspect defence witness
statements.

46. The prosecution is obliged to furnish the defence with copies of prosecution
witness statements and with any exculpatory evidence. Thus, so far as this kind of
material is concerned, the defence does not need to invoke reciprocity to gain access to
the material.

47. It may seem odd and unbalanced that the defence has a unilateral right to receive
copies of prosecution witness statements under Rule 66(A)(ii). But that, I think, is the
transmuted equivalent of the right of an accused person, under many legal systems, to be
apprised beforehand, in one way or another, of the evidence for the prosecution. Also, it
has to be remembered that, altogether apart from the question whether he is guilty or not
 guilty, a man has a right not to be charged without just cause. Fairness requires this
kind of unilateralism. A man who has been indicted, with the prospect of loss of liberty,
has a right to know what is the evidence on the basis of which he is being put through
the judicial process. The prosecution does not stand on that ground and has no similar
basis for demanding access to the evidence of the defence.

48. In my opinion, the reciprocity provisions of Rule 67(C), read with Rule 66(B)
do not enable the prosecution to have access to defence witness statements: More
importantly, it appears to me that, a contrario, those provisions imply that the
prosecution stands excluded from such access materials to which the prosecution may
have access, and then only on a reciprocal basis, are specified, and they do not include
defence witness statements.

49. A new Rule 73ter(B), not in force at the relevant time, empowers a Trial
Chamber to order the defence to file, between the close of the case for the prosecution
and the opening of the case for the defence, "a summary of the facts on which each
(defence) witness will testify." That goes some way in the direction of the submissions
of the prosecution in this case, but not all the way: it implies that the prosecution has no
right of access to defence witness statements.

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8 See the reference by Lord Parker CJ to the impermissibility of "an accusation of crime without cause" in
9 See Richard May and Marieke Wierda, "Trends in International Criminal Evidence: Nuremberg, Tokyo,
That is in keeping with the litigation privilege or the work product doctrine. The right is lost only where it is waived by the defence. It is waived where the defence itself puts a defence witness statement in issue by relying on it for one purpose or another. Such was the case of Nobles, 422 U.S. 244. There, defence counsel, in cross-examining two prosecution witnesses, sought to impeach their credit by reference to oral statements which they had allegedly made to a defence investigator as preserved in the latter's "report" to defence counsel - something in the nature of a witness statement. In the view of the United States Supreme Court, the trial judge had power, in those circumstances, to order the defence to make the "report" available to the prosecution after examination-in-chief of the investigator by the defence. That, with respect, was right; for the "report", having been relied on by the defence in cross-examining the two prosecution witnesses, was a factor which would obviously enter into the assessment of the truth. The "report" was thus put in issue by the defence itself.

On a similarly limited basis, a Trial Chamber has power to order the defence to make a defence witness statement available to the prosecution. I speak of a "limited basis" because I do not support the view that the prosecution has an unlimited right to see a defence witness statement after the witness has testified. The "cards on the table" approach favoured in some thinking on the subject has not reached that point under the Rules of Procedure and Evidence of the Tribunal. Nor, generally speaking, has that point been reached in the global common law system or in the global civil law system as they relate to criminal procedure. The right to protection is not spent at the point at which the witness has testified in chief.

I respectfully agree with the Appeals Chamber that a Chamber may order disclosure of a defence witness statement only where it is satisfied that in the particular circumstances disclosure would assist it in determining the truth. Disclosure by way of a fishing expedition is not correct. It is difficult to see how a defence witness statement is to be used by the prosecution otherwise than as a fishing expedition if it were the law that the prosecution has an automatic right to disclosure on completion of the examination-in-chief of each defence witness. At the point of disclosure, the prosecution will have no basis for suspecting that there is any variance between oral testimony and written statement it will be only "fishing" for a variance.

However, it is not clear that this limited and conditional right of access to a defence witness statement is inconsistent with the position taken by the majority of the

Trial Chamber in the relevant Decision of 27 November 1996. In the first paragraph of the separate opinion which he appended to that Decision Judge Vohrah said, "I fully agree with the views expressed by my brother Judge Stephen, for the reasons he has given". In the second paragraph of his own separate opinion, Judge Stephen said

The witness statement had not been in any way referred to in the witness' evidence-in-chief nor had anything emerged in cross-examination regarding it other than that, in answer to a question about what the witness had said when he made that statement, which was objected to by Defence counsel but was allowed, the witness said that he had "talked about, how can I put it, the truth and only the truth, how long I have known Dujo Tadić".

Clearly, the defence had not sought in any way to place reliance on the particular defence witness statement. Thus, the conclusion reached by the majority that defence witness statements were not accessible to the prosecution was not intended to apply where a defence witness statement had been in some way referred to in the evidence-in-chief of the witness or otherwise relied upon by the defence. The situation with which the majority was dealing was one in which what was being asserted by the prosecution was an unqualified right to see a defence witness statement provided only that the witness had given evidence-in-chief - even if the statement was not referred to in that evidence. It is not so clear to me that the majority intended to deny that special circumstances could warrant disclosure.

There is one other matter. The parties were agreed that nothing in the reliefs prayed for by either side turned on a determination of the above-mentioned point. They were nevertheless also agreed that the importance of the point justified a pronouncement by the Appeals Chamber. The position was similar in respect of the issue whether discriminatory intent has to be proved in respect of all crimes against humanity under Article 5 of the Statute.

Were the parties right in the position which they took? I think they were. The principle is conveniently stated thus:

Appellate courts determine only matters actually before them on appeal, and no others, and will not give opinions on controversies or declare principles of law which cannot have any practical effect in settling the rights of the litigants. They consider only those questions that are necessary for the decision of the case and do not attempt further "to lay down a rule of guidance or precedent to the bench and bar of the state". Questions not directly involved in an appeal, or not necessary or relevant to, or material in, the final determination of the cause, will not be considered or decided by an appellate court, unless, it has been held, they are affected with a public interest.
56. That approach is consistent with the Tadi Decision on Jurisdiction, at paragraph 139. There, the defence had raised an argument before the Trial Chamber concerning an element of a crime against humanity under Article 5 of the Statute of the Tribunal. The defence did not pursue the argument on appeal. Nevertheless, the Appeals Chamber observed, "Although before the Appeals Chamber the Appellant has forgone the argument ...., in view of the importance of the matter this Chamber deems it fitting to comment briefly on the scope of Article 5".

57. In my view, when the importance of the point in question is regarded, the parties were correct in agreeing that the Appeals Chamber could competently pass on.

D. Conclusion

58. These remarks concern some elements of the reasoning of the Appeals Chamber. On certain points of law, I hold different views which I desire to preserve. But I agree with the disposition of the cases set out in today's judgement.

Done in both English and French, the English text being authoritative.

Mohamed Shahabuddeen

Dated this fifteenth day of July 1999
At The Hague,
The Netherlands.

ANNEX A - GLOSSARY OF TERMS

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<th>Term</th>
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<td>Amended Notice of Appeal against Judgement</td>
<td>Amended Notice of Appeal, Case No.: IT-94-1-A, 8 January 1999.</td>
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<td>Appellant</td>
<td>Duško Tadi.</td>
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<tr>
<td>Appellant's Amended Brief on Judgement</td>
<td>Amended Brief of Argument on behalf of the Appellant, Case No.: IT-94-1-A, 8 January 1999.</td>
</tr>
<tr>
<td>BH</td>
<td>Bosnia and Herzegovina.</td>
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<tr>
<td>Claims Tribunal</td>
<td>Iran-United States Claims Tribunal.</td>
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<tr>
<td>Cross-Appellant</td>
<td>Office of the Prosecutor.</td>
</tr>
<tr>
<td>Cross-Appellant's Brief in Reply</td>
<td>Prosecution (Cross-Appellant) Brief in Reply, Case No.: IT-94-1-A, 1 December 1998.</td>
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<td>Term</td>
<td>Description</td>
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<td>-------------------------------------------</td>
<td>-----------------------------------------------------------------------------</td>
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<tr>
<td>DR</td>
<td>European Commission of Human Rights, Decisions and Reports.</td>
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<tr>
<td>FRY</td>
<td>Federal Republic of Yugoslavia (Serbia and Montenegro).</td>
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<tr>
<td>HRC</td>
<td>Human Rights Committee.</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights.</td>
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<tr>
<td>ICRC</td>
<td>International Committee of the Red Cross.</td>
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<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.</td>
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<tr>
<td>ILC</td>
<td>International Law Commission.</td>
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<tr>
<td>JNA</td>
<td>Yugoslav People's Army.</td>
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<td>Skeleton Argument – Appellant’s Appeal Against Conviction</td>
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<td>Skeleton Argument of the Prosecution, Case No.: IT-94-1-A, 19 March 1999.</td>
</tr>
<tr>
<td>Statute</td>
<td>Statute of the International Tribunal.</td>
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<tr>
<td>T.</td>
<td>Transcript of hearing in <em>The Prosecutor v. Duško Tadic</em>, Case No.: IT-94-1-A. (All transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may exist between the pagination therein and that of the final English transcript released to the public).</td>
</tr>
<tr>
<td>TRNC</td>
<td>Turkish Republic of Northern Cyprus.</td>
</tr>
<tr>
<td>VJ</td>
<td>Army of the Federal Republic of Yugoslavia.</td>
</tr>
<tr>
<td>VRS</td>
<td>Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska.</td>
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International Center for Settlement of Investment Disputes

Noble Ventures, Inc. v. Romania, Award
ICSID Case No. ARB/01/11, 12 October 2005
In the proceedings between

Noble Ventures, Inc.
(claimant)

and

Romania
/respondent

ICSID Case No. ARB/01/11

Award

Members of the Tribunal:
Professor Karl-Heinz Böckstiegel, President
Sir Jeremy Lever, KCMG, QC, Arbitrator
Professor Pierre-Marie Dupuy, Arbitrator

Secretary of the Tribunal:
Mr. Gonzalo Flores

Date of dispatch to the parties: October 12, 2005

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Abbreviations

For the many references made in this Award to the file of the Case, for convenience and shortness the Tribunal will use the following abbreviations:

APAPS Authority for Privatization and Management of the State Ownership
Art. Romanian Article
BCR BCR Romanian Commercial Bank
C 0 Investor’s Request for Arbitration Proceedings of August 21, 2001
C I Investor’s (Claimant’s) Memorial of July 10, 2003
C II Investor’s (Claimant’s) Reply of May 7, 2004
C-PHB I Investor’s First Post-hearing Brief
C-PHB II Investor’s Second Post-hearing Brief
CSR CSR Combinatul Siderurgic Resita
GD GD Government Decision
ICSID or the Centre International Centre for the Settlement of Investment Disputes
Metal Grup Metal Grup SA
No. Number
p Page
para Paragraph
PO Procedural Order
pp Pages
Privatization Law Romanian Government Emergency Ordinance No. 88/97 as amended by, in particular, Romanian Law 99/1999
R I  Respondent’s Counter-Memorial of January 23, 2004
R II  Respondent’s Rejoinder of August 30, 2004
R-PHB I  Respondent’s First Post-hearing Brief
R-PHB II  Respondent’s Second Post-hearing Brief
SOF  State Ownership Fund

A. The Parties

The Claimant
Noble Ventures, Inc
C/o Mr. Alan R. Novak
1050 K Street NW
Suite 205
Washington, D.C. 20007

Represented by:
Mr. Fred F. Fielding,
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, D.C. 20006
and
Messrs. Barry Appleton, Robert Wisner and
Hernando Otero
Appleton & Associates – International Lawyers
77 Bloor Street West, Suite 1800
Toronto, Ontario M5S 1M2

The Respondent
Government of Romania
Romanian Development Agency
Bd. Gh. Magheru 7
70161 Bucharest
Romania

Represented by:
Messrs. Darryl S. Lew, Frank A. Vasquez Jr.
and Lee A. Steven
White & Case LLP
701 Thirteenth St., NW
Washington, D.C. 20005
B. The Tribunal

Professor Karl-Heinz Böckstiegel, President
Parkstrasse 38
D-51427 Bergisch-Gladbach
Germany

Sir Jeremy Lever, KCMG, QC, Arbitrator
Monckton Chambers
1&2 Raymond Buildings
Gray’s Inn
London WC1R 5NR
United Kingdom

Professor Pierre-Marie Dupuy, Arbitrator
European University Institute
Department of Law
Villa Schifanoia, Via Boccacio 121
50133 Firenze
Italy
C. **Short Identification of the Case**

1. In what follows, the Tribunal gives a short summary of the principal facts of this case insofar as is appropriate in the context of the decision given in this award. Further details are to be found in the voluminous written briefs and documents submitted by the Parties as well as in the oral presentations by the Parties and in the evidence of the witnesses, as recorded in the transcript of the final hearing and the documents submitted with those oral presentations.

C.I. **Introduction**

2. The present case concerns a dispute between, on the one hand, an American company, Noble Ventures, Inc. (*Noble Ventures*), a juridical entity incorporated under the laws of the State of Maryland, USA in 1992, and, on the other hand, Romania. Noble Ventures’ field of business activity consisted primarily of business consulting services for steel companies in Eastern Europe. The dispute arises out of a privatization agreement concerning the acquisition, management, operation and disposition of a substantial steel mill with associated and other assets, Combinatul Siderurgic Resita (*CSR*), located in Resita, Romania. The agreement was made between Noble Ventures and the Romanian State Ownership Fund (*SOF*). SOF was a Romanian “institution of public interest” which had been created in 1992 and had as a function the privatization of Romanian State-owned enterprises. The privatization agreement included a collateral agreements and a Share Purchase Agreement dated June 5, 2000 (*SPA*) which entered into force on June 8, 2000 and which, in what follows, are collectively referred to as the “Privatization Agreement”. Completion of the agreement took place on August 16, 2000 when Noble Ventures paid SOF the initial installment of the purchase price and SOF transferred to Noble Ventures its shareholding in CSR which comprised almost CSR’s entire equity share capital.

3. CSR is a company with a rich history of steel operations. Founded in 1771, the company was one of the premier integrated steel enterprises in Europe during the 19th and 20th centuries. It was nationalized in 1948 and operated by the Romanian government throughout the Communist period. After the fall of the Communist regime in Romania, the company’s status reverted to that of a joint-stock company, named Combinatul Siderurgic Resita S.A. Before the privatization of CSR in 2000, the Romanian Government controlled approximately 95% of CSR’s shares. As far as the economic situation of CSR was concerned, decades of State ownership and control had resulted in not only a need for substantial investment in new plant and equipment but also heavy financial liabilities. In particular, at the time of its acquisition by Noble Ventures, CSR had a significant amount of debt owing to other governmental entities. Some of the creditors possessed liens on accounts of CSR.

4. The dispute arises against the background of a bilateral investment treaty (*BIT*) between Romania and the USA of May 28, 1992, which entered into force on January 15, 1994. The Treaty provides in particular for the promotion and protection of investments of nationals or companies of one Party in the territory of the other Party. The relevant provisions of the BIT are set out at paragraph 27 below.

5. At the time of the privatization, more than ten years had elapsed since the end of the Communist régime in Romania. Being still in a period of transition at the time of the conclusion of the Privatization Agreement, Romania and the Government of Prime Minister Isarescu, at that time in power in Romania, strongly supported the privatization process of State-owned enterprises. For this purpose there existed the SOF, a public institution with legal personality, subordinated to the Government, which was in charge of negotiating privatization agreements with investors. It was SOF that concluded the Privatization Agreement concerning CSR with Noble Ventures.
6. Six months after the privatization took place political control changed to an opposition party, led by Prime Minister Nastase. The change of government was reflected by the replacement of SOF by the Authority for the Privatization and Management of the State Ownership (APAPS).

7. After the acquisition of CSR by Noble Ventures a number of problems arose.

C.II. The Positions of the Parties

8. The next two Sections of this Award (“The Claimant’s perspective” and “The Respondent’s perspective”) set out, in the Parties’ own words their stated positions with regard to certain essential issues in this arbitration at the commencement of the arbitration. The citations do not imply acceptance of the correctness of the stated positions, whether by the other party or by the Tribunal.

1. The Claimant’s perspective

9. The following quotation from the Claimant’s Memorial summarizes the main aspects of its case as follows (C I, paras. 11-19, 22-25 and 28-29):

“There are four obligations under the US-Romania Bilateral Investment Treaty (‘BIT’) which apply to this Claim:

a) Romania is required to provide Noble Ventures with treatment in accordance with international law. This obligation required Romania to act in good faith, accord fair treatment and avoid arbitrary and discriminatory measures in regulating the investments of Noble Ventures in Romania.

b) Romania is required to provide Noble Ventures with full protection and security which requires Romania to enforce its own laws and to provide police protection to protect the investments of foreign investors located in Romania.

c) Romania is required to provide immediate compensation to investor whose property has been expropriated. The BIT broadly protects investments and property rights and an expropriation will occur whenever a government acts to prevent an investor from substantially enjoying its investment.

d) Romania is required to fully meet its obligations in good faith undertaken towards investors regarding investments.

11. Romania failed to act in a manner consistent with these BIT obligations. These breaches are summarized below and are set out with greater detail within this memorial.

iii) Misrepresentations about key assets

12. Romania violated Article II(2) of the BIT in that Romania’s actions and omissions constituted a failure to provide international law standards of treatment, such as good faith, fair and equitable treatment and full protection and security as required by the Bilateral Investment Treaty and international law. In addition, Romania violated Article II(2)(b) of the BIT in that Romania’s actions and omissions were an arbitrary and discriminatory
13. Romania engaged in misrepresentation regarding Association Agreements in the Tender Book. While the Tender Book prepared for the 1999 Privatization of CSR states that there were no assets subject to Association Agreements, there was in fact an important and highly material Association Agreement in place dealing with the extraction of resources from the slag piles at the CSR facility by a third party.

14. Noble Ventures management discussed the status of the slag piles with SOF and CSR officials during the privatization process before the SPA was executed. At no time did Romania ever disclose the validity of these Association Agreements with third parties. In fact, documents addressed to SOF and issued by the third party to this Association Agreement indicate that Romania knew about the existence of this contract before the privatization was completed. In light of Romania’s knowledge, the contents of the Privatization Tender Book contained fraudulent misrepresentations made by Romania with respect to this highly sensitive asset.

(iv) Failure to provide Full Protection and Security

15. Romania failed to provide full protection and security to Noble Ventures during a period of extreme labor unrest in the spring and summer of 2001. The existence of this unrest was well known to Romania. During this period of unrest, Noble Ventures made ongoing reports to the local Prefect, Minister Musetescu [the new Minister of Privatization] personally and to the Office of the Prime Minister.

16. On January 8, 2001, the local union initiated a demonstration with the goal of forcing the government to cancel the privatization contract due to Noble Ventures’ failure to make an increase in capital at the CSR facility: an increase that could not be made until Romania rescheduled the state budgetary debts. In Resita, the counselor to the Prime Minister, Ovidiu Grecia, made a statement to the press that the sale of CSR was dishonorable and that SOF officials should be investigated over their role in the sale of CSR. His actions encouraged local citizens of Resita to engage in labor unrest at CSR while Noble Ventures was in control. The local police refused to exercise adequate measures to protect Noble Ventures and CSR in Resita from unlawful activity on its premises.

17. Romania did not provide reasonable nor adequate protection and security for Noble Ventures in Resita. As a result of unlawful strikes and occupations, Noble Ventures’ premises were repeatedly occupied, its files and cash accounts were pilfered, facilities and equipment were sabotaged and members of its management were confined and, in some cases, beaten.

(v) Failure to comply with Obligations in Good Faith

18. Romania violated Article II(2) of the BIT in that Romania’s actions and omissions constituted a failure to observe its contractual obligations with the Investor as required by the Bilateral Investment Treaty and international law.

19. Romania failed to carry out its obligation to negotiate debt rescheduling with state budgetary creditors in good faith. The failure to engage in these negotiations resulted in a serious financial crisis for the Investment [Noble Ventures’ acquisition, management, operation and disposition of a major steel mill facility, CSR] as it could not meet its ordinary payments when due. In addition, the failure to obtain rescheduling also
resulted in the maintenance of liens held by state budgetary creditors on the CSR bank accounts and on assets of the company. The existence of these liens further damaged the ability of CSR to carry out its ordinary business.

(...)

22. Romania failed to meet the terms of the Accord [Appendix A to the SPA, which set out an agreement governing the transitional period between the signing of the SPA and Noble Ventures’ assumption of control of CSR], which formed an integral part of the SPA. During the Accord Period, Romania negotiated a new Collective Agreement between CSR and the local Vatra union which was highly unfavorable to CSR and to Noble Ventures. Under the terms of the Accord, Romania could not make major decisions for CSR without Noble Ventures’ consent. The New Collective Agreement was a major decision for CSR that was not approved by Noble Ventures. Romania structured the new Collective Agreement’s execution so as to give Noble Ventures no effective opportunity to remedy the situation upon its taking control of CSR.

23. Finally, Romania failed to honor the terms of a settlement agreement entered into between it and Noble Ventures in 2002 as a result of Romania’s failure to assist with the establishment of the final credit facility for Noble Ventures.

vi) Expropriation

24. Romania violated Article III of the BIT in that Romania’s actions and omissions constituted a taking of Noble Ventures’ interests in property without just compensation and in violation of the international law standards of treatment required by Article II(2) of the BIT. Romania undertook a course of action intended to deprive the Investor of the effective use of its Investment through the colorable use of bankruptcy laws. Romania undertook this measure in an unfair and discriminatory manner with the intent to prevent the Investment from being able to carry out its business functions. The evidence indicates that Romania’s action displayed an absence of bona fide intent and that it was not taken for any actual bona fide purpose.

25. Romania’s actions were motivated by a desire to revoke the effect of the Privatization Agreement between Romania and Noble Ventures, as a means of evading its liability arising from the Agreement.

(...)

28. Romania’s abuse of process, designed to deprive Noble Ventures of its investment in CSR, was an internationally wrongful and unlawful response to the political situation caused by the unlawful union strikes in Resita. Romania’s decision to violate international law standards of behaviour with respect to fair and equitable treatment, full protection and security and expropriation cannot be excused on account of the government’s desire to deal with seemingly pressing political concerns. Romania was obligated to develop solutions that were consistent with its international law obligations.

29. Since the judicial reorganization of CSR, the facility has not operated in a profitable fashion and many thousands of formerly-employed workers have been unemployed.”
2. The Respondent's perspective

10. The Respondent sees the cause of Noble Ventures’ problems with CSR quite differently, describing its position concerning the whole of the claim as follows in its Counter-Memorial (R I, paras. 3-13, footnote omitted):

“3. Whether out of arrogance or ignorance, Claimant refused to accept and respect the limits of the deal it struck with the State Ownership Fund ("SOF") to purchase CSR as set forth in the Share Purchase Agreement ("SPA"). It is common ground that, when CSR was privatized, CSR was saddled with budgetary debt. Understandably, Claimant wanted SOF to forgive this debt. Under Romanian law, however, SOF did not have that authority, and it so advised Claimant during the negotiations leading to SPA. As SOF explained to Claimant, the best SOF could do was to assist Claimant’s efforts to negotiate debt relief with the budgetary creditors, namely, ministries of the Romanian Government.

4. Neither the budgetary creditors nor the Romanian Government as a whole were parties to the SPA. For this reason, the SPA did not guarantee that CSR’s debts would be restructured. Indeed, under the SPA, Claimant agreed to pay US$2 million more to SOF after the deal closed if Claimant succeeded in restructuring CSR’s budgetary debt with SOF’s assistance. The SPA did not include a timeframe within which debt restructuring negotiations were to occur, and it did not make Claimant’s obligation to invest in CSR contingent on CSR obtaining debt relief and restructuring. Although Claimant might have wanted a different or even a better deal, Claimant agreed to the above terms in the SPA.

5. SOF fully complied with its obligations to assist Claimant’s efforts to obtain debt restructuring. Through no fault of SOF’s, Claimant failed to obtain the debt restructuring it wanted. Thereafter, Claimant simply stopped paying the workers’ wages and refused to invest the capital in CSR that Claimant knew was vital to turning CSR into a profitable venture. The results, predictably, were disastrous. CSR effectively shut down. The workers blamed Claimant and the Government in equal measure. Claimant fanned the flames of discontent by blaming the Government in the hope that union pressure would force Romania to restructure CSR’s budgetary debt regardless of the provisions of the SPA. While CSR workers suffered, Claimant’s agents lived well, drawing lavish salaries for questionable services rendered and taking foreign vacations at company expense. The Government could not stand idly by.

6. Although not required to do so, the Government authorized substantial debt restructuring for CSR in May 2001. Claimant rejected the restructuring package, thereby further exacerbating the situation in Resita. Confronted with a financial and social meltdown in Resita, the Government was wholly justified in supporting the filing of a judicial reorganization petition by CSR’s budgetary creditors in July 2001 as a temporary measure to stabilize CSR and calm the crisis that Claimant had created.

7. Claimant’s primary claim in this case centers on the judicial reorganization. According to Claimant, “Romania” breached its obligation under the SPA to restructure CSR’s budgetary debt, and then used this debt as the basis to initiate the judicial reorganization proceedings, which Claimant asserts was part of a scheme “to rescind the Privatization Agreement and allow Romania to take back control of CSR.” Claimant argues that the judicial reorganization was arbitrary, discriminatory, unfair, and expropriatory. This claim is groundless as a matter of fact and a matter of law.

8. First, SOF fully complied with its obligations under the SPA. Second, the judicial reorganization was conducted entirely in accordance with the Romanian law, and Claimant does not contend otherwise. Third, the
During the approximately six-month reorganization period, Claimant retained its majority share ownership in CSR. A court-appointed, private administrator managed the company. Far from using the organization to seize control of the company, Romania facilitated the early termination of the judicial reorganization proceedings to allow Claimant to reassess management control of CSR, which it did in January 2002. The temporary loss of management control occasioned by a lawfully instituted and conducted judicial reorganization under municipal law simply does not constitute a violation of Romania’s obligations under the US-Romanian bilateral investment treaty (the “BIT”).

9. Because Claimant asserts that its property was expropriated in July 2001, acts complained of thereafter are legally irrelevant under Claimant’s own theory of the case. Claimant’s assertion that Romania breached a settlement agreement is noteworthy, however, to demonstrate Claimant’s chronic inability to acknowledge and accept the plain terms of the documents it signed. Far from being a binding settlement, the document that Claimant drafted states clearly that it is merely a proposal. The record in this case shows that, despite further negotiations, neither Claimant nor Romania ever fully agreed to or implemented Claimant’s proposal. Claimant nonetheless tries to recast reality for this Tribunal and treat the agreement as a binding obligation that Romania breached. Claimant is simply wrong.

10. Claimant raises two additional claims that also are entirely without merit. First, Claimant alleges that SOF failed to “disclose the validity” of the joint venture contract between CSR and a company called Metal Grup related to CSR’s slag piles before Claimant signed the SPA. Claimant contends that access to the slag piles was critical to its success in Resita, and that its inability to exploit the slag piles doomed it to failure. Claimant’s allegations are not credible.

11. Not only did Claimant learn about the Metal Grup contract during its extensive pre-privatization due diligence of CSR, but SOF specifically advised Claimant of the contract before Claimant signed the SPA. Claimant was represented at all times by Romanian counsel. To the extent Claimant considered the legal status of the Metal Grup contract significant, it could have and indeed should have sought a proper legal opinion. Moreover, although Claimant complains loudly now about the slag pile issue, Claimant apparently forgot about this purportedly crucial claim when it filed its Request for Arbitration in this case (which nowhere mentions the slag pile issue as a basis for recovery). In any event, even if one were to assume contrary to the facts that SOF negligently failed to advise Claimant about the Metal Grup contract, such conduct does not rise to the level of a BIT violation.

12. Finally, Claimant alleges that Romania failed to provide it with “full protection and security” by not preventing alleged isolated acts of violence against Claimant’s agents. Contrary to Claimant’s exaggerated allegations, however, Romanian authorities reacted reasonably and exercised appropriate due diligence in response to the two complaints lodged by Claimant’s agent. Claimant does not and plausibly cannot contend that these incidents, or the remaining handful of other alleged incidents, which Claimant did not report to the authorities, caused it to abandon Romania and its investment in CSR. In this regard, Claimant does not even attempt to tie this alleged conduct to any damages at all.

13. Romania unquestionably complied with its obligations under the BIT and Claimant has not shown otherwise.”

11. Against this background, the Respondent summarizes its overall position as follows in its Rejoinder (R II, para. 2, footnote omitted):
2. Claimant Noble Ventures, Inc., took a calculated risk as the sole bidder for Combinatul Siderurgic Resita S.A. (“CSR”), an aging, bankrupt steel mill in the emerging market economy of Romania that Claimant alone believed was a “diamond in the rough.” Unwilling to invest any of its own funds in CSR, Claimant quickly failed to meet its initial investment obligations under the Share Purchase Agreement (“SPA”) or its steel production goals. Labor strife ensued because of Claimant’s failure to pay wages. Within months of taking over CSR, Claimant realized that CSR was much more “rough” than “diamond.” Claimant had underestimated significantly the difficulty in turning CSR around and had overestimated its ability to attract investment capital to do so.”

D. Procedural History

12. Arbitral Proceedings against the Respondent commenced with the Request for Arbitration sent by the Claimant to ICSID on August 21, 2001 (C 0). In the request, the Claimant invoked Romania’s consent to ICSID arbitration provided in the 1992 Treaty between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment.


14. The Request was registered by the Secretary-General of ICSID on October 17, 2001, in accordance with Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “ICSID Convention”). On that same date, the Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the Request and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal.

15. The parties did not agree on the number of arbitrators to comprise the arbitral tribunal in this case nor on the method for their appointment. Accordingly, by letter of April 16, 2002, the Claimant requested the Tribunal to be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention; i.e. one arbitrator appointed by each party, and the third arbitrator, who would serve as president of the tribunal, to be appointed by agreement of the parties. The Claimant appointed Sir Jeremy Lever, KCMG, QC, a national of the United Kingdom as an arbitrator. Romania in turn appointed as arbitrator Professor Vincenzo Porcasi, a national of Italy. Professor Porcasi accepted his appointment but, for personal reasons, would shortly after resign. Romania then appointed Professor Pierre-Marie Dupuy, a national of France as an arbitrator.

16. By letters of January 9 and 10, 2003, the Claimant and Romania, respectively, informed the Centre that they had agreed to appoint Professor Karl-Heinz Böckstiegel, a national of Germany, as the President of the Tribunal.

17. On January 16 2003, the Acting Secretary-General of ICSID, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date. On the same date, pursuant to ICSID Administrative and Financial Regulation 25, the parties were informed that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Arbitral Tribunal.
The First Session of the Tribunal was held in Washington, D.C. at the seat of the Centre on March 10, 2003. The results of the meeting were recorded in Minutes of the First Session as follows:

"Present at the session were:

Members of the Tribunal

Professor Karl-Heinz Böckstiegel, President
Sir Jeremy Lever, Arbitrator
Professor Pierre-Marie Dupuy, Arbitrator

ICSID Secretariat

Mr. Gonzalo Flores, Secretary of the Tribunal

Representing the Claimant

Mr. Fred F. Fielding, Wiley Rein & Fielding LLP
Mr. Barry Appleton, Appleton & Associates International Lawyers
Mr. Robert Wisner, Appleton & Associates International Lawyers
Mr. Hernando Otero, Appleton & Associates International Lawyers

Representing the Respondent

Mr. Ronald E.M. Goodman, White & Case LLP
Mr. Darryl S. Lew, White & Case LLP
Mr. Lee A. Steven, White & Case LLP
Mr. Florentin Tuca, Musat & Asociatii
Mr. Cornel Popa, Musat & Asociatii

Also attending on behalf of the Respondent

Mr. Claudio Seucan, Vice President, Authority for Privatization and Management of State Ownership

After welcoming the parties, the President of the Tribunal referred to a joint letter from the parties, dated March 7, 2003, comprising procedural agreements reached by the parties prior to the session. The President noted that the Tribunal had only received a copy of such letter moments before the session. The President accordingly suggested to follow the Agenda previously circulated by the Secretary, referring to the joint letter when appropriate. The parties agreed to this procedure. The parties provided the Secretary of the Tribunal with an additional copy of their joint letter for the file. A copy of the Agenda is attached to these minutes as Annex 1. A copy of the parties' joint letter is attached to these minutes as Annex 2.

I. Procedural Matters

1. Constitution of the Tribunal and the Tribunal Members’ Declarations

The President noted that the Tribunal had been constituted on January 16, 2003 and that it had been properly constituted in accordance with the ICSID Convention and the ICSID Arbitration Rules. The parties expressed their agreement that the Tribunal had been properly constituted and that they had no objection to the appointment of any of the members of the Tribunal. Prior to the commencement of the session, the Secretary distributed copies of the declarations signed by the three arbitrators pursuant to Article 6 of the ICSID Arbitration Rules. During the session, the Secretary of the Tribunal distributed additional copies of these declarations to the parties.

2. Fees and Expenses of Tribunal Members (Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees)

The President noted that the parties have considered adopting a different schedule of fees than the one established by the Centre. It was also noted that the parties had not yet agreed on such alternative schedule of fees. The point was accordingly left open, being agreed that all the communications in this connection would be jointly made by counsel for both parties to the President on behalf of the Tribunal.

3. Representation of the Parties

It was noted that the Claimant is represented in this case by:

Mr. Fred F. Fielding
Wiley Rein & Fielding LLP
1776 K Street, NW
4. Applicable Arbitration Rules

The President of the Tribunal noted that on January 1, 2003, the Centre's amended Arbitration Rules entered into force. The President also noted that, pursuant to Article 44 of the ICSID Convention, these proceedings would be conducted in accordance with the ICSID Arbitration Rules in force since September 26, 1984 unless the parties otherwise agree. The parties agreed to conduct the proceeding under the ICSID Arbitration Rules of September 26, 1984.

Counsel for the Claimant proposed to amend Arbitration Rule 48(4), allowing the publication of the Award without the need of previous consent by both parties. Counsel for the Respondent disagreed, stating that the matter should be discussed at a more appropriate stage of the proceeding. The matter was left open for further discussion in the future.

5. Apportionment of Costs and Advance Payments to the Centre

It was agreed that, in accordance with Article 61 of the ICSID Convention and Rule 14 of the ICSID Administrative and Financial Rules, the parties would defray the expenses of the proceeding in equal parts, without prejudice to the final decision of the Tribunal as to costs.

6. Records of Hearings

It was noted that complete sound recordings had been arranged for this session. It was agreed that complete sound recordings would be made of subsequent sessions. It was further agreed that the Secretary would keep minutes of meetings in summary form.

The parties had agreed that stenographic transcripts of the hearings would be made by court reporters agreed upon by the parties. After some discussions, the parties agreed to use the services of the court reporters usually used by the Centre. The use of “real time” or “same-day” transcripts was left open for future discussion.

7-8. Means of Communication and Copies of Instruments

It was agreed that all communications and written instruments in this proceeding were to be addressed to the Centre. It was further agreed that written instruments were to be submitted to the Centre in an original and six copies, two of which would be for delivery to the other party. Brief communications that were not substantive applications or submissions would be
transmitted by facsimile. It was also agreed that an additional electronic copy of the written instruments will be sent to the Secretary of the Tribunal by the parties. The Centre would arrange for the appropriate distribution of copies.

It was agreed that the date of filing of an official instrument or of receipt of a communication shall be the date of receipt by the Centre of all the documentation in hard copy. It was also agreed that the deadlines for the submissions will start upon the day that the parties receive the pertinent documents. The President of the Tribunal noted that, in exceptional circumstances, time extension requests would be considered.

In connection with the authenticity of documents, it was agreed that simple copies of a document would suffice, unless the other party challenges such document. In such case the Tribunal will ask that the original document to be submitted.

9. Quorum

It was agreed that the sittings of the Tribunal would require the presence of all its members.

10. Decisions of the Tribunal

It was confirmed that in accordance with Arbitration Rule 16(2), the Tribunal could take decisions by correspondence among its members, or by any other appropriate means of communication, provided that all members were consulted. The members of the Tribunal and the parties agreed that the President shall have the power to determine procedural matters after consultation as far as possible with the other members of the Tribunal.

11. Procedural Languages

It was decided pursuant to Arbitration Rule 22 that the language of the proceedings would be English. It was confirmed that if a party were to submit a document in a language other than English, that party would simultaneously provide a translation of the document into English.

The parties also agreed that, during oral hearings, witnesses and expert witnesses would be allowed to testify in English, Romanian or any other language, and that simultaneous interpretation services would be arranged by the Secretariat. The parties agreed to announce the need for simultaneous interpretation in fair advance for the Secretary to make the necessary arrangements.

12. Pre-Hearing Conference

It was agreed that the possibility of holding a pre-hearing conference under Arbitration Rule 21 could be addressed at a later stage in the proceeding. The possibility of holding such conference through videoconference was also left open for later consideration.

13. Place of Arbitration

It was agreed that the place of the proceedings would be the seat of the Centre in Washington, D.C., without prejudice to holding sessions with the parties at any other place with their agreement, and after consulting the Secretary-General of the Centre if appropriate. In addition, the Tribunal may meet without the parties at any other place as convenient.

14. Written and Oral Procedures

It was confirmed that the proceeding would comprise a written phase followed by an oral one.

15. Pleadings: Number, Sequence, Time Limits

Counsel for the Claimant proposed a bifurcation of liability and quantum of damages. Counsel for the Claimant stated that his party would be prepared to fully present to the Tribunal the merits of the dispute in short time. The quantum of damages, however, would be a matter of extensive discovery of documents and, therefore, would require longer time limits. Counsel for Romania opposed said bifurcation arguing that the Claimant has the burden of presenting its case and that in the present case, it has had plenty of time to do so. Counsel for Romania also announced the possible filing of counterclaims.

After consultation with the parties and due deliberation by the Tribunal, the President announced that the Tribunal has decided to continue the proceeding without bifurcation, and that the pleadings shall be submitted within the following time limits:

- The Claimant shall file its memorial within four months, counting from March 10, 2003;
- The Respondent shall file its counter-memorial within four months from its receipt of the Claimant’s memorial;
- The Claimant shall file its reply within two months from its receipt of the Respondent’s counter-memorial;
- The Respondent shall file its rejoinder within two months from its receipt of the Claimant’s rejoinder.

In the event the Respondent files a counterclaim, the Claimant will have the possibility of an additional filing, by way of rejoinder to the counter claim, to be filed within one month from the date of receipt of the Respondent’s rejoinder.
In the event a time limit expires on a holiday observed at the place of delivery (i.e. the Centre), it would be automatically extended to the next business day.

The issue of production of documents was also addressed. Counsel for the Claimant handed to the Tribunal and Counsel for Romania a documents called “Investor’s Proposal on Document Production.” A copy of this document was also handed to the Secretary for the file. This document was prepared by Counsel for the Claimant assuming a bifurcation of liability and quantum of damages.

The Tribunal asked counsel for the Respondent to comment on the Claimant’s proposal. Counsel for Romania expressed reservations to the Claimant’s proposal, stating that the issue of production of document should be addresses to the Tribunal. After hearing extensively from counsel for both parties, the President of the Tribunal suggested to use the Claimant’s Proposal only as a guideline for the production of documents between the parties. The Tribunal then urged the parties to deal with any disagreements they may have on this matter, leaving for the Tribunal only those issues they could not resolve. The parties agreed on this procedure.

It was agreed that all the accompanying documentation will be identified with the letter “C” for that presented by the Claimant and with the letter “R” for that submitted by the Respondent, and numbered in a consecutive manner throughout the proceedings (e.g., C-0001, C-0002, etc./ R-0001, R-0002, etc.). The Tribunal urged the parties to be selective in the production of documents, limiting their submissions to relevant documentation.

16. Delegation of Power to Fix Time Limits

The Tribunal informed the Parties that it had delegated to the President the power to fix time limits, pursuant to Arbitration Rule 26(1) as well as the power to decide other minor procedural matters or other procedural matters in cases of urgency if he cannot reach his co-arbitrators.

It was also agreed that in case of short extensions of time needed by either party, the requesting party will directly seek the other party’s consent and, if granted, will communicate their agreement to the Tribunal. This communication to the Tribunal could be made jointly or separately by counsel for the parties.

17. Dates of Subsequent Sessions

It was agreed that a hearing shall be held tentatively the week of May 24-28, 2004.

18. Production of Evidence

The parties agreed that they shall include with their written submissions (i.e. memorials, counter-memorials, replies and rejoinders) not only their legal arguments, but also all of the evidence on which they intend to rely for the legal arguments advanced therein, including written witness testimony, expert opinion testimony, documents and all other evidence in whatever form. It was also agreed that the parties may include with their second written submission only additional witness testimony, expert opinion testimony, and documents or other evidence responding or rebutting the matters raised by the other party’s previous written submission or by new evidence obtained by one party from the other party. It was further agreed that only in exceptional circumstances, the Tribunal would allow the introduction of new evidence at a later stage of the proceeding.

19. Time Limit for the Preparation of the Award

The Tribunal noted that while it is ready to prepare the award within the time limits prescribed by Arbitration Rule 46, the matter will be dealt with in due time.

II. Other Matters

Counsel for Romania explained to the Tribunal that they might need to file a preliminary counterclaim to prevent being affected by statutes of limitation applicable under Romanian law. Counsel for the Claimant expressed its reservations to this procedure, indicating that this may raise issues in connection with the Tribunal’s jurisdiction. The President indicated that, in this connection, Romania will be allowed to file a preliminary brief counterclaim, after the Claimant has filed its memorial, and then will be allowed to file a full counterclaim, within the time limits agreed before.

There being no further business, the President adjourned the meeting at 1 p.m. of March 10, 2003.

Sound recordings were made of the session and deposited in the archives of the Centre.

19. On April 14, 2003, the Claimant submitted a Motion for Production of Documents, requesting the Tribunal to issue a procedural order directing the Respondent to produce a number of documents after the Respondent, by letter dated April 7, 2003, refused to comply with a corresponding request from the Claimant dated March 25, 2003 and also a second request on April 9, 2004.

20. After several further submissions by the Parties, in its Procedural Order No. 1 (PO No. 1), dated June 3, 2003, the Tribunal stated as follows:
The Tribunal has considered:

1.1. the various submissions by the Parties regarding the production by Romania of documents at the present stage of the proceedings;

1.2. Article 43(a) of the ICSID Convention and ICSID Arbitration Rule 34(2)(a) both of which do not provide a basis for the application of national rules of discovery such as those of the United States Federal Rules of Civil Procedure or those for the District of Columbia;

1.3. the discussion at the Procedural Hearing in Washington, D.C. on March 10, 2003; and

1.4. the Minutes of that Hearing, particularly Sections 15 and 18.

2. The “IBA Rules on the Taking of Evidence in International Commercial Arbitration,” though not directly applicable in this case and primarily provided for use in the field of commercial arbitrations, can be considered (particularly in Articles 3 and 9) as giving indications of what may be relevant criteria for what documents may be requested and ordered to be produced, in ICSID procedures between investors and host States.

3. The Tribunal recognises that, on one hand, requests and orders regarding the production of documents are today a regular feature of international arbitration, and that Romania has throughout expressed its willingness to produce documents provided that certain conditions, which it has specified, are satisfied, but, on the other hand, the present arbitration is a case between a Government of a Civil Law country where production of documents is used far less than in Common Law countries from where the investor comes.

4. The Tribunal further recognises that, on one hand, ordering the production of documents can be helpful in the Tribunal’s task of establishing the facts of the case relevant for the issues to be decided, but, on the other hand, (1) the process of discovery and disclosure may be time-consuming, excessively burdensome and even oppressive and that unless carefully limited, the burden may be disproportionate to the value of the result, and (2) Parties may have a legitimate interest of confidentiality.

5. Finally the Tribunal notes that, insofar as a Party has the burden of proof, it is sufficient for the other Party to deny what the respective Party has alleged and then, later in the procedure, respond to and rebut the evidence provided by that respective Party to comply with its burden of proof.

6. At paragraph 3 of Romania’s Response to Claimant’s Motion for Production of Documents (“Romania’s Response”), Romania - “ask[ed] the Tribunal to order Claimant to re-formulate its requests for documents...so that production of documents can proceed apace”.

7. Conclusion of the Tribunal

Taking into account the above considerations, the Tribunal finds that at a time when only the short Request for Arbitration Proceeding submitted by Claimant on 21 August 2001 and the submissions on the production request itself are available to identify the relief sought and the factual allegations and legal arguments on which Claimant intends to rely in this regard for the alleged
breaches of the BIT Article II Sections 1 and 2 and Article III Sections 1 and 2, failing agreement of the Parties, the Tribunal is not in a position to identify, within the many and broad requests submitted by Claimant, which documents must be considered relevant and material for the Tribunal to decide on the relief sought.

8. Ruling

8.1. The Parties are invited to try to agree as soon as possible on a disclosure of documents taking into account the considerations and criteria referred to above.

8.2. To assist the Parties in their effort to agree, attached to this Order is a Tribunal Draft Order indicating, subject to further comments received from the Parties, criteria which the Tribunal is inclined to use should it be required to rule in so far as the Parties fail to agree.

8.3. In so far as no such agreement can be reached, the Parties may, if they consider it necessary, submit new requests for the production of documents together with their first memorials presenting their factual allegations and legal arguments supporting their claims and counter-claims respectively according to the 2nd paragraph of Section 15 of the Minutes of the First Session. If a Party wishes to make use of that option, the same procedure shall apply as identified in Section 15 of the minutes of the First Session regarding the production of documents.

9. Note on Submission of Documents

9.1. The Tribunal draws the attention of the Parties to the last paragraph of Section 15 of the Minutes of the First Session regarding the identification of documents and notes that the exhibits enclosed to the submissions regarding the production of documents do not fulfill these requirements.

9.2. In addition, the Tribunal clarifies that, for the convenience of using them, all documents shall be submitted separate from the respective briefs to be collected in 2-ring binders accompanied by updated lists of all documents submitted by the respective Party.”

21. In accordance with the timetable established in the Minutes of the First Session of the Tribunal, the Claimant submitted its Memorial (C I) on July 10, 2003.

22. By way of a letter dated September 5, 2003 the Respondent requested an extension of time for filing its Counter-Memorial. After further submissions from both parties, by ICSID letter of September 24, 2003, the Tribunal granted an extension and set a new timetable.


24. The Claimant filed its Reply to the Respondent’s Counter-Memorial on May 7, 2004 (C II).

26. By Procedural Order No. 2 of September 3, 2004 (PO No. 2), the Tribunal provided for rules concerning the preparation, scheduling, form and length of a hearing to be held in Washington, D.C. on October 6, 2004 as follows:

1. Introduction
   1.1. This Order takes into account the submissions by the Parties and, particularly, the recent rulings regarding the further procedure.

   1.2. Furthermore, the Parties are invited to carefully take into account all earlier rulings in the Minutes of the First Session on March 10, 2003, and letters of ICSID on behalf of the Tribunal, unless they have been changed by later rulings or rulings in this Order.

2. Changes or Additions to the Agreed Procedure and Timetable

   2.1. By September 10, 2004, the Parties shall indicate, whether and which witnesses or experts originally designated they withdraw from their list for oral examination, and which witnesses and experts of the other Party they request to examine at the Hearing.

   2.2. By September 17, 2004, the Parties shall try to agree on the order in which the witnesses and experts shall be examined and notify the Tribunal of the agreed order. If no such agreement can be reached, Claimant’s witnesses and experts will be heard first and the Party which presented the witnesses or experts shall decide on the order in which they shall be examined.

   2.3. The Tribunal recalls from Section 6 of the Minutes that a transcript shall be made of the Hearing by the court reporters usually used by the Centre. Should the Parties request “real time” or “same day” transcripts, they shall inform the Centre not later than September 17, 2004.

2.4. By September 17, 2004, the Parties shall inform the Centre according to Section 11 of the Minutes for which witnesses and experts simultaneous interpretation is required.

2.5. The Tribunal has taken note of the many and voluminous exhibits submitted by the Parties together with their briefs. As only a limited number of these exhibits will be used in the time available at the Hearings, to avoid that all exhibits have to be transported to Washington, the members of the Tribunal intend to bring to the Hearings all of the statements of witnesses and experts (without exhibits) as well as the major contractual documents, but invite the Parties to prepare and provide at the Hearings to each member of the Tribunal and to the other Party “Hearing Binders” containing copies of those further exhibits or parts of exhibits to which they intend to refer in their oral presentations and witness examination at the Hearings.

3. Time and Place of Hearings

   3.1. The Hearings shall be held at the Centre in Washington D.C.

   Starting October 6, 2004, at 9:00 a.m.

   Ending, at the latest, in the afternoon of October 10, 2004.

   3.2. To give sufficient time to the Parties and the Arbitrators to prepare for and evaluate each part of the Hearings, the daily sessions shall not go beyond the period between 9:00 a.m. and 5:00 p.m. However, the Tribunal, in consultation with the Parties, may change the timing during the course of the Hearings.

4. Intention and Scope of the Hearings

   4.1. In view of the many and voluminous submissions and documents filed by the Parties before the Hearing, there is no need to repeat their contents at the Hearing.
4.2. To make most efficient use of time at the Hearing, written Witness Statements shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the Hearing, such witnesses are invited by the presenting Party or asked to attend at the request of the other Party, after a short introduction of the witness by the presenting Party of up to 10 minutes, the available hearing time should mostly be reserved for cross-examination and re-direct examination, as well as for questions by the Arbitrators.

4.3. If a witness whose statement has been submitted by a Party and whose examination at the Hearing has been requested by the other Party, does not appear at the Hearing, his statement will not be taken into account by the Tribunal. A Party may apply with reasons for an exception from that rule.

4.4. Should the Parties request oral examination of an expert, the same rules and procedure would apply as for witnesses.

4.5. The Parties are invited to present short opening statements of not more than one hour each.

4.6. No new documents may be presented at the Hearing unless agreed by the Parties or authorized by the Tribunal. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.

5. Agenda and Timing of the Hearing

5.1. The following Agenda is established for the Hearing:

1. Introduction by the Chairman of the Tribunal.

2. Opening Statements by the Parties of not more than 60 minutes each for the Claimant and the Respondent.

3. Unless otherwise agreed by the Parties: Examination of witnesses and experts presented by Claimant. For each:
   a) Affirmation of witness or expert to tell the truth.
   b) Short introduction by Claimant (This may include a short direct examination on new developments after the last written statement of the witness or expert.).
   c) Cross examination by Respondent.
   d) Re-direct examination by Claimant, but only on issues raised in cross-examination.
   e) Remaining questions by members of the Tribunal, but they may raise questions at any time.

4. Examination of witnesses and experts presented by Respondent. For each: vice versa as under a) to e) above.

5. Any witness or expert may only be recalled for rebuttal examination by a Party or the members of the Tribunal, if such intention is announced in time to assure the availability of the witness and expert during the time of the Hearing.

6. Remaining questions by the members of the Tribunal, if any.

5.2. Examination of witnesses and experts shall take place in the order agreed by the Parties. If no such agreement has been reached, unless the Tribunal decides otherwise, Claimant’s witnesses and experts shall be heard first in the order decided by the Claimant, and then Respondent’s witnesses and experts shall be heard in the order decided by the Respondent.

5.3. Unless otherwise agreed between the Parties or ruled by the Tribunal, witnesses and experts may be present in the Hearing room during the testimony of other witnesses and experts.

5.4. Taking into account the time available during the period provided for the Hearing, the Tribunal establishes equal maximum time periods both for the Claimant and for the Respondent which the Parties shall have available for examination and cross-examination of all witnesses and experts. Taking into account the calculation of hearing time attached to this Order, the total maximum time available for the Parties (including their introductory statements) shall be as follows:
10 hours for Claimant

10 hours for Respondent

It is left to the Parties how much of their allotted total time they want to spend on Agenda items 3. and 4. b, c, and d

5.5. The Parties shall prepare their presentations and examinations at the Hearing on the basis of the time limits established in this Procedural Order.

6. Other Matters

6.1. The Parties shall coordinate with the Centre, the court reporting service and the simultaneous interpretation service in advance of the Hearing to assure that the services are available and ready to start at the beginning of the Hearing. This shall include that microphones are set up for all those speaking in the Hearing room to assure easy understanding over a loud speaker.

6.2. To give the Parties an opportunity to evaluate and comment on the results of the Hearing, the Tribunal intends to invite the Parties to submit Post Hearing Briefs (no new documents). The details will be decided after consultation with the Parties before the end of the Hearing.

6.3. The Tribunal may change any of the rulings in this order, after consultation with the Parties, if considered appropriate under the circumstances.”

27. Concerning the Hearing, the parties were informed by way of ICSID letter dated September 14, 2004 that the President of the Tribunal ruled as follows:

“1. In view of the large number of statements submitted, to facilitate the Hearing, in addition to the Hearing binders referred to in Section 2.5 of Procedural Order No. 2, the parties are invited to provide at the Hearing to each member of the Tribunal and the other party a further Hearing Binder with all statements of witnesses and experts submitted by the Party;

2. The Tribunal has decided to already start the Hearing on Tuesday, October 5, 2004;

3. The Hearing will commence on the above date at 9 a.m. and will be held in Room MC 13-121, located on the thirteenth floor of the “MC” Building of the World Bank, at 1818 H Street, N.W., 20433.

4. The Tribunal recommends to the parties to further reduce the number of witnesses and experts they invite to the Hearing. In this context, the Tribunal points out that a party, even if it does not invite a witness for oral cross-examination at the Hearing, may object to the correctness or credibility of the written witness statement in its briefs;

5. By the date set in Section 2.1 of Procedural Order No. 2 (i.e. September 17, 2004), the parties are invited to agree on and inform the Tribunal of the number, names and order of witnesses and experts to be examined at the Hearing, taking into account the recent submissions and the above recommendation of the Tribunal;

6. The Tribunal clarifies that it does not consider necessary that the Parties allot time at the Hearing to closing arguments or other pleadings, as the Post Hearing Briefs will give opportunity to do so.”
28. In accordance with ICSID letter of September 14, 2004, the Hearing was held and recorded in a transcript and audio recording. It took place from October 5, 2004 through October 9, 2004. It was attended by:

On behalf of the Claimant/Investor:

Mr. Barry Appleton
Mr. Robert Wisner
Mr. Ali Ghiassi
Mr. Hernando Otero
Ms. Barnali Choudhury
Mr. Nick Gallus
Appleton & Associates
International Lawyers
1140 Bay Street
Suite 300
Toronto, Ontario M5S 2B4

and

Mr. Florin Dutu
Stefanica, Dutu & Partners
Bucharest, Romania

On behalf of the Respondent/Party:

Mr. Darryl S. Lew
Mr. Francis A. Vasquez, Jr.
Mr. Lee A. Steven
White & Case, L.L.P.
601 13th Street, N.W.
Washington, D.C., 20005
(202) 626-3600

29. Following the Hearing, the Tribunal issued Procedural Order No. 3 (PO No. 3) dated October 13, 2004, which reads as follows:

“1. Taking into account the discussion with the Parties during the Hearing in Washington, the Tribunal rules as follows:

2. The Parties shall try to agree on any corrigenda regarding the transcript of the Hearing and, by October 22, 2005, shall submit the corrigenda agreed or otherwise their two versions of the corrigenda to the Tribunal.

3. By November 24, 2004, the Parties shall file Post Hearing Briefs of up to 50 pages containing the following sections:

   A. An exact identification of the Relief Requested..."
a) Declaratory Relief

b) Monetary Award

B. A short identification of the legal basis in the BIT for each Relief Requested

C. Only in so far as relevant for the Relief Requested

a) conclusions from the Hearing

b) references to related evidence already in the file

D. Without prejudice to what the Tribunal finally considers as relevant for its decisions, the Tribunal invites the Parties to include comments on the following questions and issues:

1. a. Relevance of other ICSID decisions, particularly the Award in SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No.ARB/02/6) to the application of an “umbrella clause” in a BIT.

b. Was SOF the Romanian State for this purpose or was it, by reason of its separate incorporation, a constituent subdivision or agency?

c. The purpose and effect of Article 25 of the ICSID Convention and their relevance, if any, to (a) and (b) above.

2. If, (i) by reason of the BIT, Romania is liable for breaches of contract by SOF;

and if, (ii) Article 15 of the Privatization Law is characterized as an obligation of means affected by the existence of Article 15 of the Privatization Law?

3. If by reason of the BIT, Romania is not liable for breaches of contract by SOF, and if Article 15 of the Privatization Law is capable of being applied post-privatization, how, if at all, is Article 15 relevant to found liability on the part of Romania as a matter of international law?

4. What is the evidence to lead one to conclude that, if by the end of 2000 CSR’s debts had been rescheduled etc., Noble Ventures would or would not have secured such further additional financial resources as would have enabled it

a. to avoid the problems that beset CSR in 2001; and

b. to fund the investment program described in its Business Plan?

5. a. On what specific acts or omissions does Noble Ventures rely as showing that SOF/APAPS did not comply with its obligation to negotiate as required by Article 7.4.2. of the SPA?

b. On what specific acts or omissions does Romania rely as showing that SOF/APAPS did comply with that obligation?

4. By December 17, 2004, the Parties shall submit Reply Post Hearing Briefs of up to 20 pages only dealing with issues raised in the Post Hearing Brief of the other Party.
5. **By January 14, 2005**, the Parties shall submit their **Cost Claims**.

6. **By January 28, 2005**, the Parties may submit comments on the **Cost Claim of the other Party**.


31. ICSID Arbitration Rule 38 (1) requires that when the presentation of the case by the Parties is complete, the proceeding shall be declared closed. Having reviewed all of the presentations by the parties, the Tribunal, came to the conclusion that there is no request by a Party or any reason to reopen the proceeding, as is possible under ICSID Arbitration Rule 38(2). Accordingly, by letter dated August 15, 2005, the Tribunal declared the proceedings closed.

**E. The Principal Relevant Legal Provisions**

32. The principal relevant provisions of the US-Romanian BIT are as follows:

**ARTICLE I**

1. **For the purposes of this Treaty,**

(a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

   (i) movable and immovable, property and tangible and intangible property, including rights such as mortgages, liens and pledges;

   (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

   (iii) a claim to money or a claim to performance having economic value, and associated with an investment;

   (iv)...

   (v) any right conferred by law or contract, including concessions to search for, extract, or exploit natural resources, and any licenses and permits pursuant to law.

"**ARTICLE II**

1. **Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Annex, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.**
2. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

(c) Each Party shall observe any obligation it may have entered into with regard to investments.

3. Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

4. Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.

5. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

6. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.

7. Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.

8. The treatment accorded by the Government of the United States of America to investments and associated activities of nationals and companies of Romania under the provisions of this Article shall in any State, Territory, or possession of the United States of America be no less favorable than the treatment accorded therein to investments and associated activities of nationals of the United States of America resident in, and companies legally constituted under the laws and regulations of other States, Territories or possessions of the United States of America.

9. The most favored nation provisions of this Article shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of:

(a) that Party’s binding obligations that derive from full membership in a free trade area or customs union; or

(b) that Party’s binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade that enters into force subsequent to the signature of this Treaty.
"ARTICLE III

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in any freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any associated compensation, conforms to the principles of international law.

3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the most favorable treatment, as regards any measures it adopts in relation to such losses."

"ARTICLE VI [which provides for arbitration of investment disputes]

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. ...

8. ...

"ARTICLE XII

This Treaty shall apply to the political subdivisions of the Parties."

33. So far as the provisions of the SPA are concerned, since the Agreement was drawn up in the Romanian language and since the Parties do not agree on the correct translation of a number of provisions of the Agreement into the English language, to the Tribunal sets out below both parties' translations of the relevant provisions.

"7.4.1(3) and 7.4.2 [Claimant’s translation]

7.4.1 (3) The Seller states that it requested the Ministry of Finance, the Ministry of Labor and Social Welfare and the Ministry of Health to remit certificates regarding the company’s fiscal burden, and undertakes to employ all due efforts in order to obtain as soon as possible such certificates,
necessary for a fair evaluation of the company’s current debts towards the budgetary creditors.

7.4.2 The Seller undertakes to submit to all the company’s budget creditors’ applications requesting monetary inducement for the repayment of the company’s debts and to negotiate, together with the Buyer and the Company, the availability of the following monetary inducement:

- rescheduling over a period of 5 years, of the payments due to the budget creditors with a negotiable interest rate, the first due date being December 31, 2001;

- exemption from the payment of penalties and surcharges for payments in arrears of the amounts due to budget creditors;

- non-inclusion of debts, other than those set forth in the fiscal certificates issued by the budgetary creditors, consequently to the best efforts employed by the Seller during the negotiations.

"7.4.1(3) and 7.4.2 [Respondent’s translation]"

7.4.1(3) The Seller states that it requested the Ministry of Finance, the Ministry of Labor and Social Welfare and the Ministry of Health to remit certificates of fiscal debts, and undertakes to employ all due efforts in order to obtain as soon as possible such certificates, in order to allow an evaluation of the Company’s current debts towards the budgetary creditors.

7.4.2 The Seller undertakes to submit to each budgetary creditor an application requesting the granting of facilities for the Company and to negotiate, together with the Buyer and the Company, the possibility of granting the following facilities:

- rescheduling, over a period of 5 years, of the payments due to the budgetary creditors with a negotiable interest rate, the first due date being December 31, 2001;

- exemption from the payment of penalties and increases for delay in paying the accounts due to budgetary creditors;

- non-inclusion of new debts, other than those set forth in the fiscal certificates issued by the budgetary creditors, consequently to the efforts employed by the Seller during the negotiations.

"9.4 and 9.5 [Claimant’s translation]"

9.4 The Buyer undertakes to pay the Seller the [additional] amount of US$ 2,000,000 if, due to the best efforts employed by the Seller, the company is granted the following cumulated incentives (advantageous conditions):

- rescheduling of the payments due to budget creditors over a period of five years, with a negotiable interest rate, the due date for the first payment being December 31, 2001;

- exemption of the payment of penalties and surcharges for payments in arrears of the amounts due to budget creditors;

- non-inclusion of other debts of the company besides those set forth in the fiscal certificates issued by the budgetary creditors, due to the best efforts employed by the Seller.
9.5 The Buyer shall pay the amount of US$2,000,000 within 30 days as of the receipt by the company of the notification regarding the granting of the incentives set forth under 7.4.2 herein above.”

9.4 and 9.5 [Respondent’s translation]

9.4 The Buyer undertakes to pay to the Seller the [additional] amount of USD 2,000,000 if, due to the efforts employed by the Seller, the Company is granted the following cumulated facilities:

- rescheduling of the payments due to budgetary creditors over a period of five years, with a negotiable interest rate, the due date for the first payment to be December 31, 2001;

- exemption of the payment of penalties and increases for delay in paying the amounts due to budgetary creditors;

- non-inclusion of new debts, others than those set forth in the fiscal certificates issued by the budgetary creditors, consequently to the efforts employed by the Seller during the negotiations.

9.5 The Buyer shall pay the amount of USD 2,000,000 within 30 days as of the receipt by the Company of the notification regarding the granting of the facilities set forth under 7.4.2 herein above.

F. Relief Sought by the Parties

34. The final relief sought by the parties is identified in their first Post-hearing Briefs as follows:

35. The Claimant asks the Tribunal (C-PHB I, para. 1) to:

   “a) declare that Romania breached Articles II(2) and III of the United States Romania Bilateral Investment Treaty (“BIT”); and to

   b) order Romania to pay compensation to Noble Ventures of US$143,531,000 plus applicable tax gross-up, interest compounded from July 31, 2001, attorney’s fees, expenses and costs of this arbitration”.

36. The Respondent requests the Tribunal to award as follows (R-PHB I, para. 2):

   “a. Declaratory Relief:

   1) That Romania has not violated Claimant’s rights or acted inconsistently with any of Romania’s obligations under the US-Romania Bilateral Investment Treaty (the “BIT”).

   2) That Claimant’s claims accordingly are dismissed in their entirety.

   b. Monetary Award:

   That Romania is awarded compensation for all fees, expenses and costs it incurred with this proceeding, as set forth in its Claims for Costs due on January 14, 2005.”

G. Short Summary of Contentions of the Parties

37. The following Sections of this Award set out the final contentions of the Parties, as contained in their respective first Post-hearing Briefs. Later
subsections of this Award deal individually in greater detail with the various contentions.

G.I.  Short Summary of Contentions of the Claimant

38. The Claimant summarizes its contentions as follows (C-PHB I paras. 2 et seq.):

"2. Romania’s actions were inconsistent with its obligations under Articles II(2) and III of the BIT. Articles II(2)(a) and (b) require that Romania provide Noble Ventures with fair and equitable treatment, provide full protection and security and that it act in a manner free from arbitrary or discriminatory conduct. Article II(2)(c) requires that Romania observe its obligations with regard to investments. Article III requires Romania to compensate Noble Ventures for the expropriation of CSR.

3. Romania has failed to meet its Article II(2)(a) and (b) obligations through:
   a) actions contrary to Noble Ventures’ legitimate expectations that Romania would exercise its sovereign powers under the Privatization Law to reschedule CSR’s budgetary debts;
   b) its arbitrary and inequitable initiation of the judicial reorganization of CSR based on debts that should have been restructured; and
   c) its failure to provide full protection and security to management and employees of Noble Ventures during the period of labor unrest.

4. Romania failed to meet its obligations under Article II(2)(c) by breaching the SPA and a binding settlement agreement. With respect to the SPA, Romania failed to use “best efforts” to obtain debt restructuring for CSR pursuant to Article 7.4.2 of the SPA and misled Noble Ventures about the status of Metal Grup’s claim over the slag pile. Romania breached the settlement agreement by failing to assist Noble Ventures with respect to the issuance of a $15 million line of credit and by denying Noble Ventures’ preemption rights to the newly issued shares of CSR.

5. In addition, Romania failed to meet its obligations under Article III through its refusal to pay compensation to Noble Ventures following its initiation of the judicial reorganization proceedings, which actions were tantamount to indirect expropriation of Noble Ventures’ investment in CSR."

G.II. Short Summary of Contentions of the Respondent

39. Against the background of the relief sought by the Respondent (paragraph 36 above), the Respondent contends as follows (R-PHB I, paras. 3 et seq. footnotes omitted):

"3. Claimant bears the burden of proving its allegations and claims. Claimant has failed to carry its burden of proving the facts necessary to sustain any of the alleged breaches of the BIT and, in addition, has failed to carry its burden to prove that any of its alleged losses were caused by the conduct of which it complains. Accordingly, Claimant’s claims must be dismissed.

4. Romania has been put to considerable expense and inconvenience in defending against Claimant’s shifting, unsustainable claims. Claimant should be ordered to bear the costs of this arbitration and to compensate Romania’s costs of presenting its case, including compensation for the fees and expenses of its legal representatives, expert witnesses, and its own internal work on the case. Romania shall set forth its Claims for Costs in accordance with Procedural Order No.3."
H. Considerations and Conclusions of the Tribunal

40. The Tribunal has carefully examined all of the many and voluminous arguments of the parties. What follows deals with those aspects that the Tribunal considers to be the most relevant in their respective context.

H.I. Preliminary Considerations

41. There are two general questions of law which are disputed between the parties and which raise preliminary questions that are relevant to many of the more specific claims. The first concerns the question of whether it is possible to address contract claims under the US-Romanian BIT and the second concerns whether the acts of SOF and APAPS are attributable to the Respondent State.

1. Arguments of the Parties Concerning Contract Claims / The Umbrella Clause Problem

Arguments by the Claimant

42. Regarding the first question the Claimant argues that, with respect to all of its following contentions, the US-Romanian BIT applies because the BIT was incorporated in the applicable Romanian law (C I, paras. 321 et seq.). It regards the BIT as incorporating also international law into Romanian law (C I, para. 323). The contract claims can therefore, according to the Claimant, be examined to see whether they involve conduct by the Respondent that fails to comply with the BIT standards.

43. Apart from this, breaches of contractual obligations become a breach of the BIT by way of Art. II(2)(c) (C II, paras. 372 and 386 et seq.), which has to be regarded as an “umbrella clause”. The Claimant refers to other ICSID decisions in which the Tribunals found that an umbrella clause means what it says, namely that the clause makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments (C-PHB I, paras. 101 et seq.).

Arguments by the Respondent

44. In this respect the Respondent contends that the BIT applies to the claims directly, and not only by way of Romanian law which incorporated the BIT (R I, paras. 247 et seq.). Nevertheless, it does not accept that the BIT affects the claims that are based on alleged breaches of contract since such claims are not subject to the BIT but are subject to Romanian law (R I, paras. 253 – 255, R II, paras. 397, and esp. 454-473 and 474 et seq.). Therefore, alleged breaches of the SPA cannot in themselves constitute a violation of the BIT (R I, para. 328).

45. Regarding specifically Art. II(2)(c), the Respondent contends that the provision does not elevate breaches of contract to BIT violations (R I, paras. 340 et seq., paras. 350 et seq., R II, paras. 474-577; R-PHB I, paras. 64 et seq.). There is nothing to suggest that the BIT created obligations other than those that exist by virtue of customary international law (R I, paras. 337 et seq.; see also R II, paras. 548-571, R-PHB I, paras. 64 et seq.). Umbrella clauses are only intended to create a treaty obligation on States to protect against the exercise of sovereign powers in a manner that interferes with contractual commitments and other legal obligations entered into with respect to investments (R-PHB I, para. 65; R-PHB II, para. 38).

The Tribunal

46. Considering that the Claimant’s case comprises some claims which concern alleged breaches of contractual relationships purportedly concluded with the
Respondent, the question for the Tribunal is whether Art. II (2)(c) BIT is an “umbrella clause” that transforms contractual undertakings into international law obligations and accordingly makes it a breach of the BIT by the Respondent if it breaches a contractual obligation that it has entered into with the Claimant. Art. II (2)(c) reads as follows: “Each Party shall observe any obligation it may have entered into with regard to investments.”

47. As indicated by the parties, a similar question arose in other recent ICSID cases. Thus an important case to address the problem was SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13; SGS v. Pakistan), which was heavily relied on by the Respondent in the present case. The Tribunal was there concerned with Article 11 of an Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments (Swiss-Pakistan BIT) which reads as follows: "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party". The Tribunal found that "(T)he text itself of Art. 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically “elevated” to the level of breaches of international treaty law. Considering the widely accepted principle with which we started, namely, that under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law, and considering further that the legal consequences that the Claimant would have us attribute to Art. 11 of the BIT are so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party, we believe that clear and convincing evidence must be adduced by the Claimant that such was indeed the shared intent of the Contracting Parties to the Swiss-Pakistan Investment Protection Treaty in incorporating Article 11 in the BIT. We do not find such evidence in the text itself of Article 11. We have not been pointed to any other evidence of the putative common intent of the Contracting Parties by the Claimant" (see paras. 166 and 167 of the Decision). Consequently, the Tribunal declined to regard Art. 11 as an umbrella clause.

48. Another important case to address the “umbrella clause” problem was SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6; SGS v. Philippines). That case was referred to by the Claimant in the present case in support of its position. The relevant clause in that case (Art. X (2) of the Agreement between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments) reads as follows: “Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party”. The Tribunal interpreted the clause by reference to its wording and the object and purpose of the bilateral investment treaty so as to apply it to inter alia contractual obligations (paras. 115 and 116) and accordingly found that the contractual commitment was incorporated and brought within the framework of the bilateral investment treaty by Article X (2): “To summarize, for present purposes Article X(2) includes commitments or obligations arising under contracts entered into by the host State” (para. 127).

49. A third case concerned with a clause regarded by one of the parties to the dispute as an umbrella clause is Salini Costruttori S.P.A. v. The Hashemite Kingdom of Jordan (No. ARB/02/13; Salini v. Jordan). The case was decided only shortly before the end of the written proceedings in this case. In Salini v. Jordan the Tribunal was concerned with a clause in the bilateral investment treaty between Italy and Jordan which read as follows (Art. 2(4)): “Each Contracting Party shall create and maintain in its territory a legal framework apt to guarantee the investors the continuity of legal treatment, including compliance, in good faith, of all undertakings assumed with regard to each specific investor”. Regarding the terms of Art. 2(4) to be appreciably different from the provisions in SGS v. Pakistan and SGS v. Philippines the Tribunal found that “(U)nder Art. 2(4), each contracting Party committed itself to
create and maintain in its territory a “legal framework” favorable to investments. This legal framework must be apt to guarantee to investors the continuity of legal treatment. It must in particular be such as to ensure compliance of all undertakings assumed under relevant contracts with respect to each specific investor. But under Article 2(4), each contracting Party did not commit itself to “observe” any “obligation” it had previously assumed with regard to specific investments of the investor of the other party as did the Philippines. It did not even guarantee the observance of commitments it had entered into with respect to investments of the investors of the other Contracting Party as did Pakistan. It only committed itself to create and maintain a legal framework apt to guarantee the compliance of all undertakings assumed with regard to each specific investor”.

50. With regard to Art. II (2)(c) of the bilateral investment treaty which is of relevance in the present case, it has to be observed that there are differences between the wording of the clause and the clauses in the other cases. Therefore, it is necessary, first, to interpret Art. II (2)(c) regardless of the other cases. In doing so, reference has to be made to Arts. 31 et seq. of the Vienna Convention on the Law of Treaties which reflect the customary international law concerning treaty interpretation. Accordingly, treaties have to 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 the object and purpose of the Treaty, while recourse may be had to supplementary means of interpretation, including the preparatory work and the circumstances of its conclusion, only in order to confirm the meaning resulting from the application of the aforementioned methods of interpretation. Reference should also be made to the principle of effectiveness (effet utile), which, too plays an important role in interpreting treaties.

51. Considering that Art. II (2)(c) BIT uses the term “shall” and that it forms part of the Article which provides for the major substantial obligations undertaken by the parties, there can be no doubt that the Article was intended to create obligations, and obviously obligations beyond those specified in other provisions of the BIT itself. Since States usually do not conclude, with reference to specific investments, special international agreements in addition to existing bilateral investment treaties, it is difficult to understand the notion “obligation” as referring to obligations undertaken under other “international” agreements. And given that such agreements, if concluded, would also be subject to the general principle of pacta sunt servanda, there would certainly be no need for a clause of that kind. By contrast, in addition to the BIT, what are often concluded concerning investments are so-called investment contracts between investors and the host State. Such agreements describe specific rights and duties of the parties concerning a specific investment. Against this background, and considering the wording of Art. II (2)(c) which speaks of “any obligation [a party] may have entered into with regard to investments”, it is difficult not to regard this as a clear reference to investment contracts. In fact, one may ask what other obligations can the parties have had in mind as having been “entered into” by a host State with regard to an investment. The employment of the notion “entered into” indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts. This is also the reason why Art. II (2)(c) would be very much an empty base unless understood as referring to contracts. Accordingly, the wording of Article II(2)(c) provides substantial support for an interpretation of Art. II (2)(c) as a real umbrella clause.

52. The object and purpose rule also supports such an interpretation. While it is not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors, here such an interpretation is justified. Considering, as pointed out above, that any other interpretation would deprive Art. II (2)(c) of practical content, reference has necessarily to be made to the principle of effectiveness, also applied by other Tribunals in interpreting BIT provisions (see SGS v. Philippines, para. 116 and Salini v. Jordan, para. 95). An interpretation to the contrary would deprive the investor of any internationally secured legal remedy in respect of investment contracts that it has entered into with the host State. While it is not the purpose of investment
treaties per se to remedy such problems, a clause that is readily capable of being interpreted in this way and which would otherwise be deprived of practical applicability is naturally to be understood as protecting investors also with regard to contracts with the host State generally in so far as the contract was entered into with regard to an investment.

53. An umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law. The Tribunal recalls the well established rule of general international law that in normal circumstances per se a breach of a contract by the State does not give rise to direct international responsibility on the part of the State. This derives from the clear distinction between municipal law on the one hand and international law on the other, two separate legal systems (or orders) the second of which treats the rules contained in the first as facts, as is reflected in inter alia Article Three of the International Law Commission’s Articles on State Responsibility adopted in 2001. As stated by Judge Schwebel, former President of the International Court of Justice, “it is generally accepted that, so long as it affords remedies in its Courts, a State is only directly responsible, on the international plane, for acts involving breaches of contract, where the breach is not a simple breach... but involves an obviously arbitrary or tortious element...” (in International Arbitration: Three Salient Problems (1987), at 111). It may be further added that, inasmuch as a breach of contract at the municipal level creates at the same time the violation of one of the principles existing either in customary international law or in treaty law applicable between the host State and the State of the nationality of the investor, it will give rise to the international responsibility of the host State. But that responsibility will co-exist with the responsibility created in municipal law and each of them will remain valid independently of the other, a situation that further reflects the respective autonomy of the two legal systems (municipal and international) each one with regard to the other.

54. That being said, none of the above mentioned general rules is peremptory in nature. This means that, when negotiating a bilateral investment treaty, two States may create within the scope of their mutual agreement an exception to the rules deriving from the autonomy of municipal law, on the one hand and public international law, on the other hand. In other words, two States may include in a bilateral investment treaty a provision to the effect that, in the interest of achieving the objects and goals of the treaty, the host State may incur international responsibility by reason of a breach of its contractual obligations towards the private investor of the other Party, the breach of contract being thus “internationalized”, i.e. assimilated to a breach of the treaty. In such a case, an international tribunal will be bound to seek to give useful effect to the provision that the parties have adopted.

55. Thus, an umbrella clause, when included in a bilateral investment treaty, introduces an exception to the general separation of States obligations under municipal and under international law. In consequence, as with any other exception to established general rules of law, the identification of a provision as an “umbrella clause” can as a consequence proceed only from a strict, if not indeed restrictive, interpretation of its terms and, more generally, in accordance with the well known customary rules codified under Article 31 of the Vienna Convention of the Law of Treaties (1969). As was stated by the International Court of Justice in the ELSI Case:

“an important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so”: Elettronica Sicula Spa –ELSI – United States v. Italy, 1989, ICJ 15 at 42).

56. In the present case, in order to identify the intention of the United States and Romania when they negotiated Art. II(2)(c) of the BIT, a key element is provided by the exact formulation of that provision. Indeed, it is the
57. In *Salini v. Jordan*, supra, it is evident that the obligation laid down at Art. 2(4) of the bilateral investment treaty between Italy and Jordan plainly justifies the conclusion reached by the Tribunal. A provision creating and maintaining a "legal framework" favourable to investment deals only with the setting of norms and establishment of institutions aimed at facilitating investment by investors of the other Party; it does not entail that each Party becomes responsible under international law for the breach of any of its contractual obligations vis-à-vis the private investors of the other Party.

58. In *SGS v. Pakistan*, supra, the relevant provision of the bilateral investment treaty (Art. 11) does not simply speak of a "legal framework"; and the provision could be interpreted as laying down a kind of general obligation for the host State as a public authority to facilitate foreign investment, namely an obligation to "guarantee" the observance of the commitments that the host State has entered into towards investors of the other Party, being an obligation to be implemented by, in particular, the adoption of steps and measures under its own municipal law to safeguard the guarantee. In other words, the formulation of Art. 11 of the bilateral investment treaty in *SGS v. Pakistan*, supra, may be interpreted as implicitly setting an international obligation of result for each Party to be fulfilled through appropriate means at the municipal level but without necessarily elevating municipal law obligations to international ones.

59. By contrast, in *SGS v. Philippines*, supra, the treaty clause was formulated so as to assimilate the host State’s contractual obligations to its treaty obligations under the bilateral investment treaty by saying that each Party “shall observe any obligation it has assumed” with regard to investments made by the investors of the other Party. It is then understandable that, without necessarily having recourse to completely different reasoning, the Tribunal in that case reached a position different from that adopted in *SGS v. Pakistan*, supra.

60. In the present case, the formulation adopted at Art. II(2)(c), which is even more general and straightforward than that in the bilateral investment treaty that fell to be considered in *SGS v. Philippines*, clearly falls into the category of the most general and direct formulations tending to an assimilation of contractual obligations to treaty ones; not only does it use the term “shall observe” but it refers in the most general terms to “any” obligations that either Party may have entered into “with regard to investments”.

61. However, it is unnecessary for the Tribunal to express any definitive conclusion as to whether therefore, despite the consequences of the exceptional nature of umbrella clauses, referred to at paragraph 55 above, Art. II(2)(c) of the BIT perfectly assimilates to breach of the BIT any breach by the host State of any contractual obligation as determined by its municipal law or whether the expression “any obligation”, despite its apparent breadth, must be understood to be subject to some limitation in the light of the nature and objects of the BIT. Since, on the facts of the present case, as will appear from what follows, the Tribunal’s ultimate conclusions would not be affected one way or the other by the resolution of that question, the Tribunal proceeds on the basis that, in including Art. II(2)(c) in the BIT, the Parties had as their aim to equate contractual obligations governed by municipal law to international treaty obligations as established in the BIT.

62. By reason therefore of the inclusion of Art. II(2)(c) in the BIT, the Tribunal therefore considers the Claimant’s claims of breach of contract on the basis that any such breach constitutes a breach of the BIT.
2. Arguments of the Parties concerning the Question of Attribution

Arguments by the Claimant

63. With regard to the question of attribution, the Claimant contends that, in so far as the purported violations have been committed by SOF or APAPS, Romania is responsible because both entities acted as organs of the Romanian State. Their acts are accordingly attributable to Romania (C II, paras. 263 and 269 et seq., esp. paras. 272 and 278).

64. The relevant features that a Tribunal should consider in determining whether an entity is a State organ are the structure and the function of the entity (C-PHB II, para. 38). Against this background it is contended that “SOF/APAPS has the structure and function of a state organ. SOF was owned by the government, the Prime Minister appointed the board of directors and SOF/APAPS’ Chairman was the Minister of Privatization. SOF’s mandate included “accomplishing the entire privatization process” – clearly a governmental function” (C-PHB II, para. 38, footnote omitted). Consequently, SOF was no mere commercial enterprise, but a State agency subordinated directly to the Prime Minister and tasked with the critical public function of transforming Romania’s economy (C-PHB II, para. 3).

65. With regard to attribution and SOF’s contractual obligations, the Claimant contends that: “Just as SOF’s actions are attributable to Romania, so too its contractual obligations are also obligations of Romania for the purpose of determining Romania’s liability under international law” (C-PHB I, para. 114).

Argument by the Respondent

66. With regard to claims under the SPA, the Respondent contends that Romanian law applies. Under Romanian law SOF has to be distinguished from Romania because it is a separate legal body (R I, paras. 256 et seq., R-PHB I, para. 80 and in more general terms R II, paras. 391-396); the SPA is a private law instrument governed by the provisions of civil law (R-PHB I, para. 80). A State does not assume the contractual obligations of its subordinates (R I, para. 258). This is so even where a contract is approved or ratified by the State (R I, para. 259). Contrary to what the Claimant argues, the concept of attribution does not apply: “...the principle of attribution cannot transform or otherwise expand obligations that are defined by reference to a municipal law. The principle of attribution is only concerned with identifying whether the conduct may be considered as a possible basis for the State’s international responsibility, but it is not a basis to alter the nature of primary obligations undertaken by a State organ” (R I, para. 261, see also paras. 260 and 262). Consequently, since SOF and Romania are, as a matter of Romanian law, different legal entities, Romania is not a party to the SPA and accordingly cannot be held liable (R I, paras. 268 and 332).

67. Even if the Tribunal were to conclude that SOF was charged with certain governmental functions, the Respondent contends that a distinction has to be drawn between governmental and commercial conduct, the latter not being attributable (R-PHB I, para. 82). By reason of the commercial character of the SPA, any failure to fulfil the obligations imposed by it, being commercial in nature, would not be attributable to Romania (R-PHB I, para. 82).

The Tribunal

68. The question of attribution is of relevance in the present case in two respects. First, there is the question whether the acts of SOF and later APAPS which are alleged to have constituted violations of the BIT can be attributed to the...
Respondent. And secondly, as already indicated above, there is the more specific question as to whether one can regard the Respondent as having entered into the SPA (as well as other contractual agreements which have allegedly been breached), breach of which could consequently, by reason of the umbrella clause, be regarded as a violation of the BIT. (In the present case no claim is, or could have been, brought against either SOF or APAPS and Art. 25(1) and (3) of the ICSID Convention are therefore of no relevance in these proceedings).

69. As States are juridical persons, one always has to raise the question whether acts committed by natural persons who are allegedly in violation of international law are attributable to a State. The BIT does not provide any answer to this question. The rules of attribution can only be found in general international law which supplements the BIT in this respect. Regarding general international law on international responsibility, reference can be made to the Draft Articles on State Responsibility as adopted on second reading 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Res. 56/83 of 12 December 2001 (the Draft Articles will hereafter be referred to as 2001 ILC Draft). While those Draft Articles are not binding, they are widely regarded as a codification of customary international law. The 2001 ILC Draft provides a whole set of rules concerning attribution. Art. 4 2001 ILC Draft lays down the well-established rule that the conduct of any State organ, being understood as including any person or entity which has that status in accordance with the internal law of the State, shall be considered an act of that State under international law. This rule concerns attribution of acts of so-called de jure organs which have been expressly entitled to act for the State within the limits of their competence. Since SOF and APAPS were legal entities separate from the Respondent, it is not possible to regard them as de jure organs.

70. The 2001 Draft Articles go on to attribute to a State the conduct of a person or entity which is not a de jure organ but which is empowered by the law of that State to exercise elements of governmental authority provided that person or entity is acting in that capacity in the particular instance. This rule is equally well established in customary international law as reflected by Art. 5 2001 ILC Draft. While not being de jure organs, SOF as well as APAPS were at all relevant times acting on the basis of Romanian law which defined their competence.

71. The relevant provisions can be found in Government Ordinance 88/1997 (GO 88/1997) as amended by Law 99/1999. In what here follows we refer to GO 88/1997, thus amended, as the Privatization Law (using the Article numbers introduced by Law 99/1999 where that Law made changes); the amendments effected by Law 99/1999 came into operation in August 1999.

72. Chapter II of the Privatization Law defined the relevant competence and powers of the Government, the Romanian Development Agency (with which the Tribunal is not concerned) and the empowered public institutions. Article 3(g) of the Privatization Law included SOF in the definition of “empowered public institution.”

73. Article 4 provided that:

“The privatization process falls within the competence and power of Government, the Romanian Development Agency and the empowered public institutions.”

74. Article 4(1) provided that:-
"The Government provides the implementation of the privatization policy, coordinates and controls the activity of ministries and public institutions that have competencies and powers in the carrying out of privatization, takes mandatory measures to expedite and complete privatization and is answerable before Parliament for the fulfillment of such obligations."

75. Article 4³ provided that:-

“(1) The empowered public body shall accomplish privatization.

“(2) To such an end, the empowered public institution shall:

“A. exercise all the rights, which the State has in its capacity as shareholder, or those pertaining to the local public administration authorities, having the capacity to empower its representatives in the General Meeting of shareholders to act for:

“…

“…

granting of advantageous conditions for the payment of budgetary obligations and negotiations of proposals in this regard, which shall be submitted for approval, as required by law;

“…

“B. undertake all the necessary measures for the privatization of corporate business entities, such as:

“…

“(d) sell the shares issued by corporate business entities at the market price;

“(3) Any litigation related to contracts, conventions, protocols and any other acts or understandings, concluded by empowered public institutions in order to prepare, perform or complete the privatization of corporate business entities or groups of such entities, fall within the competence of the commercial sections of law courts.”

76. Article 5(1) provided that:-

“The State Ownership Fund is an institution of public interest, a legal person, subordinated to Government, acting for a diminished involvement of the State and the local public administration authorities in the economy, by selling their shares…..”

77. Article 6(1),(3) and (4) provided that:-

“(1) The State Ownership Fund is managed by an Administration Board formed of Chairman, Vice-Chairman and 9 members appointed by the Prime Minister, being trained and experienced in the commercial, financial, legal or technical areas; one of these members is President of the Romanian Development Agency.

…

“(3) The members of the Board of Administration may be revoked by the authority who appointed them.
“(4) The organizational and operational regulation of the State Ownership Fund shall be approved under Government Resolution.”

78. Article 14 laid down the procedure to be followed in selling shares of “companies under privatization” as such companies were called in the Privatization Law.

79. The Tribunal deduces from the foregoing that it was not only within the competence of SOF – and APAPS which replaced SOF at the end of 2000 – when acting as the empowered public institution under the Privatization Law, to conclude agreements with investors but also, acting as a governmental agency, to manage the whole legal relationship with them, including all acts concerned with the implementation of a specific investment. In the judgment of the Tribunal, no relevant legal distinction is to be drawn between SOF/APAPS, on the one hand, and a government ministry, on the other hand, when the one or the other acted as the empowered public institution under the Privatization Law.

80. All the acts allegedly committed by SOF/APAPS were related to the investment of the Claimant. There is no indication from the parties, and there is no reason to believe, that any act by these institutions was outside the scope of their mandate. Consequently, the Tribunal concludes that SOF and APAPS were entitled by law to represent the Respondent and did so in all of their actions as well as omissions. The acts allegedly in violation of the BIT are therefore attributable to the Respondent for the purposes of assessment under the BIT.

81. Even if one were to regard some of the acts of SOF or APAPS as being ultra vires, the result would be the same. This is because of the generally recognized rule recorded in Art. 7 2001 ILC Draft according to which the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions. Since, from the Claimant’s perspective, SOF and APAPS always acted as if they were entities entitled by the Respondent to do so, their acts would still have to be attributed to the Respondent, even if an excess of competence had been shown.

82. With regard to the argument of the Respondent that a distinction has to be drawn between attribution of governmental and commercial conduct, the latter not being attributable, the following has to be said. The distinction plays an important role in the field of sovereign immunity when one comes to the question of whether a State can claim immunity before the courts of another State. However, in the context of responsibility, it is difficult to see why commercial acts, so called acta iure gestionis, should by definition not be attributable while governmental acts, so called acta iure imperii, should be attributable. The ILC-Draft does not maintain or support such a distinction. Apart from the fact that there is no reason why one should not regard commercial acts as being in principle also attributable, it is difficult to define whether a particular act is governmental. There is a widespread consensus in international law, as in particular expressed in the discussions in the ILC regarding attribution, that there is no common understanding in international law of what constitutes a governmental or public act. Otherwise there would not be a need for specified rules such as those enunciated by the ILC in its Draft Articles, according to which, in principle, a certain factual link between the State and the actor is required in order to attribute to the State acts of that actor.
Accordingly, the Tribunal concludes that the acts of SOF and APAPS which were of relevance in the present case are attributable to the Respondent for the purposes of assessment under the BIT.

The Tribunal has not overlooked the fact that international law prescribes restrictive rules with regard to representation when one is concerned with arrangements between States if they are to produce effects in international law. However, in the judgment of the Tribunal the Respondent rightly has not contended that such rules are applicable in considering whether, by reason of the attribution to the State of the acts of a governmental agency in a case such as the present, a State is to be treated as having entered into an obligation with regard to an investment.

The Tribunal is willing to assume that the Respondent is correct in contending that the principle of international law that *pacta sunt servanda* does not entail the consequence that a breach by a State of a contract that the State has entered into with an investor is in itself necessarily a breach of international law – and this is so even if the restrictive rules regarding representation of the State referred to in the last preceding paragraph are satisfied, so that indisputably the State is itself the contracting party and has committed a breach of the contract. But that does not mean that breaches of contract cannot, under certain conditions, give rise to liability on the part of a State. On the contrary, where the acts of a governmental agency are to be attributed to the State for the purposes of applying an umbrella clause, such as Art. II(2)(c) of the BIT, breaches of a contract into which the State has entered are capable of constituting a breach of international law *by virtue of the breach of the umbrella clause*.

In the judgment of the Tribunal, that is the position here. Both SOF and APAPS were responsible, as a matter of Romanian law, for the transfer of publicly owned assets to private investors. Both entities were clearly charged with representing the Respondent in the process of privatizing State-owned companies and, for that purpose, entering into privatization agreements and related contracts on behalf of the Respondent. Therefore, this Tribunal cannot do otherwise than conclude that the respective contracts, in particular the SPA, were concluded on behalf of the Respondent and are therefore attributable to the Respondent for the purposes of Art. II(2)(c) BIT.

H.II. Metal Grup’s Slag Pile Association Agreement with CSR: The Consequences as between the Claimant and the Respondent

1. Arguments by the Claimant

Over a period of probably more than 200 years, the iron and steel works at Resita had accumulated on land occupied by CSR a huge quantity of slag, a by-product of the smelting of ore. It is clear that, by the time with which the Tribunal is concerned, it had become technically possible economically to recover from the slag valuable residues.

Art. 1.2.11 of the presentation file (C-13), which is sometimes referred to as the Tender Book, stated that there were no assets of CSR subject to a partnership or association agreement (C1, para. 91). In fact, as was subsequently held by the Romanian courts, an association agreement between CSR and Metal Grup entitled the latter to exploit slag piles belonging to CSR.

The Claimant contends that SOF therefore breached the privatization agreement by way of a fraudulent misrepresentation which it regards as a violation of international law standards of treatment (C I, paras. 433 et seq.), and as a failure to observe obligations in good faith under Art. II(2) of the BIT (C I, paras. 474 et seq., C II, para. 418, C-PHB I, paras. 2 and 72 et seq.).
90. The Claimant argues that the misrepresentation concerned the Tender Book (C I, para. 91) as well as the SPA. It argues that SOF was informed about the validity of the association agreement but did not modify the Tender Book as required under Law 99/1999 (C I, para. 92) and was thereby guilty of misrepresentation because the Claimant had earlier been informed that the agreement with Metal Grup was invalid (see C I, 434 – 440; C-PHB I, para. 72). The Claimant further contends that the SPA contained a serious misrepresentation in that it did not reveal the existence of litigation concerning the Metal Grup agreement (C II, paras. 91 et seq., esp. 97 et seq.; C-PHB I, para. 72). The fact that the proceedings were initiated some days after the conclusion of the SPA was only due to the fact that an earlier application to rescind the agreement had failed for formal reasons (C-PHB I, para. 75).

91. The alleged misrepresentation was, according to the Claimant, of major importance for it because the piles were regarded as a key realizable asset and their inclusion in the sale was a determinant of the Claimant’s decision to engage in the privatization (see C I, paras. 4, 13-14, 91-92, 108-112, 161-171 and esp. 434-440 and C II, paras. 3 IV and 292-297), something for which support is gained from the references to the slag pile contained in the Claimant’s Technical Offer for CSR dated April 10, 2000 (C-22). The Claimant contends that the significance of the slag piles is further evidenced by the fact that Annex 8 to the SPA identified them, along with “Degasging installation” and “Continuous caster installation”, as the subject of planned upgrades costing in the aggregated US$20 million in years, 1, 2 and 3.

92. Regarding the Respondent’s reference to a merger clause in the SPA, the Claimant states that the merger clause in the SPA is no defence to the claim for breach of the warranty regarding litigation which is contained in the SPA (C-PHB I, para. 74).

2. Arguments by Respondent

93. The Respondent argues that the claim advanced by the Claimant with regard to the slag pile, as a contract claim, does not fall under the BIT (R I, para. 356 and R II, paras. 454 et seq. (breach of contract is not a breach of customary international law) and paras. 474 et seq. (breach of contract does not fall under Art. II(2)(c) BIT)). But even if the Tribunal can address the claim, there was no misrepresentation (R II, paras. 43-46, 355-386, 409-419). This is, first, because the Claimant was informed about the agreement with Metal Grup (R I, paras. 10-11, 275, R II, paras. 356, 362 et seq.). This was around mid-April (R I, para. 64). SOF updated information about Metal Grup (R I, para. 62). Therefore, the Claimant knew or should have known of the uncertain status of Metal Grup’s rights to the slag pile and knowingly assumed the risk when it signed the SPA (R-PHB I, para. 36). Secondly, there was a disclaimer clause in the Tender Book expressly absolving SOF of any such inaccuracies (R I, para. 277, R II, para. 414 and R-PHB I, para. 35). Thirdly, any lack of information in the Tender Book is without relevance by reason of the inclusion in the SPA of a merger clause, viz. Article 15.1: “this agreement and its Appendices represent the entirety of the agreements between the parties hereto, and supersede any prior agreement or understanding related to the subject matter hereof” (R I, para. 272, see also para. 71 and R II, para. 356, ). Therefore, according to the Respondent, the Claimant cannot rely on the Tender Book (R I, para. 276).

94. As to the Claimant’s contention that the litigation against Metal Grup ought to have been disclosed pursuant to the disclosure obligation contained in Article 7.5 of the SPA (see R II, paras. 357 et seq.), the Respondent replies that the litigation in question was filed only after the SPA was signed (R II, paras. 360, 409; R-PHB I, para. 34). In any event, according to the Respondent (R I, paras. 279 et seq.), any misrepresentation was not sufficiently serious as to engage legal liability, under Romanian law, on the part of SOF, seriousness being measured in Romanian law –
in terms of the essential character of the misrepresentation in the context of the transaction as a whole (so that the misrepresentation constitutes a "principal misrepresentation" as opposed to a "marginal misrepresentation") and

by reference to the character of the misrepresentation as fraudulent ("dolus malus" as opposed to, by the standards applied by the Romanian courts, innocent or simple ("dolus bonus.")

(The Claimant contends that in both those respects the Respondent is in error).

95. By its Rejoinder the Respondent adds that the slag pile was not identified in CSR’s records as an asset of CSR and that there was therefore no requirement under Romanian law to include information about the slag pile in the Presentation File (R II, paras. 377 and 415).

96. The Respondent also relies in this connection on the evidence of the Romanian official who was responsible for negotiating the SPA with Noble Ventures. According to that official, in mid-April 2000 he had a telephone conversation with the Claimant’s principal representative in Romania in the course of which the latter informed the official that he already knew about the Metal Grup association agreement and that, like the official, he too believed that the association agreement was invalid. The Claimant denies that any such telephone conversation took place and points to the fact that there is no record of it nor any contemporary reference to it.

97. The Claimant also points to the fact that the Tender Book did in fact identify “Slag dump” as part of CSR’s land and that the SPA, read in conjunction with an Annex to it, imposed on the Claimant contractual obligations of an environmental nature in connection with the slag pile, being obligations that were inconsistent with the continued existence of the association agreement with a third party.

3. Further observations with reference to the facts

98. The Tribunal finds that it would not be safe to rely on the SOF official’s uncorroborated and disputed evidence about an alleged telephone conversation with the Claimant’s senior representative in Romania in mid-April 2000, referred to at paragraph 96 above. However, this is only one of many aspects of the material placed before the Tribunal with regard to the slag pile that are problematic and the Tribunal finds it impossible to reach definite and reliable conclusions about precisely what either the Claimant or SOF knew about Metal Grup’s involvement in the exploitation of the slag piles or the legal position in that regard at different points of time.

99. One thing, however, seems to be reasonably certain, namely that on August 14, 2000, the day before completion of the SPA, the Claimant’s senior representative in Romania met an official of SOF (not the same official as the one referred to at paragraphs 96 and 98 above). At the meeting the Claimant’s representative requested SOF’s assistance in terminating the Metal Grup contract. The official explained that SOF could not assist Claimant because SOF was not a party to the Metal Grup contract. The official also suggested that, if the continued existence of the Metal Grup contract were of great importance to Claimant, it might consider whether it wanted to proceed with the privatization. The Claimant did not thereafter contact the official to explore possible withdrawal from the SPA. In fact, on August 15, CSR’s senior representative signed an addendum to the SPA in which SOF agreed to extend the deadline for Claimant’s down payment for CSR’s shares without mentioning the slag pile or the Metal Grup contract.
4. The Tribunal’s conclusions

100. There are two separate aspects to the Claimant’s claim with regard to the slag pile. The first depends upon the Claimant establishing that SOF was guilty of fraudulent misrepresentation of the position in relation to the slag pile. On that issue, the burden of proof (i.e., the risk of non-persuasion of the Tribunal) rests on the Claimant.

101. The evidence before the Tribunal does not satisfy it, even on a balance of probabilities, that SOF was guilty of fraudulent misrepresentation of the position in relation to the slag pile. Equally, the Tribunal is not satisfied that the management of CSR was guilty of fraudulent misrepresentation in relation to the slag pile. It follows that the Claimant could not succeed on grounds that included the existence of fraudulent misrepresentation even if, contrary to the Respondent’s contention, CSR and SOF were to be treated, for present purposes, as one and the same person because, when the SPA was negotiated and executed, SOF was the controlling shareholder in CSR.

102. It is not necessary to reach any definite conclusion with regard to a second ground on which this aspect of the Claimant’s claim with regard to the slag pile should be rejected. The second ground is that any misrepresentation was not a “principal subject” of the SPA. That it was not such is certainly suggested by the fact that, if it were otherwise, the Claimant could have been expected to have taken up SOF’s suggestion, referred to at paragraph 93 above, that, since the legal position with regard to the slag pile was evidently problematic, the Claimant should consider agreeing with SOF to cancel the SPA.

103. In this connection, it is also relevant to note that:

- a. so far as appears from the evidence before the Tribunal, the Claimant did not seek independently to verify, by reference to public records, the position with regard to litigation in respect of the slag pile, although the Claimant was aware of Metal Grup’s contentious involvement in their exploitation; and
- b. the subject matter of the SPA comprised SOF’s shares in CSR rather than the assets of CSR.

104. On this analysis of the facts, it is unnecessary to determine whether if, counterfactually, fraudulent misrepresentation by SOF, preceding the execution of the SPA, had been established, the Claimant’s claim with regard to the slag pile here under consideration -

- would have been a claim for breach of contract and, as such, capable of being advanced by virtue of Article II.2(c) of the BIT; or
- would have been a claim based on non-contractual liability.

105. In the judgment of the Tribunal, in the absence of proved fraudulent misrepresentation, the aspect of the Claimant’s claim here under consideration is not sustainable whether the claim is based on what happened before the execution of the SPA or on the provisions of the SPA itself.

106. Thus, at any rate in the absence of fraudulent misrepresentation, such a claim based on the contents of the Tender Book or anything else said or done before the execution of the SPA cannot be sustained in the light of Article 15(1) of the SPA. Article 15(1) provides that:
This Agreement and its Appendixes represent the entirety of the agreements between the Parties hereto and supersedes any prior agreement or covenant related to the subject matter hereof.

Alternatively, for there to be a basis for the relevant contractual liability in the SPA itself, one would have to find in the SPA a warranty to the effect that CSR’s assets included the slag pile, unencumbered by any association agreement. Although the SPA may perhaps have tacitly assumed the existence of slag pile that could be exploited by CSR subject only to environmental constraints, it is impossible even to imply a warranty with regard to the existence of the slag pile as such.

That leads to a consideration of the second basis on which the Claimant’s claim with regard to the slag piles is advanced. The Claimant here relies on Article 7.5 of the SPA.

Article 7.5 provides that:

“According to the management’s declaration, as at the date of the execution of the Share Purchase Agreement, the company has no commercial or ownership litigation other than those set forth under Appendix 4” (Claimant’s translation);

“According to the Company’s management’s declaration, on the date of execution of the Share Sale Purchase Agreement, the Company is not involved in any commercial or pecuniary litigation except for those set forth under Appendix 4” (Respondent’s translation).

The arguments advanced by the parties to the Tribunal proceeded on the basis that Appendix 4 to the SPA did not mention any litigation with Metal Grup about the slag pile or at all.

There are two grounds on which the Respondent resists the claim against it based on Article 7.5 of the SPA if, contrary to the Respondent’s contention but as the Tribunal has concluded, breaches of the SPA by SOF are to be attributed to the Respondent for the purposes of engaging the Respondent’s liability under Article II.(2)(c) of the BIT.

The first ground on which the Respondent here relies is that, although resumption by CSR of litigation against Metal Grup was in CSR’s contemplation when the SPA was signed, the litigation was not in fact resumed until June 14, 2000, i.e. after the SPA had been signed, and that therefore the declaration by CSR’s management was technically correct.

Although that plea is at first sight rather unattractive, it should be noted that the legal proceedings that were commenced by CSR on June 14 2000 had, so far as the Tribunal is able to ascertain, the object of, in effect, reversing an earlier judgment given in favour of Metal Grup with reference to the Association Agreement (R-64). The Claimant was aware of at least a potential problem for CSR in relation to Metal Grup’s interest in the slag pile and a due diligence investigation of CSR by the Claimant should have disclosed the existence of the pre-existing judgment (it has not been suggested that the existence of the judgment was denied or concealed by CSR or SOF; in this connection the Tribunal has not been enlightened by either party as to the significance, if any, of the inclusion in Appendix 4 to the SPA (“Litigation”) of an entry, under the heading “Claimant – CSR”, that reads as follows: “Metal Grup Deva – Annulment of Association Agreement : Pending”); a due diligence exercise should perhaps also have disclosed the fact that an earlier attempt had been made by CSR in effect to reverse the judgment, being an
attempt that had failed because CSR had not lodged at the court the required court fee. It is the pre-existing judgment, the effect of which never was reversed, rather than the fact that on June 14, 2000 CSR made its second, unsuccessful, attempt to get it reversed, that was damaging from the Claimant’s point of view.

114. The second ground on which the Respondent relies to defeat the claim based on Article 7.5 of the SPA was very clearly explained by Professor Corneliu Bîrsan of Bucharest University who gave expert evidence on Romanian law for the Respondent. Professor Bîrsan testified (C-73, footnote omitted) that:-

“105 … the language of Article 7.5 of SPA absolved the SOF of any responsibility under that provision. Article 7.5 states expressly that the litigation disclosed in Annex 4 was “According to the Company’s Management Declaration.” Under Article 7.5, therefore, the SOF is only warranting that … the information in Annex 4 was prepared by the managers of CSR, for whom the SOF is not responsible under Romanian law. By comparison, Article 7.1 of SPA states: ”The Seller [i.e. the SOF] declares and warrants that it holds all the authorizations and legal competence necessary for the conclusion of the present Agreement and the performance of the obligations flowing hereof” (emphasis added). The difference in the language between these two provisions is significant. The SOF could not (and did not) undertake promises concerning areas in which it was not directly involved and did not control. Thus, under Article 7.5, the SOF did not take responsibility for any inaccuracies that might have been included in Annex 4.

“106. I disagree with Prof. Oancea [who provided an expert opinion on Romanian law for the Claimant] when he suggests that the SOF and CSR were essentially one and the same simply because, before the privatization, the SOF was the majority shareholder and had representatives in the Board and the General Shareholders Meeting. This statement ignores the indisputable fact that the SOF and CSR were separate juridical entities and the fact that CSR was led by its own management team. Moreover, the SOF oversaw literally thousands of companies in the process of being privatized and, accordingly, could not be expected to collect and review the minutaie of any one company’s business records. That is precisely the reason why share sale-purchase contracts concluded by SOF typically distinguished between the undertakings of the SOF and statements or representations made by the representatives of the company being privatized. By identifying the statements of the officers of CSR as the source of particular information provided in the SPA, the SOF thereby disclosed to Noble Ventures that it was not responsible for any inaccuracies that might be contained in such statements. The language of Article 7.5, therefore, absolved the SOF of responsibility and put the burden on Noble Ventures to verify with CSR the accuracy of CSR’s statement concerning pending litigation.”

115. Professor Bîrsan’s semantic argument, based on a comparison of Article 7.5 of the SPA with Article 7.1, is reinforced by a comparison of Article 7.5 also with Articles 7.2.1 and 7.6, both of which are, like Article 7.1, in dispositive terms rather than the declaratory terms of Article 7.5. Moreover, Article 7.5 (like Article 7.3) simply records a declaration by the management of CSR and is not even, like Article 7.2.2, a declaration by SOF itself of the substantive position.

116. In the judgment of the Tribunal and on the basis of the considerations set out above, while the Tribunal recognizes that the legal position with regard to the slag pile may be unsatisfactory, the Claimant has failed in the present proceedings to establish that the existence, as found by the Romanian courts, of an association agreement for the exploitation of the slag pile by Metal Grup gives rise to any breach by the Respondent of the BIT, whether one looks at the obligations of the Respondent as specifically imposed upon it by the BIT, including Art. II(2)(c), or as imposed upon it by customary international law on which, by reason of the BIT, the Claimant is entitled to rely.
H.III. The Question of Compliance with SPA Obligations Concerning Rescheduling of CSR’s Debts and Related Obligations

1. A Preliminary question as to the character of Article 7.4.2 of the SPA.

117 In its Memorial (CI, para. 443) the Claimant contended that the obligation to “negotiate” imposed by the second part of Article 7.4.2 of the SPA was tantamount to an obligation of result since Romania, through SOF, was obliged to negotiate the restructuring of CSR’s budgetary debts with Romania’s own instrumentalities (i.e. the State budgetary creditors) which, according to the Claimant, was equivalent to an agreement by Romania that the budgetary debts would be restructured.

118 In its Counter-Memorial Romania (RI, paras. 81-85) relied upon the inclusion in the SPA of Articles 9.4 and 9.5 as negating any idea that Article 7.4.2 created an obligation of result: if there had been an obligation of result, there would have been no call for a “success fee” payable to SOF if the result were achieved. Romania also relied upon the fact that, on its translation of the SPA, Article 7.4.2 refers to only “the possibility of granting the [enumerated] facilities” (a respect in which Romania’s translation of the SPA differs from the Claimant’s translation, which refers to “the availability of the [enumerated] monetary inducement” (emphasis added); see paragraph 33 above.

119. The evidence of SOF officials that was adduced by Romania, was that in the negotiations leading to the signing of the SPA, they had explained to the Claimant that SOF could not guarantee restructuring of CSR’s budgetary debts. Because SOF could not do so, it conceived the idea of including in the SPA Articles 9.4 and 9.5. Since most of the “success fee” of US$ 2 million was to go to the budgetary creditors, rather than being retained by SOF, the success fee would provide an incentive to the budgetary creditors to agree to the proposed restructuring.

120. In the course of the Arbitration the Claimant accepted that SOF’s obligation to negotiate, imposed by Article 7.4.2, was an obligation of means – a “best efforts” or “due diligence” obligation – and not an obligation of result (C-PHB I, para. 117 and R-PHB I, para. 98). Indeed, in the course of cross-examination, Mr. Charles Franges, the Claimant’s chief executive, accepted that there was no “guarantee” that CSR’s budgetary debts would be restructured and there was a “risk” that they would not be restructured.

121. Both parties’ Post-hearing Briefs characterized the obligation to negotiate imposed by Article 7.4.2 of the SPA as an obligation of means and not of result. However, for reasons explained below, the Claimant contended that, if SOF had used its best efforts or due diligence the budgetary debts would in fact have been restructured and the Claimant had a legitimate expectation that that result would be achieved.

2. Arguments by the Claimant

122. Treating SOF’s obligation under the second part of Article 7.4.2 of the SPA as an obligation of means (see paragraph 120 above), the Claimant argues that the Respondent failed to comply with the obligation. In Romanian law the obligation must be understood as an obligation to exercise “best efforts” (C II, para. 50). That understanding of Art. 7.4.2 SPA is confirmed by the negotiating history (C-PHB I, paras. 13-16), the context of the obligation (C-PHB I, paras. 17-19) and SOF’s practices (C-PHB I, paras. 20-24). Moreover, SOF was empowered, by Art. 15² of the Privatization Law (see paragraph 123 below), to obtain a government decision (C-PHB I, paras. 25 et seq.). The same was true for SOF’s successor, APAPS (C II, paras. 85 et seq.). In fact, Art. 15² is regarded as defining the scope of the contractual obligation under
Art. 7.4.2 SPA (C-PHB I, paras. 117-118). The attempts undertaken by the Respondent fell short of the requirements under Romanian law (C II, paras. 47-61).

123. Accordingly the Claimant relies in this connection in particular upon Article 15² of the Privatization Law. Article 15² is in the following terms:-

“(1) When discharging its prerogatives, as provided for under Art. 42 (2)A, a, the empowered public institution shall remit to each budgetary creditor a form application for the granting of advantageous conditions as exemptions, reductions, deferment and staggering of the payment of the dues of the companies under privatization to the budget administered by the respective budgetary creditor.

“(2) Each budgetary creditor shall negotiate with the empowered public institution the possibility for the granting of the above mentioned advantageous conditions. In case such granting is beyond the competence of the budgetary creditor, such creditor is obliged to submit [to] the Government, within a 30 days’ period as of the date of the registration of such request, the result of the negotiations and to notify the empowered public institution the fulfillment of the respective obligation.

“(3) The empowered public institution is authorized in law to submit for approval by the Government the result of the negotiations in case the budgetary creditor does not observe the term provided for under (2), for the fulfillment of such obligation.

“(4) The Government shall decide regarding the granting of the advantageous conditions requested within a period of 20 days as of the date the result of the negotiations has been received.”

124. As already noted (paragraph 72 above), for present purposes SOF was the empowered public institution.

125. In the Claimant’s view neither SOF nor APAPS met their obligation (C-PHB I, paras. 44-60. Claimant contends that SOF’s failure at the end of June 2000 to take a number of specific actions under Article 15² of the Privatization Law establishes SOF’s breach of its obligations under the second part of Article 7.4.2 of the SPA. The actions identified by the Claimant in this connection (CPHB I, para. 137) were that at the end of June 2000 SOF failed to take the following specific actions pursuant to Article 15²:

a) instruct CSR to provide to the Ministries of Health and Labor the information requested in their letters;

b) if necessary, confirm that the Ministries of Health and Labor would still not provide the requested rescheduling voluntarily;

c) obtain a response from Resita City Hall to its application and instruct CSR to comply with any conditions to that response;

d) upon receipt of confirmation that the budgetary creditors would not grant the application, or in any case no later than 30 days after registration of SOF’s application with the budgetary
creditors (i.e. by mid-July 2000), submit the results of the negotiations to the Government for a decision; and

e) include in those submissions to the Government, a Substantiation Note and draft Government Decision for the Government’s approval.

126. SOF’s failure to act, it is argued, extended until the elections and thereafter (CI, paras. 188-231, see also C II, paras. 47-90). The Claimant does not regard Government Decision 490 (GD 490) of May 29, 2001 as fulfilment of the obligations under the SPA as it came too late and did not meet the requirements of the privatization agreement (C I, paras. 453 et seq., see also C I, paras. 217-231 and C-PHB I, paras. 53-60; C-PHB II, paras. 16-21).

127. According to the Claimant, the subsequent financial crisis of CSR was caused by this failure (C-PHB I, paras. 61 et seq.), while the Claimant made every effort to obtain debt restructuring (C-PHB II, paras. 15 et seq.). According to the Claimant, if SOF had taken the steps identified above, the Isarescu Government would have taken a legally and economically effective decision regarding the restructuring of CSR’s budgetary debts (see paragraph 5 above). In support of that contention the Claimant relies on a “Nota”, in fact dated September 14, 2000 (RI, para. 92), sent by the Prime Minister’s Office to SOF on October 3, 2000, which stated that the Isarescu Government had approved SOF’s request for the restructuring of, amongst other companies, CSR. The Claimant further here relies on the facts that the budgetary debts were a key threat to CSR’s survival and the preservation of jobs of some 4,000 workers at Resita and that experience showed that the Government did grant requests for such restructuring when requests to it were made by SOF (and, subsequently, APAPS).

128. These alleged violations of the SPA are regarded by the Claimant as a failure to comply with Art. II(2)(a)and(b) (C II, paras. 260, 335-339; C I, para. 441) and with Art. II(2)(c) (C II, para. 261 and C I, para. 473) of the BIT.

129. The Claimant also argues in this connection that, because budgetary debts that prejudiced the economic viability of companies under privatization were, as the Claimant alleges, routinely restructured, the Claimant had a legitimate expectation “that SOF’s request to the budgetary creditors and its “due efforts” in negotiating the rescheduling of CSR’s budgetary debts would produce the desired result” (C II, paras. 33 et seq., esp. 36-37, see also 3 I-II). The same is true regarding Art. 15² of GEO 88/1997 (C-PHB I, paras. 119-121 and C-PHB II, paras. 6 et seq.; see also C-PHB II, para. 44 where the Claimant suggests that Romania’s failure to fulfil the Claimant’s legitimate expectations created by Art. 15² also amounts to a breach of the international standard of treatment.

3. Arguments by the Respondent

130. The Respondent first contends that the claim here made is for simple breach of contract and, as such, does not fall under the BIT (R I, paras. 356 and 332 and R II, paras. 454 et seq. (breach of contract is not a breach of customary international law) and paras. 474 et seq. (breach of contract does not fall under Art. II(2)(c) BIT, see also R II, para. 574)). The Respondent further contends that the SPA did not create obligations on the part of Romania but bound only SOF as a legal entity separate from Romania (R I, paras. 253 et seq. and R II, para. 630).

131. But even if the Tribunal regarded the Respondent as a party to the contract, no breach of it was in fact committed (generally R II, paras. 6-20, 64-199, 402-408, 629-658) because SOF complied with its obligations under Articles 7.4.1
132. In the first place, SOF accepted no obligation to restructure CSR’s budgetary debts because SOF did not have the power to do so (R I, paras. 68, 85) and accordingly it refused to accept an obligation to succeed and accepted only an obligation to try to achieve the desired result (R I, para. 81). Art. 15² of the Privatization Law does not change that obligation of means into one of result (R-PHB I, paras. 89 et seq.). This is confirmed by the inclusion in the SPA of Article 9.4, which provides for an additional payment to be made in case of successful restructuring (R I, paras. 68, 82-83, 292). But even assuming that Art.15² applied, the Claimant had no legitimate expectation that it would receive budgetary debt restructuring (R-PHB II, para. 6 and paras. 10 et seq.) nor indeed any legitimate expectation on which it could rely (R II, paras. 69-88, 633 et seq.).

133. Secondly, SOF complied with the obligation of means that it accepted under the second part of Article 7.4.2 of the SPA. Indeed, SOF and later APAPS exceeded their obligations under Article 7.4.2 of the SPA in at least three ways: (i) by asking the budgetary creditors not to exercise any liens that they may have had on CSR’s assets; (ii) by seeking and obtaining the Nota from Prime Minister Isarescu’s Office referred to at paragraph 127 above; and (iii) by seeking and obtaining, despite an alleged lack of cooperation on the part of the Claimant, Government Decision 490 just four months after the Claimant first asked APAPS to assist the Claimant by obtaining a Government decision (R I, paras. 291, 293; see also R-PHB I, paras. 136 et seq.). GD 490 provided for re-scheduling of CSR’s budgetary debts over a five-year period with a six-month grace period and an exemption from late payment penalties (R1, para. 162). GD 490 was, according to the Respondent, baselessly rejected by the Claimant (R-PHB I, paras. 7 et seq.; R-PHB II, para. 3). GD 490 did not provide CSR with too little budgetary debt restructuring, nor did it come too late (R-PHB I, paras. 10-11.) It was the Claimant’s fault that the budgetary debt was not then restructured (R I, para. 294, R II, paras. 162-199, 642-645; R-PHB II, para. 3).

134. Thirdly, Article 15² of the Privatization Law cannot be invoked by the Claimant to found liability on the part of the Respondent under international law (R-PHB I, paras. 102 et seq.).² It is significant that Article 15² played no part in the Claimant’s case as that case was originally formulated.

135. Consequently, the Respondent regards the Claimant’s reliance on Article 15² of the Privatization Law as irrelevant for the case and emphasizes that the Respondent authorized budgetary debt restructuring for CSR that met and exceeded the possible restructuring envisaged in the SPA, and did so in a timeframe that did not prejudice the Claimant (R-PHB I, para. 22).

4. The Tribunal

136. For reasons already stated, a breach of the SPA is, as a matter of law, capable of constituting a breach, attributable to the Respondent, of the BIT by reason of the inclusion in the BIT of Article II(2)(c), and, in the judgment of the Tribunal, whatever, if any, limitation is to be placed on the meaning of “obligation” where that expression is used in Article II(2)(c) of the BIT (cf. paragraph 61 above), a breach that is attributable to the Respondent of Article 7.4.2 of the SPA would constitute a breach by the Respondent of Article II(2)(c) of the BIT.

137. In connection with the Claimant’s claim here under consideration, it should be stressed at the outset that neither party is without blame for the failure of the Claimant’s investment in CSR.

² In its Rejoinder and at the hearing the Respondent contended, contrary to the Claimant’s position, that Article 15² was applicable only prior to, and not after, privatization and, if only for that reason, was irrelevant in the present case.
Largely because of CSR’s budgetary debts, the company was bankrupt and had a large negative value, a fact known to both the Claimant and SOF. The company almost certainly required massive capital investment and the Claimant’s proclaimed plans for CSR certainly necessitated massive capital investment.

Nevertheless, as the Claimant disclosed in writing to SOF in April 2000 (C-22), if the Claimant acquired CSR:

(a) “funding for all company strategic planning” would come from a combination of sources, namely internally generated funds (CSR profit), traditional debt investments and proceeds from sale of equity in the market” (i.e. the Claimant did not include any capital of its own as a source of funds);

(b) currently the Claimant’s “acquisition financial planning” allowed only for funding the purchase of the stock, the installation of certain new equipment and the working capital needed to reach planned levels of business (i.e., there was no mention of funding any of the “cost of the past” even after the budgetary debts had been reduced by elimination of accrued interest and penalties, with repayment of the residue spread over a number of years)

It was a precondition for authorization of restructuring of budgetary debts of a company under privatization that the company should demonstrate that it could be expected to be economically viable after the restructuring. Given the fact that the Claimant did not plan to make any capital investment from its own funds, if any, there was, therefore, at least prima facie, a “chicken and egg” situation: unless and until the restructuring of CSR had been effected there could be no assurance that the funds needed to enable the conditions for restructuring to be satisfied would be forthcoming.

Thus, Mr. Alan Novak, a financially experienced Director of the Claimant company testified that third parties would not spend time even investigating the possibility of investing in CSR until there was “overwhelming evidence” that the budgetary debts would be rescheduled or the debts had actually been rescheduled; that was subject to the qualification that third parties whose business had a “synergy” with CSR’s business might be an exception to that general proposition (Transcript, pp. 578-580).

The Claimant’s senior representative in Romania, Mr. Charles Franges, accepted under cross-examination, that there was no “guarantee” that budgetary debt restructuring, as envisaged in the SPA or at all, would take place and that there was a “risk” that it would not do so (see paragraph 120 above). Although the Claimant’s Memorial (paragraph 146) stated, on this critically important issue, that “Noble Ventures expected that CSR’s budgetary debts would be restructured by the closing of the SPA”, i.e. within at most two-and-a-half months from the signing of the SPA, Mr. Franges testified orally that he expected it to take place within “about three months” or alternatively “three or four months” from the signing of the SPA on June 5, 2000 and that he was comfortable with four months for planning purposes.

There were a number of reasons why in the case of CSR even Mr. Franges’ expectation of restructuring within four months appears to have been optimistic.

In the first place, as was public knowledge in Romania, on April 5, 2000 the Minister of Finance had announced that new requests for budgetary debt
145. Secondly, there were a number of budgetary creditors to whom CSR owed money, each of whom had to be dealt with separately and, despite the “success fee” of US$2 million (most of which SOF was to distribute to the budgetary creditors in the event of the hoped-for restructuring), they showed no enthusiasm about writing off substantial amounts shown in their books as assets (in the form of debts owed by CSR). The Claimant included amongst the documents that it filed with its Memorial a paper, “A decade of privatization in Romania” (C-137), written in 2000 by Dragos Negrescu, Delegation of European Commission, Bucharest, Romania. The paper noted that SOF lacked Cabinet rank and that the Privatization Law, by increasing the powers of the “line ministries” (in the present case, the budgetary creditors”) actually marked a step backwards. Specifically with regard to budgetary debts, the paper commented that the “arbitrage” by the Cabinet was “time-consuming” and that “the progress recorded in the last year with respect to the treatment of debts incurred by privatizable companies does not augur work for the future.”

146. There was the further complication that a general election was due to be held, and was in fact held, on November 26, 2000 so that it would not be surprising if, as the election approached, Ministers were preoccupied with matters of more immediate concern to themselves than the rescheduling of CSR’s budgetary debts. In fact the election resulted in the defeat of the incumbent government party and a new President was elected to office on December 10, and a government headed by Prime Minister Nastase replaced the old government on December 28, 2000.

147. There is nothing to suggest that, in entering into the SPA, the Claimant relied on the existence of Article 15² of the Privatization Law as something that would strengthen the hand of SOF in fulfilling its obligation to use due diligence to procure a restructuring of CSR’s budgetary debts, albeit without empowering SOF itself to impose such a restructuring. But whether or not a company as lacking in resources, capital and prudence as the Claimant could have made a success of the privatization of CSR even if CSR’s budgetary debts had been restructured within four months, it was as plain as a pikestaff that if they were not very speedily restructured, the consequences would be disastrous for CSR, its workforce and indeed the town of Resita. If, as the Respondent contends, once CSR had been privatized SOF lost its power under Article 15² of the Privatization Law even to propose the imposition of restructuring of CSR’s budgetary debts, the imprudence of SOF, quite apart from the imprudence of the Claimant, in entering into the SPA was all the greater. This very fact probably led the Claimant to assume that, with SOF’s support, the restructuring of CSR’s budgetary debts would be little more than a formality. If so, the Claimant’s assumption was fundamentally flawed.

148. In fairness to SOF, it should be recalled that on a date unknown to the Tribunal it sought from the office of Prime Minister Isarescu a decision approving in principle the restructuring of CSR’s budgetary debts. Such a decision was taken on September 14, 2000 although it was not communicated to SOF until October 3, 2000. However the decision, recorded in a Nota, had no legal effect. Whether because of a dragging of feet by the “line ministries” (see paragraph 145 above) or because of the approach of the Romanian general election or because of a lack of urgency, such as typifies bureaucracies not only in Romania, or for some other reason, there is no evidence of SOF exerting itself vigorously, as it ought to have done, or indeed at all, to secure implementation of the September 14, 2000 political decision of the Prime Minister’s Office. However the Tribunal is not persuaded that, even if SOF had exercised due diligence in this regard, it would have succeeded in finalizing the restructuring before the ruling party’s defeat in November and the resulting change of government.
Moreover, even if rescheduling of CSR’s budgetary debts had been effected or legally guaranteed at the end of Mr. Franges’ four months, any interested third party who then commenced a due diligence investigation of the Claimant and CSR would have been likely to have ascertained at least some of the following facts:

149.1 that the Claimant had borrowed and had not yet repaid the initial instalment of the purchase price of CSR;

149.2 that the Claimant and CSR had defaulted on the repayment of the instalment of the Spanish banks consortium’s loan to CSR that had fallen due on September 14, 2000;

149.3 that CSR still had outstanding debts from the past which it owed to the utilities and that those debts had not been rescheduled;

149.4 that the legal position with regard to CSR’s freedom to exploit the slag pile, to which the Claimant attached great weight in the present arbitration, was problematic;

149.5 that Article 8.5 of the SPA prohibited the Claimant from declaring any of CSR’s workforce redundant, even though further reductions in the size of the workforce were probably necessary (R-239, Section 4.3, paragraph 11 and Paul Cretan, R-5, paragraph 7), at any rate unless the Claimant succeeded in rapidly expanding CSR’s production and sales (into an already competitive market); and

149.6 that, in breach of Article II.5 of the BIT, Article 8.8.1 of the SPA obliged the Claimant to export a substantial quantity of CSR’s production.

One therefore cannot assume that, following on completion of the restructuring of CSR’s budgetary debts, third party investors would have injected new capital into CSR without at any rate some delay.

If, as seems very possible, further investment by third parties of at least US$5 million (plus the amount required to pay the outstanding instalment on the Spanish bank consortium’s loan to CSR) had not been realized by December 31, 2000, any potential investor would have further noted that, as a result:

150.1 the Claimant was in further default of its obligations under the SPA; and

150.2 CSR was in arrears in paying the wages of its workforce, with mounting labour problems in consequence.

In view of the conflicting statements about precisely what were the Claimant’s expectations as to the time that it would take to get CSR’s budgetary debts rescheduled, the Tribunal cannot be sure what the Claimant’s “business plan” presupposed in that connection. But the evidence of Mr. Novak (see paragraph 141 above) was to the effect that the Claimant’s “business plan” was bound to “collapse” if budgetary debt restructuring was not effected within the time schedule premised in the plan or even if there was “uncertainty that interrupts that schedule” (Transcript, pages 577-578).
152. In the Tribunal’s judgment, precisely such a collapse was all too readily foreseeable.

153. Although APAPS inherited SOF’s obligation under Article 7.4.2 of the SPA to use due diligence to secure a restructuring of CSR’s budgetary debts, it inherited from SOF a highly problematic situation so far as CSR was concerned. In particular, by the beginning of 2001, when APAPS became the responsible agency, the Claimant was in breach of the SPA both by reason of its failure to pay the September 2000 instalment of the Spanish banks consortium’s loan to CSR and by reason of the Claimant’s failure to inject US$5 million of capital into CSR on December 31, 2000. Associated with the second of those defaults was the fact that from early January 2001 onwards CSR was in serious delay in meeting the wages of the workforce, and in recurrent breach of its promises to the workforce to remedy that situation, with serious consequences for not only the workers and their families but also the Resita locality. In other words the Claimant was in serious obligee’s default so far as APAPS was concerned.

154. The Claimant contends that its default was attributable to the non-restructuring of CSR’s budgetary debts. For reasons that have already been explained, the Tribunal is far from satisfied that, even if CSR’s budgetary debts had been restructured by the end of Mr. Franges’ four month period, the necessary investments of over US$5 million would have been secured by the end of 2000 after which the mounting labour problems at CSR might have been expected to deter even the most speculative investor. Be that as it may, the SPA did not make the Claimant’s obligations under the SPA contingent upon CSR’s budgetary debts having been satisfactorily restructured even though the US$2 million “success fee” payable by the Claimant to SOF was expressed to be subject to that condition.

155. In the judgment of the Tribunal, APAPS did not commit a breach of Article 7.4.2 of the SPA either by reason of the time that it took to procure a legally binding right for CSR to get restructuring of its budgetary debts or by reason of the terms of GD 490 which created that right. The Tribunal finds that whether or not GD 490 was more or less advantageous to the Claimant than a restructuring in the terms outlined in Article 7.4.2 is not the critical issue, which is whether APAPS failed to use due diligence to have those terms timely implemented. The burden of proof on that issue lies on the Claimant and, in the judgment of the Tribunal, the Claimant has not discharged that burden.

156. Even though in early 2001 the President of APAPS was a Cabinet Minister, he did not have the power unilaterally to impose a restructuring plan on the budgetary creditors, which were also government Ministries or agencies. Given the pre-condition for restructuring of budgetary debts that, after restructuring, the debtor would be economically viable, it may be thought surprising not that it took until May 2001 to achieve GD 490 but rather that GD 490 was achieved at all despite the Claimant’s serious contractual defaults, its lack of resources and its evident willingness to make promises (to amongst others, CSR’s workforce) that it had no means of fulfilling and that it failed to fulfil. The President of APAPS far from being an ideologically motivated enemy of the Claimant, as the Claimant has sought to portray him, was the prime promoter, albeit a reluctant promoter, of arrangements that would allow the Claimant to remain in control of CSR, if only faute de mieux.

157. Moreover, the fact that GD 490 did not include CSR’s debts to its utilities suppliers would probably have led the Claimant to reject GD 490 irrespective of the other respects in which the Claimant criticized, and criticizes, GD 490 and irrespective of the fact that it was enacted in May 2001 and not earlier. Yet, as the Claimant ultimately recognized in the course of the present arbitration, the debts owed to utilities suppliers were not “budgetary debts” and therefore fell outside the scope of Article 7.4.2 of the SPA.
158. In conclusion with regard to the issue of alleged breach of Article 7.4.2 of the SPA, the Claimant’s claim fails not because a proved breach would not have constituted a breach of the BIT, i.e. Article II(2)(c) of the BIT, but because -

- although SOF failed to use due diligence, the Tribunal is not satisfied that even if SOF had used due diligence it would have achieved legally binding arrangements for the contemplated restructuring before SOF itself was dissolved; and

- it has not been established that the efforts made by APAPS which resulted in GD 490 fell short of the due diligence that APAPS was required to exercise.

159. Therefore, the Tribunal concludes that this claim has to be dismissed.

H.IV. Compliance with the Obligation to Provide Full Protection and Security to the Investment

1. Arguments by the Claimant

160. The Claimant contends that from January 2001 onwards demonstrations and protests by CSR’s employees occurred frequently and on a large scale and that they were accompanied by unlawful acts for which the Respondent is responsible by reason of its failure to provide full protection and security as provided for under the BIT. Accompanied by unlawful acts such as theft, occupations of the CSR facilities, acts of intimidation, the seizure of the facilities from Romanian workers and the forcible detention and beatings of its management (C I, paras. 7 and 232-248). According to the Claimant, Romanian officials, although informed about these events, refused to exercise adequate measures to protect the Claimant, its staff and CSR from unlawful activities (C I, paras. 15-17): “Police attended and observed the protests, but Romania has not shown that a single charge was laid for this lawless behavior” (C II, para. 166). The Claimant contends that, after what is claimed to have been a serious assault on a US employee of the Claimant and of CSR, the Romanian Government “effectively condoned this act of violence” (C II, para. 167).

162. The Claimant regards this as a failure by the Respondent to comply with international law standards of treatment (C I, para. 468) and as a violation of Art. II(2)(a) and (b) of the BIT (C II, paras. 260 and 335; C-PHB I, para. 2). It is argued that “Romania did not provide the reasonable measures of protection which a well-administered government would be expected to exercise under similar circumstances” (C II, para. 353). This failure allegedly also led to a significant impairment of CSR’s steel production in the first half of 2001 (C I, para. 471; C-PHB I, para. 77).

2. Arguments by the Respondent

163. The Respondent argues that there was no failure to provide full protection and security (R I, para. 391 and R II, paras. 50-52, 688-695). That obligation is not to be understood as an absolute standard providing for strict liability but as a due diligence standard (R I, paras. 381 et seq.). That standard was complied with. (R II, paras. 255-261) Requests for protection were never directly addressed to the Respondent. The Claimant also failed to provide sufficient evidence that acts occurred which could give rise to an obligation to protect (R II, para. 692). The workers’ demonstrations, which were caused by the Claimant’s failure to pay their wages, were conducted in an orderly manner.
and after notice had been given to the Prefect’s office: “The Romanian authorities went to great lengths in their efforts to stabilize the situation caused by the Claimant” (R I, para. 391, R II, paras. 255-256; R-PHB I, para. 54). There were only two complaints, one concerning personal injury and one concerning damage to property (R I, paras. 157 and 391), the first of which was not substantiated in accordance with standard police procedures (R-PHB I, para. 55). The alleged acts of violence did not prevent the Claimant from carrying out its activities at CSR (R-PHB I, para. 55). The authorities reacted reasonably and exercised appropriate due diligence (R I, para. 12, R II, para. 694). Finally, the Claimant has not demonstrated how the alleged failure caused it damage (R I, para. 12).

3. The Tribunal

164. With regard to the Claimant’s argument that the Respondent breached Art. II (2)(a) of the BIT which stipulates that the “Investment shall ... enjoy full protection and security”, the Tribunal notes: that it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens. The latter is not a strict standard, but one requiring due diligence to be exercised by the State. Questions concerning the content of the standards of protection have already been discussed to some extent by inter alia ICSID Tribunals in Asian Agricultural Products Limited v. Republic of Sri Lanka (Case No. ARB/87/3, Award of 27 June 1990, ICSID Reports IV, p. 250 and at pp. 278 et seq.) and in American Manufacturing & Trading, Inc. v. Republic of Zaire (Case No. ARB/93/1, Award of 21 February 1997, ICSID Reports V, p. 14, at p. 30) although the facts in those cases were quite different from those in the present case.

165. However, in its ELSI judgment (ICJ Reports 1989, p. 15 et seq.), the ICJ had to deal with a situation not so different from that in the present case. In ELSI the Court was concerned with the occupation of a plant by its employees and with an alleged breach of a protection standard provided for in a Treaty of Friendship, Commerce and Navigation concluded between the United States and Italy in 1948. The Court found that the protection provided by Italy could not be regarded as falling below the full protection and security required by international law which, considering the facts of that case, indicates that violations of protection standards are not easily to be established. Comparing the facts of the ELSI case with the situation in the present case, it is difficult to see in what respect the conduct of the Respondent in the present case was more harmful than that of Italy in the ELSI case, so as to justify a different result.

166. However, it does not seem to be necessary to enter into a detailed examination with regard to the claimed violation of Art. II (2)(a) of the BIT. Even assuming the correctness of the Claimant’s factual allegations, it is difficult to identify any specific failure by the Respondent to exercise due diligence in protecting the Claimant. And even if one concluded that there was a certain failure on the side of the Respondent sufficiently grave to regard it as a violation, it has not been established that non-compliance with the obligation prejudiced the Claimant, to a material degree. The Claimant has failed to prove that its alleged injuries and losses could have been prevented had the Respondent exercised due diligence in this regard, nor has it established any specific value of the losses.

167. Accordingly the claim has to be dismissed.

H.V. The Legality of the Initiation of Judicial Reorganization

1. Arguments by the Claimant

168. On July 3, 2001 proceedings for the judicial reorganization of CSR were initiated by budgetary creditors, amongst others the Ministry of Labour, through its local Employment and Pension and Social Security agencies, the
169. The Claimant regards the initiation of the proceedings as a failure to meet international law standards by an abuse of process contrary to the BIT (Art. II(2)(a)) (C I, paras. 458-467 and C II, paras. 260, 335), as an arbitrary and discriminatory measure prohibited under Art. II(2)(b) of the BIT (C I, para. 484) and as a breach of Art. II(2)(c) (C II, paras. 387 and 418) as well as the international law principle *pacta sunt servanda* (C II, paras. 372 et seq.), though the two claims concerning Art. II(2)(c) and *pacta sunt servanda* no longer appear in C-PHB I).

170. The Claimant contends that there were intentions behind the initiation of judicial reorganization other than the ordinary commercial purpose (C-PHB I, paras. 78-85). The Claimant states that the “the true purpose of the judicial reorganization proceedings was to rescind the Privatization Agreement and allow Romania to take back control of CSR. Since the time of privatization, CSR had become effectively insolvent due to Romania’s failure to meet its obligations under the BIT and the Privatization Agreement. Now, as a result of the directive from the Minister of Privatization, CSR’s budgetary creditors would apply for judicial reorganization based on the very debts that were to be restructured under the SPA” (C I, para. 257, see also C II, para. 3 VI). By way of the judicial reorganization the Respondent sought to cancel the SPA in an indirect manner (C II, paras. 172 et seq.; C-PHB II, paras. 23-27) because the Respondent was not entitled to do so under the SPA (see C II, paras. 298 et seq.; C-PHB I, paras. 79 et seq.)

171. The Claimant further contends that the Respondent took the decision to go for judicial reorganization of CSR for the further reason of bringing to an end the disruptive public demonstrations by the union in Resita (see C I, 463). In this respect it was a “step in order to accommodate political pressure from the local Vatra union (...)” (C I, para. 459).

172. Apart from these alleged intentions behind the initiation of the proceedings, the Claimant emphasizes that “Romania’s petitioning of CSR into judicial reorganization was unprecedented. In nearly all privatizations, companies slated for privatization have substantial debts to the state resulting from a history of implicit subsidization. It is common for companies with large debts to be technically insolvent and, for this reason restructuring of debts to the state is a key component of many privatizations” (C I, para. 270) and that “Romania singled out Noble Ventures’ investment for special arbitrary and discriminatory treatment. Romania did not treat other investors and investments operating in Romania in similar circumstances as CSR” (C I, para. 484, see also C II, paras. 343 et seq.).

2. Arguments by the Respondent

173. The Respondent argues that the judicial reorganization proceedings were not a violation of the BIT (see generally R II, paras. 30-34, 230-291, 659-687). The proceedings were initiated and carried out in accordance with Romanian law (R II, paras. 660, 271 et seq.) which applies indiscriminately to companies subject to such procedures; the budgetary creditors, the judge and the judicial administrator fulfilled their role (R I, para. 307). It was not the purpose of the proceedings to cancel the SPA nor did the proceedings have that effect (R-PHB I, para. 30). They were meant to promote the financial rehabilitation of the debtor (R I, para. 183), to maintain the integrity of CSR (R-PHB I, para. 30) and to solve the crisis of CSR’s workforce (R I, paras. 174, 177-179, R II, 662). They were necessitated by the crisis caused by the Claimant (R II, paras. 230-254). The creditors were justified in initiating the proceedings (R
II, para. 679). The record shows that the judicial reorganization was a necessary, proper, temporary and proportionate means to stabilize CSR and to get it back into production (R-PHB I, para. 32). The Government never gained control of CSR (R I, para. 183, R II, para. 274). Regarding the Claimant’s contention that the proceeding were another way to cancel SPA, the Respondent argues that the proceedings could not and did not affect the ownership of CSR (R I, para. 379, R II, paras. 271 et seq. and 662). The reorganization clearly did not violate international standards of treatment (R-PHB I, para. 32).

174. With regard to the application of international law in this connection, the Respondent is of the opinion that a violation of the minimum standard of treatment is established only when the act is severely wrongful, amounts to bad faith, is a willful neglect of duty or is taken without a basis in law or without reasonable justification (R I, para. 358, see also R II, 659). None of those conditions is met here, as the proceedings were justified, the Claimant could participate and the Claimant retained ownership (R I, paras. 377-379).

3. The Tribunal

175. The question for the Tribunal is whether Art. II(2)(a) and/or (b) have been breached. Art. II (2)(a) requires from the Parties to the BIT to accord “fair and equitable treatment” and Art. II(2)(b) that “Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment ... of investments.”

176. The Tribunal will first turn to the question of a breach of Art. II(2)(b) BIT by way of arbitrary and discriminatory measures. The BIT gives no definition of either the notion “arbitrary” or “discriminatory.” Regarding arbitrariness, reference can again be made to the decision of the ICJ in the ELSI case. The Court defined it as “not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of “arbitrary action” being “substituted for the rule of law” (Asylum, Judgment, ICJ Reports 1950, p. 284). It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety” (ELSI, ICJ Reports 1989, para. 128).

177. Considering the facts of the present case, it is difficult to regard either the initiation or the conduct of the judicial proceedings as arbitrary. The parties disagree on the reasons for the grave economic situation of CSR at the time of the initiation of the judicial proceedings, but not on the factual insolvency of CSR at the time. Nor is the difficult situation of the approximately 4,000 employees denied. Considering that there was neither a prospect of the budgetary creditors rescheduling debts on a short time basis, nor that of the Claimant making further investments in CSR and that the situation for the employees as well as for the whole region was desperate, there are sufficient grounds not to regard the proceedings as arbitrary. Their initiation can neither be regarded as shocking nor surprising in the sense understood by the ICJ in ELSI. On the contrary, one may well conclude that the proceedings were at that time the only short term solution of the “social crisis” that had engulfed Resita as a result of the Claimant’s inability to pay CSR’s workforce and therefore equally reasonable as well-founded.

178. Such proceedings are provided for in all legal systems and for much the same reasons. One therefore cannot say that they were “opposed to the rule of law.” Moreover, they were initiated and conducted according to the law and not against it. CSR was in a situation that would have justified the initiation of comparable proceedings in most other countries. Arbitrariness is therefore excluded.
179. In this context it is obviously of major importance that this Tribunal – as discussed above – did not conclude that the situation of CSR at the time of initiation of the proceedings was caused by violation by SOF/APAPS of their obligations under the SPA with regard to debt rescheduling or failure to provide protection and security. Obviously, the answer to the question of arbitrariness might have been different had the Tribunal concluded that the Respondent was responsible under international law for the economic situation of CSR. Since that is not the case the Tribunal concludes that neither the initiation nor the conduct of the judicial proceedings was arbitrary.

180. The Tribunal now turns to the question of whether the proceedings were discriminatory. The parties have not provided the Tribunal with any information that comparable proceedings have been initiated against investors from other countries or in particular against US investors. But that in itself does not exclude the possibility that the proceedings constituted a discriminatory measure because it is possible for a single measure to be discriminatory if proof to that effect is given. As one cannot rely on objective criteria in such situations, the Claimant has to demonstrate that a certain measure was directed specifically against a certain investor by reason of his, her or its nationality. As demonstrated above, the judicial proceedings against CSR were in no way arbitrary but on the contrary were well founded. And there was no indication whatsoever that the measure was specifically directed against the Claimant as a U.S. company. Furthermore, the Claimant failed to prove that other investors with debt problems not being subjected to judicial proceedings were in fact in a situation as grave as that of CSR. Equally the Claimant did not demonstrate that other investors were left unaffected by judicial proceedings although they were in similar situations. The Tribunal accordingly concludes that the measure was not discriminatory and that therefore no violation of Art. II(2)(b) has been established.

181. The Tribunal will now address the question whether the Respondent complied with the duty to accord fair and equitable treatment to the Claimant. Here the Tribunal is confronted with two notions which are particularly difficult to define. Although in this respect Art. II(2)(a) mirrors standard clauses in BITs and other international instruments and courts and tribunals have been concerned with violations of fair and equitable treatment standards, the question whether those standards have been violated has to be considered in the light of the circumstances of each case.

182. Considering the place of the fair and equitable treatment standard at the very beginning of Art. II(2), one can consider this to be a more general standard which finds its specific application in *inter alia* the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor. As demonstrated above, none of those obligations or standards has been breached. While this in itself cannot lead to the conclusion that the more general fair and equitable treatment standard has not been breached, it remains difficult to see how the judicial proceedings can be regarded as a violation of Art. II(2)(a) of the BIT. As described above with regard to alleged arbitrariness, the situation of the Claimant, CSR and its employees was such that the judicial proceedings seemed to be the only solution to an otherwise insoluble situation. Bearing in mind the interests of the approximately 4,000 employees who depended on CSR and their prospects at that time, the initiation of the proceedings was neither unfair nor inequitable. This conclusion is reinforced by the consideration that the Respondent is not to be blamed for having violated any obligations under international law in connection with the indisputably dramatic economic situation at that time. Therefore, no violation of Art. II(2)(a) and its fair and equitable treatment standard has occurred.

183. Consequently, the Tribunal regards the judicial proceedings as a violation of neither Art. II(2)(a) nor Art. II(2)(b) BIT.
H.VI The Conclusion of the Collective Agreement

184. As a preliminary remark, the Tribunal notes that it is not clear whether the Claimant continues to advance this claim. Rather, it seems that in its Reply the Claimant dropped the claim: “Although Noble Ventures does not allege that the breach of the accord led to CSR’s subsequent financial difficulties, it demonstrates lack of due diligence” (C II, para. 109, see also paras. 105–108). There is no (at least no explicit) mention of this aspect where the Claimant applies the facts to the applicable law (C II, page 86 onward) nor does the claim appear in C-PHB I. The Respondent regarded the Claimant’s initial position concerning the collective agreement to be a separate claim (see list of claims identified in R I, para. 247). But in its Rejoinder the Respondent regarded the claim as abandoned (R II, para. 399). Nevertheless, as a precaution, the claim is now addressed by the Tribunal.

1. Arguments by the Claimant

185. The Claimant contends that the conclusion of the Collective Employment Agreement constituted a failure, imputable to the Respondent, to observe contractual agreements in good faith as required by Art. II(2)(c) BIT, because according to Annex A of the SPA, SOF was to use its best efforts to ensure that CSR’s management did not take any major decision without the Claimant’s consent (C I, para. 476 and C I, paras. 22 and 175-180).

2. Arguments by the Respondent

186. The Respondent contends that this is a claim for a simple breach of contract that is not affected by the BIT (R I, para. 356 and R II, paras. 454 et seq. (breach of contract is not a breach of customary international law) and paras. 474 et seq. (breach of contract does not fall under Art. II(2)(c) BIT)). In any event the Respondent contends that no violation has been established (R I, paras. 296-300, see also paras. 94 et seq.).

3. The Tribunal

187. Annex A to the SPA provided that, during the period between the execution of the SPA, on the one hand, and payment by the Claimant of the initial instalment of the purchase price and the transfer to it by SOF of its shares in CSR, on the other hand, CSR would not take “major decisions” without the prior consent of the Claimant’s representative – in fact Mr Charles Franges – who might appoint Mr Victor Manolescu to exercise control over major decisions taken by the management of CSR regarding CSR’s day-to-day operations. Annex A enumerated what constituted “major decisions”. The list did not include the making of labour agreements.

188. However, in Annex 1 to the SPA, CSR’s then General Manager, Mr. Teodor Gavris, not only undertook that, during the interval before the Claimant gained control of CSR, he would not do a number of things that might prejudice CSR’s economic position but also specifically declared that: “The collective labor agreement and the individual labor agreement remain the same as of this date” – i.e. they had not been changed since the Claimant’s due diligence exercise was completed.

189. Towards the end of June 2000 – i.e. during the interval between the execution and completion of the SPA – the VATRA trade union requested CSR to start negotiations for a new Collective Employment Agreement on July 3, 2000. Mr. Gavris, very prudently, annotated (in Romanian) VATRA’s letter as follows:

“Yes – if the representative of the company NV agrees and countersigns: 30.06.2000.”

Mr. Charles Franges then added a further annotation (in the English language):
We agree to meet at the specified time to listen to your point of view concerning contract negotiation.”

190. Mr. Franges himself signed the first Negotiation Minutes of the consequential meetings which recorded that the Claimant would be free to be represented at subsequent meetings.

191. There is uncontested evidence that thereafter Mr. Manolescu, as the Claimant’s delegated representative, was kept fully informed of the negotiations with VATRA and concurred in the signing of a new collective labour agreement, which was officially registered on August 18, 2000.

192. A complaint that the making of the new collective labour agreement contravened the Accord annexed to the SPA was first made by Mr McNutt on behalf of the Claimant as one of a number of alleged grievances, though Mr McNutt was not on the scene when the new labour agreement was negotiated and signed. In its Reply the Claimant continued to contend that the signing of the new agreement constituted a breach of the Accord and that the alleged breach demonstrated SOF’s lack of diligence in fulfilling its obligations under the SPA (CII, paras. 105-109). However no reference was made to that contention in the Arbitration thereafter.

193. The Tribunal finds, on the basis of the facts set out above, that, even if the conclusion of a new collective labour agreement by CSR during the interim period before completion of the SPA constituted a major decision that required the Claimant’s consent, its consent was sought and given and there is therefore no question of any lack of diligence or other fault in this regard on the part of SOF and therefore no question of any such default being attributable to the Respondent.

H.VII. Conclusion of, and Compliance with, the Settlement Agreement

1. Arguments by the Claimant

194. The Claimant contends that, following negotiations starting on September 11, 2001, a settlement agreement was concluded with the Respondent on October 19, 2001, the so-called “Novak-Dijmarescu Protocol” (C I, para. 283, C II, paras. 214 et seq. and C II, paras. 214 et seq.). Mr. Alan Novak was a director of the Claimant company who had extensive experience in international project finance and had earlier practised law in two major US law firms. Approval of the Protocol on the side of the Respondent was purportedly expressed by way of the signature of Counselor Dijmarescu (an experienced and senior Romanian diplomat and government functionary). Approval of the Protocol was subsequently communicated to the Claimant (C II, paras. 214 et seq.):

“After Noble Ventures’ proposal was circulated to various Ministries, Counselor Dijmarescu gave a briefing to the Cabinet on October 18, 2001. Romania has not produced the minutes to this Cabinet meeting. However, following this Cabinet meeting, Mr. Dijmarescu wrote to Noble Ventures stating: At the request of the Prime Minister, I have emphasized the political, legal and economic implications of the case and I have endorsed the proposal that a solution can and should be based on negotiations within the framework of discussed proposals embodied in your letter of September 13, 2001.

At the end of discussions, the Prime Minister has asked APAPS as a legal party [sic] in the contract to send to Noble Ventures a formal invitation for negotiations of an addendum to the privatization contract, based on the package discussed in Washington (C II, para. 216).
The same day, Minister Musetescu sent the formal invitation as follows: I have the pleasure in informing you that the Government of Romania, in the last Cabinet meeting, has mandated [APAPS] to lead the negotiations for an addendum to the privatization contract. The bases [sic] of our mandate is the framework for a settlement resulted during the exchange of views and understanding reached in Washington and presented at length in your letter of September 13, 2001 (C II, para. 217).

Mr. Novak immediately responded to this letter by stating: Thank you for your letter dated October 19, 2001 accepting, on behalf of the Government of Romania, the framework for a settlement as presented in my letter of 13 September 2001 ... (C II, para. 218).

Thus, by October 19, 2001, an agreement had been reached based on the terms of the Novak-Dijmarescu Protocol which were also set out in Mr. Novak’s proposal of September 13, 2001. This agreement was to be implemented by further negotiations of the details of an addendum to the SPA and other matters. However, the essential terms of the addendum were already included in the Novak-Dijmarescu Protocol (C II, para. 219).

According to the Claimant, the Respondent agreed within the settlement to assist the Claimant in obtaining a one year revolving US$ 15 million line of credit to be provided by the State-owned Romanian Commercial Bank (BCR), (C I, paras. 290 et seq. and C II, paras. 220-242). The negotiations with BCR were unproductive and the Claimant contends that the Government of Romania did not provide the allegedly promised assistance with respect to the line of credit (C I, para. 301, C II, paras. 238 et seq.). The Claimant argues that this was a violation of the general principle of international law of *pacta sunt servanda* (C II, para. 372 though this claim no longer appears in C-PHB I) and of Art. II(2)(c) of the BIT (C I, paras. 478 et seq. and C II, paras. 261, 387 and 418 III; C-PHB I, para. 4).

2. Arguments by the Respondent

196. The Respondent takes the view first that this claim is a mere contract claim which falls outside the scope of the application of the BIT (R I, para. 356 and R II, paras. 454 et seq. (breach of contract is not a breach of customary international law) and paras. 474 et seq. (breach of contract does not fall under Art. II(2)(c) of the BIT)).

197. Secondly the Respondent argues that at no time was an agreement concluded (R I, paras. 9, 200-214, 309 et seq.; R-PHB I, paras. 41 - 44; see also in more general terms R II paras. 47-49, 292-311, 312-354, 420-435). But even if the Tribunal found that the parties agreed on a settlement, the Respondent did not breach the settlement since there was no obligation to grant a loan (R I, paras. 313 et seq., R II, paras. 312-316) but only to support the Claimant and assist it in obtaining a loan: thus the wording in the disputed agreement (at paragraph (i)4) was: “The Government of Romania supports and will assist in CSR obtaining a one-year revolving $15 million line of credit” (R I, para. 228; R-PHB I, para. 45). This the Respondent did (R I, paras. 230 et seq., R II, paras. 430-435; R-PHB I, para. 45). The only reason why the Claimant did not receive a loan from BCR was that mutually acceptable commercial terms could not be agreed (R-PHB I, para. 46) and because the Claimant refused to comply with Romanian banking laws (R I, paras. 230 et seq., 317, R II, paras. 317-324). The Respondent adds that, were one to regard a “settlement” as being concluded, claims that arose before the time of the settlement would be precluded by the terms of the settlement itself (R II, paras. 426-429).

3. The Tribunal

198. If a settlement was indeed concluded, a claim for breach of the settlement would be included under the umbrella clause contained in Art. II(2)(c) of the BIT because the text of the alleged settlement provided *inter alia* for modifications of the SPA. However, the primary question for the Tribunal in this context is whether one can really regard a settlement agreement as having
been concluded by, or in consequence of, the so-called Novak-Dijmarescu Protocol.

199. The Tribunal cannot accept the Claimant’s argument in this respect. First, the text of the Novak-Dijmarescu Protocol was entitled “proposed settlement” for the return of Noble Ventures to CSR S.A. which prima facie indicates that it was not a concluded settlement. But apart from that, the text of the Protocol contains a clause stating “Both parties agree that this document is in furtherance of settlement negotiations and both parties agree that it is not to be used in any subsequent legal proceedings. In the event the proposed settlement is agreed to by both parties, the Claimant agrees to withdraw its claim in ICSID”. That further wording clearly shows that, at the time when the proposed settlement was signed, neither party regarded any of its parts as binding. Consequently the Novak-Dijmarescu Protocol had no binding force and could therefore not give rise to any obligations.

200. Did it become binding later? The Claimant failed to provide any convincing proof that a binding settlement was concluded on the basis of the proposed settlement. The Claimant provided the Tribunal with documents which indicate a general willingness to proceed with negotiations such as the letter from the Chairman of APAPS, Minister Musetescu, to Mr. Novak dated October 19, 2001 the relevant part of which was cited by the Claimant at CII, para. 217 (see para. 175 above).

201. Minister Musetescu’s statement can at best be understood as a positive attitude on the side of the Respondent with regard to reaching a final settlement along the lines set out in the “Protocol.” Even if one regarded the proposed settlement as an agreed framework, it would be impossible to derive from it specific obligations as the Claimant appears to seek to do.

202. Accordingly, this claim has to be dismissed for lack of an existing binding obligation.

H.VIII. The Question of Expropriation

I. Arguments by the Claimant

203. The Claimant contends that the Respondent expropriated the Claimant’s investment in CSR, first, by taking de facto control of CSR through the initiation and carrying out of the judicial reorganization proceedings (C-PHB I, para. 5) and, secondly, by taking de jure control through the Respondent’s subsequent dilution of the Claimant’s majority interest (C II, paras. 262, 358). According to the Claimant, the Respondent thereby violated Article III of the BIT and is liable to pay compensation to the Claimant in consequence.

204. As far as the judicial reorganization is concerned, the Claimant contends that, starting with the initiation of the judicial reorganization, the Respondent engaged in a permanent expropriation of the Claimant without compensation (C II, paras. 360-366). Concerning the judicial reorganization the Claimant argues (C I, paras. 24-29):

"24. Romania violated Article III of the BIT in that Romania’s actions and omissions constituted a taking of Noble Ventures’ interests in property without just compensation and in violation of the international law standards of treatment required by Article II(2) of the BIT. Romania undertook a course of action intended to deprive the Investor of the effective use of its Investment through the colorable use of bankruptcy laws. Romania undertook this measure in an unfair and discriminatory manner with the intent to prevent the Investor from being able to carry out its business functions. The evidence indicates that Romania’s action displayed an absence of bona fide intent and that it was not taken for any actual bona fide purpose."
“25. Romania’s actions were motivated by a desire to revoke the effect of the Privatization Agreement between Romania and Noble Ventures, as a means of evading its liability arising from the Agreement.

“26. If Romania wanted to legitimately have some form of judicial review of the Privatization Agreement, it was entitled to go to court in Romania to seek cancellation of the Agreement. Romania avoided this route as the Investor had strong grounds to resist such an unfair application by Romania.

“27. Under the terms of the Privatization Agreement, there were specific financial obligations and pledges which would enable Romania to obtain liquidated damages in the event of a breach of contract by Noble Ventures. Noble Ventures was required to pledge 11.5% of its shares in CSR with respect to security for its covenants under the Privatization Agreement. This was the only recourse that Romania would have had with respect to any breach of contract made by Noble Ventures. Cancellation of the Privatization Agreement was not an available remedy until after December 31, 2002. Apparently Romania was unprepared to wait until 2003 to deprive Noble Ventures of the benefit of its Privatization Agreement as Romania acted precipitously and colorably against Noble Ventures. By abusing the otherwise legitimate process of bankruptcy law, Romania was guaranteed a method to remove the control of CSR from Noble Ventures quickly, which would result in political benefit for the government with the local union.

“28. Romania’s abuse of process, designed to deprive Noble Ventures of its investment in CSR, was an internationally wrongful and unlawful response to the political situation caused by the unlawful union strikes in Resita. Romania’s decision to violate international law standards of behaviour with respect to fair and equitable treatment, full protection and security and expropriation cannot be excused on account of the government’s desire to deal with seemingly pressing political concerns. Romania was obligated to develop solutions that were consistent with its international law obligations.

“29. Since the judicial reorganization of CSR, the facility has not operated in a profitable fashion and many thousands of formerly employed workers have been unemployed.”

205. The Claimant further contends that after the judicial reorganization the Respondent continued to deprive the Claimant substantially of its operation, control and management of CSR (C II, paras. 367 et seq.): “Romania’s de facto taking of CSR continued after the end of the judicial reorganization. Noble Ventures did not regain control of CSR after the termination of the proceedings. Noble Ventures’ employees only returned to Romania to implement the Novak-Dijmarescu Protocol and not to re-exercise control over CSR. CSR shareholder meeting minutes from February 22, 2002 and April 30, 2002, record that Noble Ventures were not free to continue to operate CSR. The company was inoperable without a line of credit and the debt restructuring that Noble Ventures pursued through the Novak-Dijmarescu Protocol” (C II, para. 369).

206. As far as the dilution of its majority interest is concerned, the Claimant contends that the Respondent secured majority ownership of CSR on July 5, 2002 (C II, para. 3 VIII, see also C I, paras. 303-312 and C II, paras. 243-251); and at CII, para. 371:

“Romania’s de facto taking of CSR became de jure on July 5, 2002. In unilaterally registering the shareholder decision to issue new shares to the budgetary and utility creditors, APAPS reduced Noble
Ventures’ shareholding in CSR to 14%. With no longer even de jure control over CSR, Noble Ventures’ employees returned to the United States.”

207. In its Reply (CII) the Claimant explains the background to that action as follows:

”243. While Noble Ventures was negotiating with BCR for the line of credit, it also took steps to implement other aspects of the Novak-Dijmarescu Protocol. One of the key terms of the Protocol was the restructuring of CSR’s budgetary and utility debts. The mechanism for this restructuring was contained in GEO 172 and GD 1280.

“244. Under GEO 172 and GD 1280, CSR’s budgetary and utility debts would be eliminated by means of debt for equity swap. The budgetary and utility creditors would receive shares from CSR in exchange for their budgetary debts. These shares were then to be transferred to APAPS. In order to ensure that Noble Ventures would retain control of CSR, Noble Ventures could exercise a preemption right that would require APAPS to sell the shares to it at a steep discount.

“245. In order to implement this debt for equity swap, Noble Ventures called a shareholders meeting on April 30, 2002. As with the previous shareholders meeting, Noble Ventures recorded in the Minutes of the meeting that it was participating for the purpose of implementing the Novak-Dijmarescu Protocol. At the meeting, new shares were issued from CSR’s treasury to the budgetary and utility creditors, effective upon the registration of the shareholders’ decision.

“246. However, due to the size of the budgetary and utility debts, the immediate effect of the registration of this decision would have been to render Noble Ventures a minority shareholder in CSR holding less than 14% of the shares. Although APAPS was required to transfer these shares to Noble Ventures upon the registration of Noble Ventures’ preemption right, APAPS could not transfer shares that it did not own.

“247. By this point, Noble Ventures had witnessed SOF/APAPS excuse itself from both its obligations under the SPA and under the Novak-Dijmarescu Protocol on the grounds that it had limited legal competence and could only exercise “due efforts”. In these circumstances, Noble Ventures wanted to make sure that CSR’s budgetary and utility creditors had signed “transfer protocols” that committed them to transferring their shares to APAPS before it allowed itself to be diluted to a minority shareholder in CSR.

“248. Although Noble Ventures did not immediately register the shareholders’ decision, it indicated its commitment to pursuing the debt equity swap by registering its preemption right on May 23, 2002. The registration of this right created a binding obligation on APAPS to transfer the swapped shares of CSR to Noble Ventures once it had received them from the budgetary creditors.

“249. APAPS, however, still did not have the shares nor did[it] have the transfer protocols executed. Indeed, documents produced by Romania indicate that the shares were not transferred to APAPS until January 2003. Noble Ventures’ caution was fully justified. This
was not “a classic ‘stick up’ of Romania” but a prudent move designed to preserve Noble Ventures’ control of CSR.

“250. Later events demonstrated that APAPS had no intention of transferring the newly issued shares to Noble Ventures. Rather than obtain the transfer protocols, on July 5, 2002, APAPS moved to register the shareholders’ decision unilaterally. Upon doing so, control of CSR was transferred to the budgetary and utility creditors. Mr. Franges and Mr. McNutt no longer had any mandate to act on behalf of CSR as they no longer represented the majority shareholder and were only authorized to act for the purposes of implementing the Novak-Dijmarescu Protocol. As a result, they returned to the United States.

“251. From July 5, 2002 onwards, CSR was controlled by the budgetary creditors and state-owned utilities. Only Romania is to blame for the property loss to CSR in the second half of 2002 and the continued suffering of its workers. Despite having control of CSR from July 5, 2002 onwards, Romania could not start production until March 2003.”

208. Regarding the question of the application of Art. III of the BIT and the preconditions of an alleged expropriation in this case, the Claimant contends that Romania controlled the act of expropriation (C I, paras. 486-489), that the judicial reorganization was an act of expropriation for a discriminatory purpose and without the required compensation (C I, paras. 490-497) and that in this context the Respondent also failed to meet its obligations under the international law standards of treatment (C I, paras. 498-501).

2. Arguments by the Respondent

209. The Respondent argues that no expropriation took place (R II, paras. 29-42, 696-717). It contends that the judicial reorganization was properly conducted in accordance with Romanian law and did not lead to a taking of CSR since the Claimant retained its majority shares and exercised its shareholder’s rights during the proceedings (R I, paras. 7 et seq., 410-411, R II, paras. 696 et seq.). The proceedings were not intended to cancel and did not cancel the SPA (R II, paras. 271-272; R-PHB I, para. 24). The Respondent further emphasizes that the loss of control was only temporary and therefore cannot amount to an expropriation (R I, paras. 183, 401, 405 et seq., 410, R II, paras. 706-714; R-PHB I, para. 24), since the Claimant reacquired control at the end of the proceedings (R I, paras. 219 et seq.; R II, paras. 287-291; R-PHB I, para. 25). Nor can there be expropriation if a degree of control is retained and where, as here, the investor participates in the proceedings (R I, para. 413, R II, paras. 702-705, R-PHB I, para. 24). The Respondent also argues that it never acquired control or replaced the shareholders (R I, para. 183).

210. With regard to the dilution of the Claimant’s interest in CSR on which the Claimant relies, the Respondent contends that the Claimant divested itself of its majority interest in CSR (R II, paras. 715-717) and that, even after so doing, it exercised control (R II, paras. 350-354).

3. The Tribunal

211. The Tribunal will first consider whether the judicial proceedings can be regarded as a violation of Art. III(1) of the BIT which reads as follows:

“Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (‘expropriation’) except: for public purpose; in a non discriminatory manner; upon payment of prompt, adequate and effective compensation; and
in accordance with due process of law and the general principles of treatment provided for in Article II(2). ...”.

212. The question for the Tribunal is whether judicial proceedings initiated by reason of a company’s insolvency can be regarded as an expropriation at all. The ICJ, in the above-mentioned ELSI case, was faced with a situation which was similar to that in the present case. The Court was concerned with the requisitioning of a company the situation of which it described as follows: “... given an under-capitalized, consistently loss-making company, crippled by the need to service large loans, which company its stockholders had themselves decided not to finance further but to close and sell off because, as they were anxious to make clear to everybody concerned, the money was running out fast, it cannot be a matter of surprise if, several days after the date at which the management itself had predicted the money would run out, the company should be considered to have been actually or virtually in a state of insolvency for the purpose of Italian bankruptcy law” (ICJ Reports 1989, p. 62, para. 100).

213. CSR’s economic situation was no better. The Claimant, effectively its sole shareholder, evidently had no funds of its own (indeed, as the Tribunal knows, it still owed Edw. C. Levy Co. the money that the latter had lent to the Claimant to enable the Claimant to make the down payment on the purchase price of CSR). Moreover when the petitions for CSR’s judicial reorganization were filed, neither the creditors nor the Respondent had any reason to be confident that, if and when GD 490 was implemented, the Claimant would be able at once to end, as had become imperative, the social crisis at Resita by clearing the arrears of wages and from then on paying the wages as they fell due. The purpose of the judicial reorganization was indeed to preserve, rather than to destroy, the possibility of the Claimant reviving CSR as an economic steel producer, which the Respondent still saw as being at least the “best of a bad job” despite the risks and problems associated with the solution.

214. Regarding the question whether the requisitioning of the company in ELSI by the Mayor of Palermo constituted an expropriation or taking of property, the Court, for a number of reasons, denied such an effect. It held in particular: “Even if it were possible to see the requisition as having been designed to bring about bankruptcy, as a step towards disguised expropriation, then if ELSI was already under an obligation to file a petition of bankruptcy, or in such a financial state that such a petition could not be long delayed, the requisition was an act of supererogation” (ICJ Reports 1989, p. 71, para. 119.).

215. As far as the present case is concerned, CSR was – as pointed out above – de facto insolvent, being unable to honour its obligations in particular toward its workforce. It is of no relevance in this context that the Claimant, contrary to the owners in ELSI, still had the intention to run the company in such a situation, albeit without the intention itself to invest.

216. The judicial proceedings, therefore, did not concern a viable company or valuable assets to be expropriated. Consequently, one cannot regard the proceedings to be a violation of Art. III(1) of the BIT.

H.IX. Violation of the Claimant’s preemption rights

1. Arguments by the Claimant

217. The Claimant contends that “Romania failed to meet its obligation under Art. II(2)(c) by breaching .... a binding settlement agreement. .... Romania breached the settlement agreement .... by denying Noble Ventures’ preemption rights to the newly issued shares of CSR” (C-PHB I, para. 4).
218. While this question has been addressed in a previous quotation concerning expropriation (see C II, para. 246), the position of the Claimant is best summarized in the following passage of its Reply (C II):

“313. Contrary to Romania’s allegations, Noble Ventures did not refuse to implement the debt-equity swap provided for in GD 1280 and GEO 172. Noble Ventures held a shareholders meeting on April 30, 2001 and agreed to issue shares to the budgetary creditors. Noble Ventures also filed its pre-emption right with APAPS. Under the terms of GD 1280 and GEO 172, APAPS was then required to transfer the newly issued shares to Noble Ventures once it received them from the budgetary creditors.

“314. The number of shares to be issued to the budgetary creditors was far greater than those controlled by Noble Ventures. Noble Ventures sought to ensure that the budgetary creditors had committed to transferring the shares to APAPS before allowing its control to be diluted. By unilaterally registering the April 30 shareholders’ meeting decision, APAPS diluted Noble Ventures’ control to 14% of CSR’s shares without transferring to Noble Ventures any of the newly issued shares.

“315. APAPS’ cancellation of the SPA only affects the 14% of CSR’s shares that were transferred to Noble Ventures under the SPA. This cancellation did not affect Noble Ventures’ rights under GD 1280 and GEO 172 to the additional shares representing in excess of 80% of CSR’s share capital. Once APAPS received these shares from the budgetary creditors, it was required to transfer them to Noble Ventures.

“316. In January 2003, the budgetary and utility creditors of CSR ultimately transferred the shares they received for the debt-equity swap to APAPS. APAPS was then required to transfer these shares to Noble Ventures. It refused to do so, choosing instead to resell them to another bidder. This action represented yet another breach of APAPS’ obligations”.

Against this background it is contended that the Respondent acted in violation of Art. II(2)(c) BIT (C II, paras. 418 IV-419).

2. Arguments by Respondent

219. The Tribunal notes that the Respondent’s Counter-Memorial (RI) does not address this claim directly since it was not presented as a proper claim in the Claimant’s Memorial (CI). This is also the reason why this claim does not feature in the list of claims identified in RI, para. 247. However, there is a reference to this issue in RI, paras. 225 et seq., esp. para. 226.

220. With regard to this claim, the Respondent argues that it was by reason of the Claimant’s own failure that it lost the right to the newly issued shares (RII, paras. 436-453). In its First Post-hearing Brief the Respondent argues that Romania is not liable for any alleged failure to transfer the newly issued shares to the Claimant (R-PHB I, paras. 48-53):

“48. Claimant asserted in its Reply that Romania’s registration of, and failure to transfer, the newly issued shares approved by Claimant at the April 30, 2002 shareholders meeting violated Claimant’s pre-emption rights and contributed to the expropriation of its investment. These allegations are without merit.

“49. As explained in Romania’s Rejoinder and in the expert opinion of Professor Tănăsescu, Claimant divested itself of its majority interest at the shareholders meeting held on April 30, 2002 when it approved the issuance of new shares and vested ownership rights in those shares in CSR’s budgetary
50. It also is an unrebutted fact of Romanian law that CSR was required to register the minutes of the April 30, 2002 shareholders meeting and the new shareholding structure with the Trade Register before the newly issued shares could be transferred to Claimant. Claimant admits that it refused to complete the registration requirements. APAPS accordingly did so on July 5, 2002 pursuant to its legal rights as a CSR shareholder.

51. APAPS thereafter moved immediately to complete the sale of the shares to Claimant, inviting Claimant to sign the necessary legal documents in conjunction with the addendum to the SPA that the parties had been negotiating. When the parties met on July 29-30, 2002, however, Claimant presented an entirely new set of demands as a pre-condition to its purchase of the shares and completion of the pending settlement negotiations. Romania could not accept these new conditions, which violated Romanian law. Minister Muşetescu nonetheless invited Claimant to APAPS and informed Claimant that APAPS remained willing to complete the sale of shares and the other settlement documents in accordance with the parties' previous negotiations.

52. Claimant never responded to Minister Muşetescu's invitation. Claimant instead abandoned CSR and the country, and failed to pay the second installment under the SPA that was due on December 31, 2002. As a result of that failure, the SPA terminated automatically under its terms and any rights that Claimant may have had to the shares also lapsed.

53. Claimant accordingly bears full responsibility for its decisions to divest itself of its majority ownership of CSR by approving the issuance of new shares and to reject APAPS's subsequent offers to sell those shares.

3. The Tribunal

221. The Tribunal takes note that the Claimant regards the violation of its preemption rights as being contrary to Art. II(2)(c) of the BIT. This presupposes that there was an obligation that the Respondent had "entered into" with regard to the Claimant's investment in respect of the preemption rights. In this context, the Claimant refers to obligations flowing from GD 1280 and GEO 172. That legislation is mentioned by the Claimant in the context of the settlement agreement as a confirmation that a settlement agreement had been concluded (C II, para. 224). However, as the Tribunal has concluded above, no such settlement had been concluded.

222. There remains the question whether GD 1280 and GEO 172 can be regarded as creating obligations under Art. II(2)(c) of the BIT. In the judgment of the Tribunal, the legislation did not do so since it was enacted for the purpose of implementing a settlement agreement if and when such an agreement was concluded. If only for that reason, since no settlement agreement was concluded, the legislation created no obligations on the part of the Respondent on which the Claimant was entitled to rely by virtue of Article II.2(c) of the BIT or at all.

223. Accordingly this claim has to be dismissed.

H.X. Considerations Concerning Damages

224. The parties have argued extensively regarding the issue of damages and the Tribunal considers that, in order to put on record the economic relevance of the case for the parties, this should be reflected in this Award in spite of the conclusions of the Tribunal regarding liability.
1. Arguments by the Claimant

225. The Claimant proposes the following methods of calculation of losses (C-PHB I, paras. 86-100):

"i) A DCF Valuation Is Appropriate

"86. Prior to this arbitration, both SOF and Noble Ventures valued CSR using a Discounted Cash Flow ("DCF") methodology. The SOF valuation performed by Coopers & Lybrand in 1998 forecast cash flows for the relevant period that were higher than those used in the initial years of Mr. Rosen’s valuation. These cash flows implied a value for CSR of US$167 million before adjusting for historical debts. Only after these debts were factored in did the value of CSR become zero.

"87. On cross-examination, Mr. Kaczmarek of Navigant admitted that he had relied on the valuation by Coopers & Lybrand in rejecting the application of a DCF methodology. However, Mr. Kaczmarek admitted that he did not know the extent to which the budgetary debts resulted in the low valuation. The dramatic effect of these budgetary debts is illustrated by the flaws in Mr. Kaczmarek’s calculation of the net replacement value of CSR's assets. Mr. Kaczmarek estimated that this value was also less than zero by June 30, 2000. However, once Mr. Kaczmarek’s own calculations are revised to account for the rescheduling of these debts and cancellation of penalties, the net replacement value is US$17,156,000. Mr. Kaczmarek’s analysis only confirms Noble Ventures’ thesis that, without the rescheduling of CSR’s budgetary debts, the company was insolvent.

"88. A DCF valuation is simply the calculation of projected revenues less projected costs and the application of a discount rate to reflect the value of those future cash flows at a present date. When asked about the projected revenues in Mr. Rosen’s calculations, Mr. Kaczmarek declined to describe them as "speculative". Instead, he said this was a matter to be left to the respective industry experts. Yet the Atkins report offers no projections of revenues for this Tribunal to choose from and is based on a fundamental misunderstanding of the products to be produced by Noble Ventures.

"89. Mr. Trendell, by contrast, was intimately familiar with these products. Based on his own track record of obtaining 38,000 MT of orders even before quality certifications were completed and his experience as a seller of a complementary line of products, Mr. Trendell provides a highly reliable forecast of future sales volumes. The capacity of CSR to produce these volumes is confirmed by the evidence of Mr. Ciurel of IPROLAM and Mr. Perian, a former CSR director. The prices at which these volumes would be sold is a matter of public record, as steel is a traded commodity.

"90. Given CSR’s long track record of production, the forecast of its costs is simply an exercise of cost accounting. Mr. Roy Steel, a former Ernst & Young consultant with extensive steel industry experience, performed such a calculation for Noble Ventures using historical production records for CSR. The authors of the Atkins Report do not have any training in accounting, did not understand the CSR product mix and make erroneous criticisms. For example, the Atkins Rejoinder stresses later increases in worldwide scrap metal prices while ignoring evidence that CSR's scrap prices were below world prices due to export restraints and other advantages.

"91. Instead of adopting a DCF methodology, Mr. Kaczmarek proposed that the price paid for CSR’s shares reflected its true value. Mr. Kaczmarek’s theory, however, has a number of serious flaws. First, Mr. Kaczmarek’s theory is inconsistent with notions of fair market value requiring a sale that is free of compulsion. On cross-examination, Mr. Predoiu claimed that he had no choice
but to sell to Noble Ventures. CSR was sold to the only bidder just as the
deadline for its privatization was to expire.

“92. Second, in his calculation of fair market value, Mr. Kaczmarek ignored
elements of consideration other than the fixed cash price. SOF's own
documents, however, demonstrate that it considered the variable cash
consideration, the proposed investments, the environmental and social
obligations as part of the value received from the sale to Noble Ventures.
Similarly, when APAPS resold CSR in 2004, its press release described the
purchaser's commitments of 14 million Euros in investments and assumption
of debts of 10 million Euros as key benefits of the transaction, even though the
cash consideration was 1 Euro.

“93. This additional consideration in the SPA undermines Mr. Kaczmarek's
calculations of supposedly unrealistic rates of return. While the Navigant
Rejoinder described the calculation of these rates of return as a “simple”
calculation of value over price paid, Mr. Kaczmarek resisted such a simple
comparison on cross-examination.

“94. The examinations of Mr. Franges, Mr. Rosen and Mr. Kaczmarek
revealed that a number of technical criticisms of Mr. Rosen's DCF calculation
are also unfounded. Thus, Mr. Rosen properly accounted for investments that
were to be made in the first year of operations. Mr. Kaczmarek, who is not a
Chartered Public Accountant, did not understand how investments, such as the
one in the oxygen plant, were included in the calculations. He confused the
Linde joint venture contract with a loan, when in fact it was at most a
contingent liability. The Atkins Rejoinder also incorrectly assumed an
investment in the blooming mill was necessary in the first year of operations.
In any event, should the Tribunal choose to accept any of the criticisms of Mr.
Rosen's DCF calculations, these criticisms can be accounted for in the
electronic model submitted by Mr. Rosen on CD ROM. They do not require a
complete rejection of the DCF methodology.

“95. In applying a DCF valuation, Mr. Rosen properly considered the later
rise in steel prices and the continued devaluation of the Romanian Lei. As Mr.
Rosen explained in his cross-examination, he considered other post-valuation
date events identified in the Navigant Rejoinder but these only confirmed his
calculations.

“96. The use of hindsight is a legal issue and not one to be determined by the
valuation experts. The legal issue was settled in the Chorzow Factory case
which held that compensation must “wipe out the consequences” of Romania's
illegal acts. In that case, the majority referred the valuation of Germany's
damages to a team of experts and directed them to use hindsight.

ii) Alternative Methods of Compensation

“97. Although they were both prepared at a time when Noble Ventures was a
seller under duress, two potential transactions provide an alternate, albeit less
reliable basis on which the Tribunal can value CSR. First, the March 2001
Investment Presentation valued CSR's shares at approximately US$24 million.
Second, Middlesex valued CSR at US$20 million in its first offer made in a
December 20, 2000 e-mail, suggesting a value of Noble Ventures' interest of at
least US$15 million.

“98. Navigant dismissed the evidence in the Middlesex e-mail on the grounds
that a formal offer would only be made after receiving legal advice and
completion of due diligence. However, these standard conditions were mere
formalities. At the time that Middlesex sent its e-mail, Mr. Trendell had been
working at CSR for several months. Mr. Trendell was part of the Middlesex
team that participated in the financing negotiations with Noble Ventures and would therefore have completed most due diligence on their behalf. The unreasonable nature of Navigant’s position was demonstrated in Mr. Kaczmarek’s cross-examination when he claimed that an offer to purchase a house, conditional upon an inspection, would provide no information regarding the value of the house.

“99. The Tribunal should not adopt an amounts invested approach in this case as such an approach does not provide any compensation for lost profits. However, if the Tribunal were to adopt such an approach, the calculations prepared by Mr. Rosen are to be preferred. Navigant places no value on the services performed for CSR by Mr. Franges, Mr. McNutt, Mr. Adams, Mr. McLean and others. Noble Ventures’ representatives devoted time and effort throughout the period of its management of CSR and should be compensated based on the amounts set out in a Management Agreement prepared before this dispute occurred. As Noble Ventures was the owner of nearly all of CSR’s shares, this Agreement forms a reliable indication of the value of the services Noble Ventures provided.

“100. Navigant also makes other errors. For example, it credits Romania the amount of US $361,483 for interest charged on the remaining US$4 million purchase price pursuant to Article 5.2.1 of the SPA despite the fact that, under the amounts invested approach, the parties are placed in the same position as if the SPA had never been performed. In that event, Romania would not be entitled to the interest payment. In addition, Navigant incorrectly claims that the $100,000 deposit by Sametal under its option contract with Noble Ventures was a liability of CSR even though Sametal’s claim for this amount was dismissed during CSR’s judicial reorganization proceedings. Navigant also fails to include Noble Ventures’ payment of the $71,177 delay penalty charged by SOF on the grounds that the penalty was justified. Even if this were true (which it is not), this amount was still invested by Noble Ventures in order to acquire CSR”.

2. Arguments by the Respondent

226. Regarding the question of damages the Respondent contends first that the Claimant has failed to establish any right to compensation (R-PHB I, paras. 56-62):

“56. Throughout these proceedings Claimant has failed to meet its burden of proving that there is any direct causal connection between any of Romania’s alleged violations of the BIT and the claimed loss of its investment in CSR.

“57. First, Claimant has not proven that the alleged delay in restructuring CSR’s budgetary debt caused Claimant to lose its opportunity in CSR. Regardless of whether the budgetary debts were restructured, Claimant has not shown that it would have turned CSR into a profitable enterprise because, as the evidence does show, Claimant lacked experience, financial backing, and a viable business plan.

“58. Second, Claimant has not shown that the alleged misrepresentations regarding the slag pile led to the loss of its shares in CSR. Third, there is no relationship between Romania’s alleged failure to provide Claimant with full protection and security and the compensation that Claimant seeks.

“59. Fourth, even if the judicial reorganization constituted an expropriation, which it did not, Claimant’s calculation of its alleged losses does not match Claimant’s liability theory because Claimant did not value its investment as of the date of the judicial reorganization. Fifth, Claimant has not shown how the alleged breach of the Proposed Settlement led to the total loss of its interest in CSR, and has not connected these acts to its compensation claim.
Claimant’s failure to establish any causal link between these alleged BIT violations and the harm that it says it suffered logically leads to the conclusion that Claimant has not met its burden of proving that it suffered harm in the amount of the compensation it claims. All of Claimant’s compensation models, including the third and latest one submitted at the hearing, purport to calculate the value of Claimant’s total investment in CSR – that is, they quantify only the alleged loss of the entire investment. Claimant’s case thus apparently is “all or nothing.” Romania, however, has demonstrated that none of Claimant’s allegations of wrongful conduct is the proximate cause of Claimant’s losses. Viewing them together does nothing to address the lack of cause-and-effect in Claimant’s case.

As the tribunal in GAMI Investments v. Mexico observed in an award dated November 15, 2004, it is necessary that a Claimant provide a detailed “cause-and-effect” analysis between the alleged acts of the Respondent and the harm the Claimant allegedly suffered: “the prejudice must be particularized and quantified.” In GAMI, as in this case, the Claimant took an “all or nothing” approach to compensation, claiming a complete expropriation for acts that were not shown to have caused such an injury. The tribunal noted that the Claimant’s failure to quantify the harm it suffered from each of the Respondent’s alleged violations of international law made it impossible for the tribunal to calculate appropriate compensation, even if liability were proven.

Similarly, the tribunal in C-PHB I for the calculation of damages, the Respondent made the following further submission (R-PHB I, para. 63): “Additionally, Romania objects to Claimant’s new compensation model. Consistent with the Tribunal’s direction at the hearing, Romania’s objections to this most recent model are contained in the Addendum attached hereto” (see also R-PHB II, paras. 28-37).

The Addendum referred to reads as follows:

“1... The new model contains three methods of calculating compensation: a Discounted Cash Flow (“DCF”) methodology, a transaction-based methodology, and an amounts invested approach. As with Claimant’s previous models, the new model contains baseless assumptions and is otherwise plagued with methodological and technical problems that make it unreliable and unusable. The amounts invested approach, as calculated by Romania, provides the only proper, non-speculative basis for measuring compensation (assuming that liability were to be established).

“I. It is improper to use a DCF analysis in this case

“A. Claimant’s Model Ignores the Threshold Findings the Tribunal Must Make to Determine Whether a DCF Calculation Is Proper

“2. The first question in the model is whether the Tribunal believes that a DCF methodology should be used. This lone yes or no question is an improper starting point. The Tribunal instead must first determine several threshold issues, including: (1) whether CSR was a going concern; (2) whether Noble Ventures could have successfully implemented its entire business plan; and (3) whether Claimant has proven what CSR’s financial performance would have been from the privatization to the alleged expropriation had CSR’s debts been
Restructured as Claimant allegedly expected. Claimant’s CD-ROM model does not allow the Tribunal to consider any of these threshold issues. As summarized below, the answer to these questions is negative, rendering Claimant’s DCF methodology speculative and unreliable.

"1. CSR Was Not A Going Concern

"3. Under international law, an enterprise may be considered a going concern only if it has a recent history of profitability from which to project future profits with a reasonable degree of certainty. Thus, in deciding whether CSR was a going concern, the Tribunal must consider its actual performance in the years just prior to the alleged expropriation.

"4. Claimant relies on the 1998 Coopers & Lybrand Report and CSR’s 200-year existence to show CSR was a going concern. Neither basis supports Claimant. The Coopers & Lybrand report effectively concluded that CSR was bankrupt in 1998, and CSR’s financial condition only worsened thereafter.

"5. Furthermore, even if CSR had been a going concern when Claimant acquired it, CSR was not a going concern as it was to be operated by Claimant under its business plan. Claimant’s financial expert admitted at the hearing his DCF calculations were not based on CSR’s historical operating results, and that under Noble Ventures’ business plan CSR “was very different from what it was historically.” Projections not based on historical results are speculative by their very nature.

"6. Moreover, it is clear that Claimant itself was never a going concern; Claimant did not have any history of operating or reviving steel mills under plans similar to the one it prepared for CSR. As Mr. Franges testified, Claimant has never purchased or operated a steel mill, and never made a profit in any of the years it existed as a legal entity. Claimant similarly had never obtained any sources of financing for such ventures. This, again, reconfirms the speculative nature of Claimant’s plans.

“2. Noble Ventures Could Not Have Successfully Implemented Its Business Plan

"7. Claimant’s entire damages model is based upon the fundamental assumption that its business plan would succeed. To so conclude requires numerous subsidiary determinations not identified in Claimant’s DCF model.

"8. First, although Mr. Franges admitted that budgetary debt restructuring was not guaranteed, Claimant’s business plan assumed unreasonably that all of CSR’s debts would be restructured immediately. Claimant’s compensation model perpetuates this error.

"9. Second, Claimant’s business plan assumed an immediate refinancing of all of CSR’s un-restructured ROL denominated debt into USD denominated debt. Claimant’s CD-ROM model does not consider the likelihood that Claimant would not achieve this. The model also does not show how each debt would be refinanced over time, or the effect of such relief.

“10. Third, Claimant’s business plan contemplates that CSR would sell immediately new products in new markets. Claimant’s CD-ROM fails to address the likelihood that CSR would not succeed at all, let alone immediately. CSR had never competed as a worldwide exporter of modern steel products, and Claimant has produced no evidence that it could have funded its investment program even if CSR’s debts had been restructured.
“3. Claimant’s Model Does Not Explain How CSR Would Have Performed Under Claimant’s Ownership Had CSR’s Debts Been Restructured

“11. Claimant must explain specifically how CSR would have generated profits (if any) from the privatization to the date of the alleged expropriation had CSR’s budgetary debts been restructured. An analysis of this time period is critical to determine whether a DCF analysis with a valuation date of July 31, 2001 is appropriate, but the CD-ROM DCF model fails to do so. Instead, Claimant begins its DCF analysis on the date of the alleged expropriation, July 31, 2001, and simply assumes that the projections in its business plan would have come to pass. There is no evidence, however, to support the proposition on which the DCF rests: that Claimant’s CSR shares worth US $4,515,780 on June 5, 2000, were worth between US $145 million and US $186 million on July 31, 2001.

“12. Claimant’s DCF model does not address any of the seven questions posed by Navigant in its Rejoinder Report. Claimant must answer at least those seven questions in order for it to be anything other than pure conjecture. Indeed, all of the questions must be answered just to address the very first question on Claimant’s CD-Rom – “Is a Discounted Cash Flow the appropriate methodology to assess damages?” Because these questions are not even included in the tool, it is incomplete and inaccurate. In these circumstances, any use of the Claimant’s DCF model – or any other DCF model – is inherently speculative.

“B. Claimant’s Model Is Rife with Technical Errors

“13. Even if the Tribunal were to find that the DCF method was appropriate, Claimant’s model contains numerous other technical flaws that render it inaccurate and useless. At the hearing, Navigant identified a number of other criticisms that are still not addressed in Claimant’s model, including: (1) Claimant’s model improperly overvalues its management agreement by US $1,375,000; (2) Claimant’s model assumes erroneously that it would have funded all of the required capital investments itself despite Claimant’s admission that it would not provide any funding itself; (3) Claimant’s model contradicts the capital investment requirements of the SPA; (4) Claimant’s model fails to incorporate accurate information regarding the production and pricing of raw materials and steel; and (5) Claimant’s model double counts the tax benefit of capital costs.

“II. There is no basis to conduct a transaction-based analysis for determining compensation in this case

“14. Claimant’s “transaction-based” analysis purports to value CSR’s shares using documents that supposedly price those shares. This approach is fatally flawed because as both Navigant and Mr. Rosen have observed, the documents on which it is based – Claimant’s own investment presentation for CSR’s shares and an email from Middlesex Holdings – are neither “transactions,” nor an otherwise reliable measure of CSR’s share value. Claimant’s “transaction-based” method of valuing CSR’s shares must be rejected.

“III. The Amounts Invested Method as calculated by Romania is the only proper measure of compensation

“15. For the reasons previously stated, Romania considers the “amounts invested” approach as calculated by Navigant to be the only proper, non-speculative measure of compensation in this case should liability and causation be established. On a net basis, this approach yields a maximum potential award of US $143,970 as of July 31, 2001, plus simple interest at the 3-month U.S. Treasury Bill rate.”
3. **The Tribunal**

229. In view of the Tribunal’s determination with regard to liability, the question of damages and the numerous issues that would need to be addressed in connection with their quantification do not arise.

**H.XI. Considerations Regarding Costs**

230. Sections 5 and 6 of Procedural Order No.3 invited the Parties to submit their respective cost claims by January 14, 2005 and comments on the other Party’s cost claim by January 28, 2005.

1. **The Claimant**

231. By these submissions, taking into account a correction in its second submission, the Claimant requested that it be awarded a total of US$3,145,210.27.

2. **The Respondent**

232. The Respondent, by its submissions, requested that it be awarded a total of US$8,930,868.05.

3. **The Tribunal**

233. Provisions regarding the Tribunal’s decision in the matter of costs are to be found in Art. 61(2) of the ICSID Convention and Arts. 28 and 47 (j) of the ICSID Arbitration Rules. Noting that none of these provisions mentions specific criteria for the decision on costs, the Tribunal takes into account the following particular considerations:

234. On one hand, it is a principle common to both national laws and international law that a party injured by a breach must be compensated for its losses and damages, which include arbitration costs. On the other hand, the “loser pays” principle is not common to all national laws or international law, and in particular is stated in neither the ICSID Convention nor the ICSID Arbitration Rules.

235. On the issue of costs the Tribunal has taken into consideration all the circumstances of this case. In particular, it notes that, although all the claims ultimately failed, the Claimant succeeded on certain issues, notably the fundamental legal issue of the umbrella clause contained in Article II(2)(c) of the BIT as a basis for liability under the BIT in this case and the factual issue with regard to the diligence exercised by SOF after the execution of the SPA, albeit without causal significance. The Tribunal also has in mind that the basic flaws in the SPA are to be attributed to both SOF and the Claimant.

236. Therefore, using the discretion that it has under the ICSID Convention and the ICSID Arbitration Rules, the Arbitral Tribunal deems it fair and reasonable that the cost burden be shared equally between the parties, each bearing its own legal and other expenses and 50% of the arbitration costs.
I. Decisions

For the foregoing reasons, the Tribunal renders the following award:

1. The claims raised by the Claimant are dismissed.
2. Each party shall bear the expenses incurred by it in connection with the present arbitration. The arbitration costs, including the fees of the members of the Tribunal, shall be borne by the parties in equal shares.

[signed] [signed]
Sir Jeremy Lever Prof. Pierre-Marie Dupuy
Arbitrator Arbitrator
[date: October 3, 2005] [date: September 21, 2005]

[signed]
Prof. Karl-Heinz Böckstiegel
President of the Tribunal
[date: October 5, 2005]
Report of the International Law Commission

Fifty-eighth session
(1 May-9 June and 3 July-11 August 2006)

General Assembly
Official Records
Sixty-first session
Supplement No. 10 (A/61/10)

Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word Yearbook followed by suspension points and the year (e.g. Yearbook ... 1971) indicates a reference to the Yearbook of the International Law Commission.

A typeset version of the report of the Commission will be included in Part Two of volume II of the Yearbook of the International Law Commission 2006.
2. Text of the draft articles with commentaries thereto

50. The text of the draft articles with commentaries thereto adopted by the Commission at its fifty-eighth session are reproduced below.

**DIPLOMATIC PROTECTION**

(1) The drafting of articles on diplomatic protection was originally seen as belonging to the study on State Responsibility. Indeed the first Rapporteur on State Responsibility, Mr. F.V. Garcia Amador, included a number of draft articles on this subject in his reports presented from 1956 to 1961. The subsequent codification of State Responsibility paid little attention to diplomatic protection and the final draft articles on this subject expressly state that the two topics central to diplomatic protection - nationality of claims and the exhaustion of local remedies - would be dealt with more extensively by the Commission in a separate undertaking.

Nevertheless, there is a close connection between the articles on Responsibility of States for internationally wrongful acts and the present draft articles. Many of the principles contained in the articles on Responsibility of States for internationally wrongful acts are relevant to diplomatic protection and are therefore not repeated in the present draft articles. This applies in particular to the provisions dealing with the legal consequences of an internationally wrongful act. A State responsible for injuring a foreign national is obliged to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act. This reparation may take the form of restitution, compensation or satisfaction, either singly or in combination. All these matters are dealt with in the articles on Responsibility of States for internationally wrongful acts.

(2) Diplomatic protection belongs to the subject of “Treatment of Aliens”. No attempt is made, however, to deal with the primary rules on this subject - that is, the rules governing the treatment of the person and property of aliens, breach of which gives rise to responsibility to the State of nationality of the injured person. Instead the present draft articles are confined to secondary rules only - that is, the rules that relate to the conditions that must be met for the bringing of a claim for diplomatic protection. By and large this means rules governing the admissibility of claims. Article 44 of the articles on Responsibility of States for internationally wrongful acts provides:

“The responsibility of a State may not be invoked if:

(a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.”

The present draft articles give content to this provision by elaborating on the rules relating to the nationality of claims and the exhaustion of local remedies.

(3) The present draft articles do not deal with the protection of an agent by an international organization, generally described as “functional protection”. Although there are similarities between functional protection and diplomatic protection, there are also important differences. Diplomatic protection is traditionally a mechanism designed to secure reparation for injury to the national of a State premised largely on the principle that an injury to a national is an injury to the State itself. Functional protection, on the other hand, is an institution for promoting the efficient functioning of an international organization by ensuring respect for its agents and their independence. Differences of this kind have led the Commission to conclude that protection of an agent by an international organization does not belong in a set of draft articles on diplomatic protection. The question whether a State may exercise diplomatic protection in respect of a national who is an agent of an international organization was answered by the International Court of Justice in the *Reparation for Injuries* case: “In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the
Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense. …"19

PART ONE
GENERAL PROVISIONS

Article 1

Definition and scope

For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

Commentary

(1) Draft article 1 makes no attempt to provide a complete and comprehensive definition of diplomatic protection. Instead it describes the salient features of diplomatic protection in the sense in which the term is used in the present draft articles.

(2) Under international law, a State is responsible for injury to an alien caused by its wrongful act or omission. Diplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. The present draft articles are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised. They do not seek to define or describe the internationally wrongful acts that give rise to the responsibility of the State for injury to an alien. The draft articles, like those on the Responsibility of States for internationally wrongful acts,20 maintain the distinction between primary and secondary rules and deal only with the latter.

(3) Diplomatic protection has traditionally been seen as an exclusive State right in the sense that a State exercises diplomatic protection in its own right because an injury to a national is deemed to be an exercise to the State itself. This approach has its roots, first in a statement by the Swiss jurist Emmerich de Vattel in 1758 that “whoever ill-treats a citizen indirectly injuries the State, which must protect that citizen”21 and, secondly in a dictum of the Permanent Court of International Justice in 1924 in the Mavrommatis Palestine Concessions case that “by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law.”22 Obviously it is a fiction - and an exaggeration23 - to say that an injury to a national is an injury to the State itself. Many of the rules of diplomatic protection contradict the correctness of this fiction, notably the rule of continuous nationality which requires a State to prove that the injured national remained its national after the injury itself and up to the date of the presentation of the claim. A State does not “in reality” - to quote Mavrommatis - assert its own right only. “In reality” it also asserts the right of its injured national.

(4) In the early years of international law the individual had no place, no rights in the international legal order. Consequently if a national injured abroad was to be protected this could be done only by means of a fiction - that an injury to the national was an injury to the State itself. This fiction was, however, no more than a means to an end, the end being the protection of the rights of an injured national. Today the situation has changed dramatically. The individual is the subject of many primary rules of international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign


22 Mavrommatis Palestine Concessions (Greece v. U.K) P.C.I.J. Reports, 1924, Series A, No. 2, p. 12. This dictum was repeated by the Permanent Court of International Justice in the Panayiotis Sakkas Railway case (Estonia v. Lithuania) P.C.I.J. Reports, 1939, Series A/B, No. 76, p. 16.

Governments. This has been recognized by the International Court of Justice in the *La Grand* and *Avena* cases. This protection is not limited to personal rights. Bilateral investment treaties confer rights and protection on both legal and natural persons in respect of their property rights. The individual has rights under international law but remedies are few. Diplomatic protection conducted by a State at inter-State level remains an important remedy for the protection of persons whose human rights have been violated abroad.

(5) Draft article 1 is formulated in such a way as to leave open the question whether the State exercising diplomatic protection does so in its own right or that of its national - or both. It views diplomatic protection through the prism of State responsibility and emphasizes that it is a procedure for securing the responsibility of the State for injury to the national flowing from an internationally wrongful act.

(6) Draft article 1 deliberately follows the language of the articles on Responsibility of States for internationally wrongful acts. It describes diplomatic protection as the invocation of the responsibility of a State that has committed an internationally wrongful act in respect of a national of another State, by the State of which that person is a national, with a view to implementing responsibility. As a claim brought within the context of State responsibility it is an inter-State claim, although it may result in the assertion of rights enjoyed by the injured national under international law.

(7) As draft article 1 is definitional by nature it does not cover exceptions. Thus no mention is made of stateless persons and refugees referred to in draft article 8 in this provision. Draft article 3 does, however, make it clear that diplomatic protection may be exercised in respect of such persons.

(8) Diplomatic protection must be exercised by lawful and peaceful means. Several judicial decisions draw a distinction between “diplomatic action” and “judicial proceedings” when describing the action that may be taken by a State when it resorts to diplomatic protection. Draft article 1 retains this distinction but goes further by subsuming judicial proceedings under “other means of peaceful settlement”. “Diplomatic action” covers all the lawful procedures employed by a State to inform another State of its views and concerns, including protest, request for an inquiry or for negotiations aimed at the settlement of disputes. “Other means of peaceful settlement” embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement. The use of force, prohibited by Article 2, paragraph 4, of the Charter of the United Nations, is not a permissible method for the enforcement of the right of diplomatic protection. Diplomatic protection does not include demarches or other diplomatic action that do not involve the invocation of the legal responsibility of another State, such as informal requests for corrective action.

(9) Diplomatic protection may be exercised through diplomatic action or other means of peaceful settlement. It differs from consular assistance in that it is conducted by the representatives of the State acting in the interest of the State in terms of a rule of general international law, whereas consular assistance is, in most instances, carried out by consular officers, who represent the interests of the individual, acting in terms of the Vienna Convention on Consular Relations. Diplomatic protection is essentially remedial and is designed to remedy an internationally wrongful act that has been committed; while consular assistance is largely preventive and mainly aims at preventing the national from being subjected to an internationally wrongful act.

(10) Although it is in theory possible to distinguish between diplomatic protection and consular assistance, in practice this task is difficult. This is illustrated by the requirement of the exhaustion of local remedies. Clearly there is no need to exhaust local remedies in the case of consular assistance as this assistance takes place before the commission of an internationally wrongful act. Logically, as diplomatic protection arises only after the commission of an internationally wrongful act, it would seem that local remedies must always be exhausted, subject to the exceptions described in draft article 15.

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26 See Chapter 1 of Part Three titled “Invocation of the Responsibility of a State” (articles 42-48). Part Three itself is titled “The implementation of the International Responsibility of a State”.

(11) In these circumstances draft article 1 makes no attempt to distinguish between diplomatic protection and consular assistance. The draft articles prescribe conditions for the exercise of diplomatic protection which are not applicable to consular assistance. This means that the circumstances of each case must be considered in order to decide whether it involves diplomatic protection or consular assistance.

(12) Draft article 1 makes clear the point, already raised in the general commentary,28 that the present draft articles deal only with the exercise of diplomatic protection by a State and not with the protection afforded to its agent by an international organization.29

(13) Diplomatic protection mainly covers the protection of nationals not engaged in official international business on behalf of the State. These officials are protected by other rules of international law and instruments such as the Vienna Convention on Diplomatic Relations of 196130 and the Vienna Convention on Consular Relations of 1963.31 Where, however, diplomats or consuls are injured in respect of activities outside their functions they are covered by the rules relating to diplomatic protection, as, for instance, in the case of the expropriation without compensation of property privately owned by a diplomatic official in the country to which he or she is accredited.

(14) In most circumstances it is the link of nationality between the State and the injured person that gives rise to the exercise of diplomatic protection, a matter that is dealt with in draft articles 4 and 9. The term “national” in this article covers both natural and legal persons. Later in the draft articles a distinction is drawn between the rules governing natural and legal persons, and, where necessary, the two concepts are treated separately.

Article 2
Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

28 See general commentary, para. (3).

Commentary

(1) Draft article 2 is founded on the notion that diplomatic protection involves an invocation - at the State level - by a State of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a national of the former State. It recognizes that it is the State that initiates and exercises diplomatic protection; that it is the entity in which the right to bring a claim vests. It is without prejudice to the question of whose rights the State seeks to assert in the process, that is its own right or the rights of the injured national on whose behalf it acts. Like article 132 it is neutral on this subject.

(2) A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national, but international law imposes no such obligation. The position was clearly stated by the International Court of Justice in the Barcelona Traction case:

“… within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress … The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case”.33

(3) Today there is support in domestic legislation34 and judicial decisions35 for the view that there is some obligation, however limited, either under national law or international law, on the

32 See commentary to article 1, paras. (3) to (5).
33 Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970, p. 4 at p. 44.
State to protect its nationals abroad when they have been subjected to serious violation of their human rights. Consequently, draft article 19 declares that a State entitled to exercise diplomatic protection “should … give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred” (emphasis added). The discretionary right of a State to exercise diplomatic protection should therefore be read with draft article 19 which recommends to States that they should exercise that right in appropriate cases.

Draft article 2 deals with the right of the State to exercise diplomatic protection. It makes no attempt to describe the corresponding obligation on the respondent State to consider the assertion of diplomatic protection by a State in accordance with the present articles. This is, however, to be implied.

PART TWO
NATIONALITY

CHAPTER I
GENERAL PRINCIPLES

Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.
2. Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8.

Commentary

(1) Whereas draft article 2 affirms the discretionary right of the State to exercise diplomatic protection, draft article 3 asserts the principle that it is the State of nationality of the injured person that is entitled, but not obliged, to exercise diplomatic protection on behalf of such a person. The emphasis in this draft article is on the bond of nationality between State and national which entitles the State to exercise diplomatic protection. This bond differs in the cases of natural persons and legal persons. Consequently separate chapters are devoted to these different types of persons.

(2) Paragraph 2 refers to the exception contained in draft article 8 which provides for diplomatic protection in the case of stateless persons and refugees.

CHAPTER II
NATURAL PERSONS

Article 4

State of nationality of a natural person

For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States, or in any other manner, not inconsistent with international law.

Commentary

(1) Draft article 4 defines the State of nationality for the purposes of diplomatic protection of natural persons. This definition is premised on two principles: first, that it is for the State of nationality to determine, in accordance with its municipal law, who is to qualify for its nationality; secondly, that there are limits imposed by international law on the grant of nationality. Draft article 4 also provides a non-exhaustive list of connecting factors that usually constitute good grounds for the grant of nationality.

(2) The principle that it is for each State to decide in accordance with its law who are its nationals is backed by both judicial decisions and treaties. In 1923, the Permanent Court of International Justice stated in the Nationality Decrees in Tunis and Morocco case that:

“in the present state of international law, questions of nationality are … in principle within the reserved domain”. 36

This principle was confirmed by article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws:

“It is for each State to determine under its own law who are its nationals.”

More recently it has been endorsed by the 1997 European Convention on Nationality.

(3) The connecting factors for the conferment of nationality listed in draft article 4 are illustrative and not exhaustive. Nevertheless they include the connecting factors most commonly employed by States for the grant of nationality: birth (jus soli), descent (jus sanguinis) and naturalization. Marriage to a national is not included in this list as in most circumstances marriage per se is insufficient for the grant of nationality: it requires in addition a period of residence, following which nationality is conferred by naturalization. Where marriage to a national automatically results in the acquisition by a spouse of the nationality of the other spouse problems may arise in respect of the consistency of such an acquisition of nationality with international law. Nationality may also be acquired as a result of the succession of States.

(4) The connecting factors listed in draft article 4 are those most frequently used by States to establish nationality. In some countries, where there are no clear birth records, it may be difficult to prove nationality. In such cases residence could provide proof of nationality although it may not constitute a basis for nationality itself. A State may, however, confer nationality on such persons by means of naturalization.

(5) Draft article 4 does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the Nottebohm case, as an additional factor for the exercise of diplomatic protection, even where the national possesses only one nationality. Despite divergent views as to the interpretation of the case, the Commission took the view that there were certain factors that served to limit Nottebohm to the facts of the case in question, particularly the fact that the ties between Mr. Nottebohm and Liechtenstein (the Applicant State) were “extremely tenuous” compared with the close ties between Mr. Nottebohm and Guatemala (the Respondent State) for a period of over 34 years, which led the International Court of Justice to repeatedly assert that Liechtenstein was “not entitled to extend its protection to Nottebohm vis-à-vis Guatemala”. This suggests that the Court did not intend to expound a general rule applicable to all States but only a relative rule according to which a State in Liechtenstein’s position was required to show a genuine link between itself and Mr. Nottebohm in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties. Moreover, it is necessary to be mindful of the fact that if the genuine link requirement proposed by Nottebohm was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today’s world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.

(6) The final phrase in draft article 4 stresses that the acquisition of nationality must not be inconsistent with international law. Although a State has the right to decide who are its nationals, this right is not absolute. Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws confirmed this by qualifying the provision that “it is for each State to determine under its own law who are its nationals” with the proviso “[t]his law shall be recognized by other States insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality”. Today, conventions, particularly in the field of human rights,

40 See Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, Yearbook..., 1999, vol. II (Part Two), para. 47.
41 In the Nottebohm case the International Court of Justice stated: “According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual’s connection which has made him its national”, op. cit., at p. 23.
require States to comply with international standards in the granting of nationality.\textsuperscript{46} For example, article 9, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women provides that:

“States parties shall grant women equal rights to men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.”\textsuperscript{47}

Draft article 4 recognizes that a State against which a claim is made on behalf of an injured foreign national may challenge the nationality of such a person where his or her nationality has been acquired contrary to international law. Draft article 4 requires that nationality should be acquired in a manner “not inconsistent with international law”. The double negative emphasizes the fact that the burden of proving that nationality has been acquired in violation of international law is upon the State challenging the nationality of the injured person. That the burden of proof falls upon the State challenging nationality follows from the recognition that the State conferring nationality must be given a “margin of appreciation” in deciding upon the conferment of nationality\textsuperscript{48} and that there is a presumption in favour of the validity of a State’s conferment of nationality.\textsuperscript{49}

Where a person acquires nationality involuntarily in a manner inconsistent with international law, as where a woman automatically acquires the nationality of her husband on marriage, that person should in principle be allowed to be protected diplomatically by her or his former State of nationality.\textsuperscript{50} If, however, the acquisition of nationality in such circumstances results in the loss of the individual’s former nationality, equitable considerations require that the new State of nationality be entitled to exercise diplomatic protection. This would accord with the ruling of the International Court of Justice in its 1971 Opinion on Namibia\textsuperscript{51} that individual rights should not be affected by an illegal act on the part of the State with which the individual is associated.

\textbf{Article 5}

\textbf{Continuous nationality of a natural person}

1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality.

4. A State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim.

\textsuperscript{46} This was stressed by the Inter-American Court of Human Rights in its advisory opinion on Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, Advisory Opinion OC-484 of 19 January 1984, Series A, No. 4, in which it held that it was necessary to reconcile the principle that the conferment of nationality falls within the domestic jurisdiction of a State “with the further principle that international law imposes certain limits on the State’s power, which limits are linked to the demands imposed by the international system for the protection of human rights”, at para. 35. See also ILR vol. 79, p. 296.


\textsuperscript{48} See the advisory opinion of the Inter-American Court of Human Rights in the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, paras. 62-63.


\textsuperscript{50} See article 2 of the Convention on the Nationality of Married Women.

Commentary

(1) Although the continuous nationality rule is well established, it has been subjected to considerable criticism on the ground that it may produce great hardship in cases in which an individual changes his or her nationality for reasons unrelated to the bringing of a diplomatic claim. Suggestions that it be abandoned have been resisted out of fear that this might be abused and lead to “nationality shopping” for the purpose of diplomatic protection. For this reason draft article 5 retains the continuous nationality rule but allows exceptions to accommodate cases in which unfairness might otherwise result.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a person who was its national both at the time of the injury and at the date of the official presentation of the claim. State practice and doctrine are unclear on whether the national must retain the nationality of the claimant State between these two dates, largely because in practice this issue seldom arises. For these reasons the Institute of International Law in 1965 left open the question whether continuity of nationality was required between the two dates. It is, however, incongruous to require that the same nationality be shown both at the time of injury and at the date of the official presentation of the claim without requiring it to continue between these two dates. Thus, in an exercise in progressive development of the law, the rule has been drafted to require that the injured person be a national continuously from the date of the injury to the date of the official presentation of the claim. Given the difficulty of providing evidence of continuity, it is presumed if the same nationality existed at both these dates. This presumption is of course rebuttable.

53 See the comment of Judge Sir Gerald Fitzmaurice in the Barcelona Tractio case, at pp. 101-102; see, too, E. Wyley, La Règle Dite de la Continuité de la Nationalité dans le Contentieux International (Paris: PUF, 1999).
54 See the statement of Umpire Parker in Administrative Decision No. V (United States v. Germany), UNRIAA vol. VII, p. 119 at p. 141 (1925): “Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal for their claims.”

(3) The first requirement is that the injured national be a national of the claimant State at the date of the injury. The date of the injury need not be a precise date but could extend over a period of time if the injury consists of several acts or a continuing act committed over a period of time.

(4) The second temporal requirement contained in paragraph 1 is the date of the official presentation of the claim. There is some disagreement in judicial opinion over the date until which the continuous nationality of the claim is required. This uncertainty stems largely from the fact that conventions establishing mixed claims commissions have employed different language to identify the date of the claim. The phrase “presentation of the claim” is that most frequently used in treaties, judicial decisions and doctrine to indicate the outer date or dies ad quem required for the exercise of diplomatic protection. The word “official” has been added to this formulation to indicate that the date of the presentation of the claim is that on which the first official or formal demand is made by the State exercising diplomatic protection in contrast to informal diplomatic contacts and enquiries on this subject.

(5) The dies ad quem for the exercise of diplomatic protection is the date of the official presentation of the claim. There is, however, support for the view that if the individual should change his nationality between this date and the making of an award or a judgment he ceases to be a national for the purposes of diplomatic protection. In 2003 in Loewen Group Inc. v. USA an ICSID arbitral tribunal held that “there must be continuous material identity from the date of the events giving rise to the claim, which date is known as the dies a quo, through to the date of the resolution of the claim, which date is known as the dies ad quem”. On the facts, the Loewen case dealt with the situation in which the person sought to be protected changed nationality after the presentation of the claim to that of the respondent State, in which circumstances a claim for diplomatic protection can clearly not be upheld, as is made clear in draft article 5, paragraph (4). However, the Commission was not prepared to follow the Loewen tribunal in adopting a blanket
rule that nationality must be maintained to the date of resolution of the claim.\footnote{For criticism of the Loewen case, see J. Paulsson, *Denial of Justice in International Law* (New York: Cambridge University Press, 2005), pp. 183-4.} Such a rule could be contrary to the interests of the individual, as many years may pass between the presentation of the claim and its final resolution and it could be unfair to penalize the individual for changing nationality, through marriage or naturalization, during this period. Instead, preference is given to the date of the official presentation of the claim as the *dies ad quem*. This date is significant as it is the date on which the State of nationality shows its clear intention to exercise diplomatic protection - a fact that was hitherto uncertain. Moreover, it is the date on which the admissibility of the claim must be judged. This determination could not be left to the later date of the resolution of the claim, the making of the award.

(6) The word “claim” in paragraphs 1, 2 and 4 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form reparation should take. This matter is dealt with more fully in article 43 of the articles on the Responsibility of States for Internationally Wrongful Acts of 2001 and the commentary thereto.

(7) While the Commission decided that it was necessary to retain the continuous nationality rule it agreed that there was a need for exceptions to this rule. Paragraph 2 accordingly provides that a State may exercise diplomatic protection in respect of a person who was a national at the date of the official presentation of the claim but not at the time of the injury provided that three conditions are met: first, the person seeking diplomatic protection had the nationality of a predecessor State or has lost his or her previous nationality; secondly, that person has acquired the nationality of another State for a reason unrelated to the bringing of the claim; and thirdly, the acquisition of the new nationality has taken place in a manner not inconsistent with international law.

(8) Paragraph 2 is concerned with cases in which the injured person has lost his or her previous nationality, either voluntarily or involuntarily. In the case of the succession of States, and, possibly, adoption and marriage when a change of nationality is compulsory, nationality will be lost involuntarily. In the case of other changes of nationality the element of will is not so clear. For reasons of this kind, paragraph 2 does not require the loss of nationality to be involuntary.

(9) In the case of the succession of States this paragraph is limited to the question of the continuity of nationality for purposes of diplomatic protection. It makes no attempt to regulate succession to nationality, a subject that is covered by the Commission’s articles on Nationality of Natural Persons in relation to the Succession of States.

(10) As stated above,\footnote{See para. (1) of commentary to the present draft article.} fear that a person may deliberately change his or her nationality in order to acquire a State of nationality more willing and able to bring a diplomatic claim on his or her behalf is the basis for the rule of continuous nationality. The second condition contained in paragraph 2 addresses this fear by providing that the person in respect of whom diplomatic protection is exercised must have acquired his or her new nationality for a reason unrelated to the bringing of the claim. This condition is designed to limit exceptions to the continuous nationality rule mainly to cases involving compulsory imposition of nationality, such as those in which the person has acquired a new nationality as a necessary consequence of factors such as marriage, adoption or the succession of States. The exception in paragraph 2 will not apply where the person has acquired a new nationality for commercial reasons connected with the bringing of the claim.

(11) The third condition that must be met for the rule of continuous nationality not to apply is that the new nationality has been acquired in a manner not inconsistent with international law. This condition must be read in conjunction with draft article 4.

(12) Paragraph 3 adds another safeguard against abuse of the lifting of the continuous nationality rule. Diplomatic protection may not be exercised by the new State of nationality against a former State of nationality of the injured person in respect of an injury incurred when that person was a national of the former State of nationality and not the present State of nationality.
(13) Paragraph 4 provides that if a person in respect of whom a claim is brought becomes a national of the respondent State after the presentation of the claim, the applicant State loses its right to proceed with the claim as in such a case the respondent State would in effect be required to pay compensation to its own national. This was the situation in Loven Group Inc v. USA and a number of other cases\(^{62}\) in which a change in nationality after presentation of the claim was held to preclude its continuation. In practice, in most cases of this kind, the applicant State will withdraw its claim, despite the fact that in terms of the fiction proclaimed in \textit{Maximatis} the claim is that of the State and the purpose of the claim is to seek reparation for injury caused to itself through the person of its national.\(^{63}\) The applicant State may likewise decide to withdraw its claim when the injured person becomes a national of a third State after the presentation of the claim. If the injured person has in bad faith retained the nationality of the claimant State until the date of presentation and thereafter acquired the nationality of a third State, equity would require that the claim be terminated, but the burden of proof will be upon the respondent State.

(14) Draft article 5 leaves open the question whether the heirs of an injured national, who dies as a consequence of the injury or thereafter, but before the official presentation of the claim, may be protected by the State of nationality of the injured person if he or she has the nationality of another State. Judicial decisions on this subject, while inconclusive as most deal with the interpretation of particular treaties, tend to support the position that no claim may be brought by the State of nationality of the deceased person if the heir has the nationality of a third State.\(^{64}\) Where the heir has the nationality of the respondent State it is clear that no such claim may be brought.\(^{65}\) There is some support for the view that where the injured national dies before the official presentation of the claim, the claim may be continued because it has assumed a national character.\(^{66}\) Although considerations of equity might seem to endorse such a position, it has on occasion been repudiated.\(^{67}\) The inconclusiveness of the authorities make it unwise to propose a rule on this subject.

\textbf{Article 6}

\textbf{Multiple nationality and claim against a third State}

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

\textbf{Commentary}

(1) Dual or multiple nationality is a fact of international life. An individual may acquire more than one nationality as a result of the parallel operation of the principles of \textit{jus soli} and \textit{jus sanguinis} or of the conferment of nationality by naturalization or any other manner as envisaged in draft article 4, which does not result in the renunciation of a prior nationality. Although the laws of some States do not permit their nationals to be nationals of other States, international law does not prohibit dual or multiple nationality: indeed such nationality was given approval by article 3 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, which provides:

\textit{“… a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses.”}

It is therefore necessary to address the question of the exercise of diplomatic protection by a State of nationality in respect of a dual or multiple national. Draft article 6 is limited to the exercise of diplomatic protection by one or all of the States of which the injured person is a


\(^{63}\) See commentary to art. 1, para. (3).

\(^{64}\) Exchauzier claim, UNR IIIA vol. IV, p. 207; Kren claim; Gledell claim (\textit{Great Britain v. Mexico}) UNR IIIA vol. V, p. 44; Sed contra, Straub claim, ILR vol. 20, p. 228.


\(^{67}\) Eschauzier claim (\textit{Great Britain v. Mexico}), at p. 209.
national against a State of which that person is not a national. The exercise of diplomatic protection by one State of nationality against another State of nationality is covered in draft article 7.

(2) Paragraph 1 allows a State of nationality to exercise diplomatic protection in respect of its national even where that person is a national of one or more other States. Like draft article 4, it does not require a genuine or effective link between the national and the State exercising diplomatic protection.

(3) Although there is support for the requirement of a genuine or effective link between the State of nationality and a dual or multiple national in the case of the exercise of diplomatic protection against a State of which the injured person is not a national, in both arbitral decisions and codification endeavours, the weight of authority does not require such a condition. In the Salem case an arbitral tribunal held that Egypt could not raise the fact that the injured individual had effective Persian nationality against a claim from the United States, another State of nationality. It stated that:

"the rule of International Law [is] that in a case of dual nationality a third Power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring to the nationality of the other power." 

This rule has been followed in other cases and has more recently been upheld by the Iran-United States Claim Tribunal. The decision not to require a genuine or effective link in such circumstances accords with reason. Unlike the situation in which one State of nationality claims from another State of nationality in respect of a dual national, there is no conflict over nationality where one State of nationality seeks to protect a dual national against a third State.

(4) In principle, there is no reason why two States of nationality may not jointly exercise a right that attaches to each State of nationality. Paragraph 2 therefore recognizes that two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national against a State of which that person is not a national. While the responsible State cannot object to such a claim made by two or more States acting simultaneously and in concert, it may raise objections where the claimant States bring separate claims either before the same forum or different forums or where one State of nationality brings a claim after another State of nationality has already received satisfaction in respect to that claim. Problems may also arise where one State of nationality waives the right to diplomatic protection while another State of nationality continues with its claim. It is difficult to codify rules governing varied situations of this kind. They should be dealt with in accordance with the general principles of law recognized by international and national tribunals governing the satisfaction of joint claims.

Article 7

Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

Commentary

(1) Draft article 7 deals with the exercise of diplomatic protection by one State of nationality against another State of nationality. Whereas draft article 6, dealing with a claim in respect of a dual or multiple national against a State of which the injured person is not a national, does not require an effective link between claimant State and national, draft article 7 requires the claimant State to show that its nationality is predominant, both at the time of the injury and at the date of the official presentation of the claim.
(2) In the past there was strong support for the rule of non-responsibility according to which one State of nationality might not bring a claim in respect of a dual national against another State of nationality. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws declares in article 4 that:

“A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.”

Later codification proposals adopted a similar approach and there was also support for this position in arbitral awards. In 1949 in its advisory opinion in the case concerning Reparation for Injuries, the International Court of Justice described the practice of States not to protect their nationals against another State of nationality as “the ordinary practice”.

(3) Even before 1930 there was, however, support in arbitral decisions for another position, namely that the State of dominant or effective nationality might bring proceedings in respect of a national against another State of nationality. This jurisprudence was relied on by the International Court of Justice in another context in the Notebohm case and was given explicit approval by Italian-United States Conciliation Commission in the Mergé claim in 1955. Here the Conciliation Commission stated that:

“The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty.”

In its opinion, the Conciliation Commission held that the principle of effective nationality and the concept of dominant nationality were simply two sides of the same coin. The rule thus adopted was applied by the Conciliation Commission in over 50 subsequent cases concerning dual nationals. Relying on these cases, the Iran-United States Claims Tribunal has applied the principle of dominant and effective nationality in a number of cases. Codification proposals have given approval to this approach. In his Third Report on State Responsibility to the Commission, Garcia Amador proposed that:

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73 See, too, art. 16 (a) of the 1929 Harvard Draft Convention of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, AJIL, vol. 23, Special Supplement (1929), pp. 133-139.


76 I.C.J. Reports 1949, p. 186.

“In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal or other ties.”

A similar view was advanced by Orrego Vicuña in his report to the International Law Association in 2000.3

(4) Even though the two concepts are different the authorities use the term “effective” or “dominant” without distinction to describe the required link between the claimant State and its national in situations in which one State of nationality brings a claim against another State of nationality. Draft article 7 does not use either of these words to describe the required link but instead uses the term “predominant” as it conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another. A tribunal considering this question is required to balance the strengths of competing nationalities and the essence of this exercise is more accurately captured by the term “predominant” when applied to nationality than either “effective” or “dominant”. It is moreover the term used by the Italian—United States Conciliation Commission in the Mergé claim which may be seen as the starting point for the development of the present customary rule.4

(5) No attempt is made to describe the factors to be taken into account in deciding which nationality is predominant. The authorities indicate that such factors include habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e., the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military service. None of these factors is decisive and the weight attributed to each factor will vary according to the circumstances of each case.

(6) Draft article 7 is framed in negative language: “A State of nationality may not exercise diplomatic protection … unless” its nationality is predominant. This is intended to show that the circumstances envisaged by draft article 7 are to be regarded as exceptional. This also makes it clear that the burden of proof is on the claimant State to prove that its nationality is predominant.

(7) The main objection to a claim brought by one State of nationality against another State of nationality is that this might permit a State, with which the individual has established a predominant nationality subsequent to an injury inflicted by the other State of nationality, to bring a claim against that State. This objection is overcome by the requirement that the nationality of the claimant State must be predominant both at the date of the injury and at the date of the official presentation of the claim. Although this requirement echoes the principle affirmed in draft article 5, paragraph 1, on the subject of continuous nationality, it is not necessary in this case to prove continuity of predominant nationality between these two dates. The phrases “at the date of injury” and “at the date of the official presentation of the claim” are explained in the commentary on draft article 5. The exception to the continuous nationality rule contained in draft article 5, paragraph 2, is not applicable here as the injured person contemplated in draft article 7 will not have lost his or her other nationality.

Article 8

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

82 Document ACN.4/111, in Yearbook ... 1958, vol. II, p. 61, draft art. 21, para. 4.
Commentary

(1) The general rule was that a State might exercise diplomatic protection on behalf of its nationals only. In 1931 the United States-Mexican Claims Commission in Dickson Car Wheel Company v. United Mexican States held that a stateless person could not be the beneficiary of diplomatic protection when it stated:

“A State ... does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury.”

This dictum no longer reflects the accurate position of international law for both stateless persons and refugees. Contemporary international law reflects a concern for the status of both categories of persons. This is evidenced by such conventions as the Convention on the Reduction of Statelessness of 1961 and the Convention Relating to the Status of Refugees of 1951.

Draft article 8, an exercise in progressive development of the law, depart from the traditional rule that only nationals may benefit from the exercise of diplomatic protection and allows a State to exercise diplomatic protection in respect of a non-national where that person is either a stateless person or a refugee. Although draft article 8 is to be seen within the framework of the rules governing statelessness and refugees, it has made no attempt to pronounce on the status of such persons. It is concerned only with the issue of the exercise of the diplomatic protection of such persons.

(3) Paragraph 1 deals with the diplomatic protection of stateless persons. It gives no definition of stateless persons. Such a definition is, however, to be found in the Convention Relating to the Status of Stateless Persons of 1954 which defines a stateless person “as a person who is not considered as a national by any State under the operation of its law.” This definition can no doubt be considered as having acquired a customary nature. A State may exercise diplomatic protection in respect of such a person, regardless of how he or she became stateless, provided that he or she was lawfully and habitually resident in that State both at the time of injury and at the date of the official presentation of the claim. Habitual residence in this context is intended to convey continuous residence.

(4) The requirement of both lawful residence and habitual residence sets a high threshold. Although this threshold is high and leads to a lack of effective protection for some individuals, the combination of lawful residence and habitual residence is justified in the case of an exceptional measure introduced de lege ferenda.

(5) The temporal requirements for the bringing of a claim are contained in paragraph 1. The stateless person must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

(6) Paragraph 2 deals with the diplomatic protection of refugees by their State of residence. Diplomatic protection by the State of residence is particularly important in the case of refugees as they are “unable or unwilling to avail [themselves] of the protection of [the State of Nationality]” and, if they do so, run the risk of losing refugee status in the State of residence. Paragraph 2 mirrors the language of paragraph 1. Important differences between stateless persons and refugees, as evidenced by paragraph 3, explain why a separate paragraph has been allocated to each category.

(7) Lawful residence and habitual residence are required as preconditions for the exercise of diplomatic protection of refugees, as with stateless persons, despite the fact that article 28 of the Convention Relating to the Status of Refugees sets the lower threshold of “lawfully

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85 UNRRAA, vol. IV, p. 669 at p. 678.
87 Ibid., vol. 189, p. 150.
88 In Ali Rawa & Others, R (on the Application of) v. Secretary of State for Foreign Affairs and Another [2006] EWHC (Admin) an English court held that draft article 8 was to be considered lex ferenda and “not yet part of international law” (para. 63).
90 Article 1.
91 The terms “lawful and habitual” residence are based on the 1997 European Convention on Nationality, article 6 (4) (g), where they are used in connection with the acquisition of nationality. See, too, the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, which includes for the purpose of protection under this Convention a “stateless person having his habitual residence in that State”; article 21 (3) (c).
92 Article 1 (A) (2) of the Convention Relating to the Status of Refugees.
93 Habitual residence in this context connote continuous residence.
staying\footnote{We use the phrase “travaux préparatoires” of the Convention to emphasize that “stay” means less than habitual residence.} for Contracting States in the issuing of travel documents to refugees. Two factors justify this position. First, the fact that the issue of travel documents, in terms of the Convention, does not in any way entitle the holder to diplomatic protection.\footnote{See para. 16 of the Schedule to the Convention.} Secondly, the necessity to set a high threshold when introducing an exception to a traditional rule, \textit{de lege ferenda}.\footnote{Article 6 (4) (g).}

(8) The term “refugee” in paragraph 2 is not limited to refugees as defined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol but is intended to cover, in addition, persons who do not strictly conform to this definition. The Commission considered using the term “recognized refugees”, which appears in the 1997 European Convention on Nationality,\footnote{United Nations, \textit{Treaty Series}, vol. 1001, p. 45. This Convention extends the definition of refugee to include “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”.} which would have extended the concept to include refugees recognized by regional instruments, such as the 1969 O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa,\footnote{Note on International Protection submitted by the United Nations High Commissioner for Refugees, document A/PC.96/830, p. 17, para. 35.} widely seen as the model for the international protection of refugees,\footnote{O.A.S. General Assembly, XV Regular Session (1985).} and the 1984 Cartagena Declaration on the International Protection of Refugees in Central America, approved by the General Assembly of the O.A.S. in 1985.\footnote{For instance, it may be possible for a State to exercise diplomatic protection on behalf of a person granted political asylum in terms of the 1954 Caracas Convention on Territorial Asylum, United Nations, \textit{Treaty Series}, vol. 1438, p. 129.} However, the Commission preferred to set no limit to the term in order to allow a State to extend diplomatic protection to any person that it recognized and treated as a refugee.\footnote{Both paragraphs 1 and 2 provide that a State of refuge “may exercise diplomatic protection”. This emphasizes the discretionary nature of the right. A State has a discretion under international law whether to exercise diplomatic protection in respect of a national. \emph{A fortiori} it has a discretion whether to extend such protection to a stateless person or refugee.}

\footnote{See draft articles 2 and 19 and commentaries thereto.}

\footnote{\textit{A fortiori} the exercise of diplomatic protection in respect of a refugee, or a stateless person, should in no way be construed as affecting the nationality of the protected person.}
CHAPTER III

LEGAL PERSONS

Article 9

State of nationality of a corporation

For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

Commentary

1. Draft article 9 recognizes that diplomatic protection may be extended to corporations. The first part of the article follows the same formula adopted in draft article 4 on the subject of the diplomatic protection of natural persons. The provision makes it clear that in order to qualify as the State of nationality for the purposes of diplomatic protection of a corporation certain conditions must be met, as is the case with the diplomatic protection of natural persons.

2. State practice is largely concerned with the diplomatic protection of corporations, that is profit-making enterprises with limited liability whose capital is generally represented by shares, and not other legal persons. This explains why the present article, and those that follow, are concerned with the diplomatic protection of corporations and shareholders in corporations. Draft article 13 is devoted to the position of legal persons other than corporations.

3. As with natural persons, the granting of nationality to a corporation is "within the reserved domain" of a State. As the International Court of Justice stated in the Barcelona Traction case:

   "... international law has to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law."  

Although international law has no rules of its own for the creation, management and dissolution of a corporation or for the rights of shareholders and their relationship with the corporation, and must consequently turn to municipal law for guidance on this subject, it is for international law to determine the circumstances in which a State may exercise diplomatic protection on behalf of a corporation or its shareholders. This matter was addressed by the International Court of Justice in Barcelona Traction when it stated that international law "attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office": Here the Court set two conditions for the acquisition of nationality by a corporation for the purposes of diplomatic protection: incorporation and the presence of the registered office of the company in the State of incorporation. As the laws of most States require a company incorporated under its laws to maintain a registered office in its territory, even if this is a mere fiction, incorporation is the most important criterion for the purposes of diplomatic protection. The Court in Barcelona Traction was not, however, satisfied with incorporation as the sole criterion for the exercise of diplomatic protection. Although it did not reiterate the requirement of a "genuine connection" as applied in the Nottebohm case, and acknowledged that "in the particular field of the diplomatic protection of corporate entities, no absolute test of the 'genuine connection' has found general acceptance," it suggested that in addition to incorporation and a registered office, there was a need for some "permanent and close connection" between the State exercising diplomatic protection and the corporation. On the facts of this case the Court found such a connection in the incorporation of the company in Canada for over 50 years, the maintenance of its registered office, accounts and share register there, the holding of board meetings there for many years, its listing in the records of the Canadian tax authorities and the general recognition by other States

104 Barcelona Traction case, at pp. 33-34, para. 38.

105 Ibid., p. 42, para. 70.


of the Canadian nationality of the company.109 All of this meant, said the Court, that “Barcelona Traction’s links with Canada are thus manifold”.110 In Barcelona Traction the Court was not confronted with a situation in which a company was incorporated in one State but had a “close and permanent connection” with another State. One can only speculate what the Court might have decided in such a situation. Draft article 9 does, however, provide for such cases.

Draft article 9 accepts the basic premise of Barcelona Traction that it is incorporation that confers nationality on a corporation for the purposes of diplomatic protection. However, it provides an exception in a particular situation where there is no other significant link or connection between the State of incorporation and the corporation itself, and where certain significant connections exist with another State, in which case that other State is to be regarded as the State of nationality for the purpose of diplomatic protection. Policy and fairness dictate such a solution. It is wrong to place the sole and exclusive right to exercise diplomatic protection in a State with which the corporation has the most tenuous connection as in practice such a State will seldom be prepared to protect such a corporation.

Draft article 9 provides that in the first instance the State in which a corporation is incorporated is the State of nationality entitled to exercise diplomatic protection. When, however, the circumstances indicate that the corporation has a closer connection with another State, a State in which the seat of management and financial control are situated, that State shall be regarded as the State of nationality with the right to exercise diplomatic protection. Certain conditions must, however, be fulfilled before this occurs. First, the corporation must be controlled by nationals of another State. Secondly, it must have no substantial business activities in the State of incorporation. Thirdly, both the seat of management and the financial control of the corporation must be located in another State. Only where these conditions are cumulatively fulfilled does the State in which the corporation has its seat of management and in which it is financially controlled qualify as the State of nationality for the purposes of diplomatic protection.

(6) In Barcelona Traction the International Court of Justice warned that the granting of the right of diplomatic protection to the States of nationality of shareholders might result in a multiplicity of actions which “could create an atmosphere of confusion and insecurity in international economic relations”.111 The same confusion might result from the granting of the right to exercise diplomatic protection to several States with which a corporation enjoys a link or connection. Draft article 9 does not allow such multiple actions. The State of nationality with the right to exercise diplomatic protection is either the State of incorporation or, if the required conditions are met, the State of the seat of management and financial control of the corporation. If the seat of management and the place of financial control are located in different States, the State of incorporation remains the State entitled to exercise diplomatic protection.

Article 10

Continuous nationality of a corporation

1. A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. A State is no longer entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim.

3. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the date of injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation.

Commentary

(1) The general principles relating to the requirement of continuous nationality are discussed in the commentary to draft article 5. In practice problems of continuous nationality arise less in the case of corporations than with natural persons. Whereas natural persons change nationality easily as a result of naturalization, marriage or adoption, and State succession, corporations generally change nationality only by being re-formed or reincorporated in another State, in

109 Ibid., pp. 42-43, paras. 71-76.
110 Ibid., p. 42, para. 71.
111 Ibid., p. 49, para. 96.
which case the corporation assumes a new personality, thereby breaking the continuity of nationality of the corporation.\(^{132}\) The most frequent instance in which a corporation may change nationality without changing legal personality is in the case of State succession.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a corporation that was its national both at the time of the injury and at the date of the official presentation of the claim. It also requires continuity of nationality between the date of the injury and the date of the official presentation of the claim. These requirements, which apply to natural persons as well, are examined in the commentary to draft article 5. The date of the official presentation of the claim is preferred to that of the date of the award, for reasons explained in the commentary to draft article 5. An exception is, however, made in paragraph 2 to cover cases in which the Corporation acquires the nationality of the State against which the claim is brought after the presentation of the claim.

(3) The requirement of continuity of nationality is met where a corporation undergoes a change of nationality as a result of the succession of States.\(^ {133}\) In effect, this is an exception to the continuity of nationality rule. This matter is covered by the reference to "predecessor State" in paragraph 1.

(4) The word "claim" in paragraph 1 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form of reparation should take.\(^ {134}\)

(5) In terms of paragraph 2, a State is not entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim. This paragraph is designed to cater for the type of situation that arose in the *Loewen* case\(^ {135}\) in which a corporation ceased to exist in the State in which the claim was initiated (Canada) and was reorganized in the respondent State (the United States). This matter is further considered in the commentary to draft article 5.\(^ {136}\)

(6) Difficulties arise in respect of the exercise of diplomatic protection of a corporation that has ceased to exist according to the law of the State in which it was incorporated and of which it was a national. If one takes the position that the State of nationality of such a corporation may not bring a claim as the corporation no longer exists at the time of presentation of the claim, then no State may exercise diplomatic protection in respect of an injury to the corporation. A State could not avail itself of the nationality of the shareholders in order to bring such a claim as it could not show that it had the necessary interest at the time the injury occurred to the corporation. This matter troubled several judges in the *Barcelona Traction* case\(^ {137}\) and it has troubled certain courts and arbitral tribunals\(^ {138}\) and scholars.\(^ {139}\) Paragraph 3 adopts a pragmatic approach and allows the State of nationality of a corporation to exercise diplomatic protection in respect of an injury suffered by the corporation when it was its national and has ceased to exist and therefore ceased to be its national - as a result of the injury. In order to qualify, the claimant State must prove that it was because of the injury in respect of which the claim is brought that the corporation has ceased to exist. Paragraph 3 must be read in conjunction with

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\(^{132}\) See Mixed Claims Commission, United States-Venezuela constituted under the Protocol of 17 February 1903, the *Orinoco Steamship Company Case*, UNRIAA, vol. IX., p. 180. Here a company incorporated in the United Kingdom transferred its claim against the Venezuelan Government to a successor company incorporated in the United States. As the treaty establishing the Commission permitted the United States to bring a claim on behalf of its national in such circumstances, the claim was allowed. However, Umpire Barge made it clear that, but for the treaty, the claim would not have been allowed; *ibid.*, at p. 192. See also *Loewen Group Inc v. U.S.A.* at paragraph 220.

\(^{133}\) See further on this subject the *Panayides-Saladziskis Railway* case, at p. 18. See also Fourth Report on Nationality in relation to the Succession of States, document ACN/4/489, which highlights the difficulties surrounding the nationality of legal persons in relation to the succession of States.

\(^{134}\) See, further, article 43 of the draft articles on the Responsibility of States for Internationally Wrongful Acts and the commentary thereto.


\(^{136}\) Paragraphs (5) and (13).


\(^{138}\) See the *Kanhardt and co.* case (Opinions in the American-Venezuelan Commission of 1903), UNRIAA, vol. XII, p. 171, and particularly the dissenting opinion of the Venezuelan Commissioner, Mr. Paúl, at p. 180; F.W. Flack, *on behalf of the Estate of the Late D.L. Flack (Great Britain)* v. United Mexican States, decision No. 10 of 6 December 1929, UNRIAA, vol. V, p. 61 at p. 63.

draft article 11, paragraph (a), which makes it clear that the State of nationality of shareholders will not be entitled to exercise diplomatic protection in respect of an injury to a corporation that led to its demise.

**Article 11**

Protection of shareholders

The State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

(a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or

(b) The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.

Commentary

1. The most fundamental principle of the diplomatic protection of corporations is that a corporation is to be protected by the State of nationality of the corporation and not by the State or States of nationality of the shareholders in a corporation. This principle was strongly reaffirmed by the International Court of Justice in the *Barcelona Traction* case. In this case the Court emphasized at the outset that it was concerned only with the question of the diplomatic protection of shareholders in “a limited liability company whose capital is represented by shares”. Such companies are characterized by a clear distinction between company and shareholders. Whenever a shareholder’s interests are harmed by an injury to the company, it is to the company that the shareholder must look to take action, for “although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed”. Only where the act complained of is aimed at the direct rights of the shareholders does a shareholder have an independent right of action. Such principles governing the distinction between company and shareholders, said the Court, are derived from municipal law and not international law.

2. In reaching its decision that the State of incorporation of a company and not the States of nationality of the shareholders in the company is the appropriate State to exercise diplomatic protection in the event of injury to a company, the Court in *Barcelona Traction* was guided by a number of policy considerations. First, when shareholders invest in a corporation doing business abroad they undertake risks, including the risk that the State of nationality of the corporation may in the exercise of its discretion decline to exercise diplomatic protection on their behalf. Secondly, if the State of nationality of shareholders is permitted to exercise diplomatic protection, this might lead to a multiplicity of claims by different States, as frequently large corporations comprise shareholders of many nationalities. In this connection the Court indicated that if the shareholder’s State of nationality was empowered to act on its behalf there was no reason why every individual shareholder should not enjoy such a right. Thirdly, the Court was reluctant to apply by way of analogy rules relating to dual nationality to corporations and shareholders and to allow the States of nationality of both to exercise diplomatic protection.

3. The Court in *Barcelona Traction* accepted that the States(s) of nationality of shareholders might exercise diplomatic protection on their behalf in two situations: first, where the company had ceased to exist in its place of incorporation - which was not the case with the *Barcelona Traction*; secondly, where the State of incorporation was itself responsible for inflicting injury on the company and the foreign shareholders’ sole means of protection on the international level was through their State(s) of nationality - which was not the case with

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120 *I.C.J. Reports 1970*, p. 34, para. 40.
Barcelona Traction. These two exceptions, which were not thoroughly examined by the Court in *Barcelona Traction* because they were not relevant to the case, are recognized in paragraphs (a) and (b) of draft article 11. As the shareholders in a company may be nationals of different States, several States of nationality may be able to exercise diplomatic protection in terms of these exceptions. In practice, however, States will, and should, coordinate their claims and make sure that States whose nationals hold the bulk of the share capital are involved as claimants.

Draft article 11 is restricted to the interests of shareholders in a corporation as judicial decisions on this subject, including *Barcelona Traction*, have mainly addressed the question of shareholders. There is no clear authority on the right of the State of nationality to protect investors other than shareholders, such as debenture holders, nominees and trustees. In principle, however, there would seem to be no good reason why the State of nationality should not protect such persons.\(^{131}\)

Draft article 11, paragraph (a) requires that the corporation shall have “ceased to exist” before the State of nationality of the shareholders shall be entitled to intervene on their behalf. Before the *Barcelona Traction* case the weight of authority favoured a less stringent test, one that permitted intervention on behalf of shareholders when the company was “practically defunct".\(^ {132}\) The Court in *Barcelona Traction*, however, set a higher threshold for determining the demise of a company. The “paralysis” or “precarious financial situation” of a company was dismissed as inadequate.\(^ {133}\) The test of “practically defunct” was likewise rejected as one which lacks all legal precision."\(^ {134}\) Only the “company’s status in law” was considered relevant. The Court stated: “Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their Government could arise."\(^ {135}\) Subsequent support has been given to this test by the European Court of Human Rights.\(^ {136}\)

(6) The Court in *Barcelona Traction* did not expressly state that the company must have ceased to exist in the *place of incorporation* as a precondition to shareholders’ intervention. Nevertheless it seems clear in the context of the proceedings before it that the Court intended that the company should have ceased to exist in the State of incorporation and not in the State in which the company was injured. The Court was prepared to accept that the company was destroyed in Spain\(^ {137}\) but emphasized that this did not affect its continued existence in Canada, the State of incorporation: “In the present case, the *Barcelona Traction* is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist.”\(^ {138}\) A company is “born” in the State of incorporation when it is formed or incorporated there. Conversely, it “dies” when it is wound up in its State of incorporation, the State which gave it its existence. It therefore seems logical that the question whether a company has ceased to exist, and is no longer able to function as a corporate entity, must be determined by the law of the State in which it is incorporated.

(7) The final phrase “for a reason unrelated to the injury” aims to ensure that the State of nationality of the shareholders will not be permitted to bring proceedings in respect of the injury to the corporation that is the cause of the corporation’s demise. This, according to draft article 10, is the continuing right of the State of nationality of the corporation. The State of nationality of the shareholders will therefore only be able to exercise diplomatic protection in respect of shareholders who have suffered as a result of injuries sustained by the corporation

\(^{131}\) This is the approach adopted by the United Kingdom. See United Kingdom of Great Britain and Northern Ireland: “Rules Applying to International Claims” reproduced in document ACN/4/561/Add.1, Annex.


unrelated to the injury that might have given rise to the demise of the corporation. The purpose of this qualification is to limit the circumstances in which the State of nationality of the shareholders may intervene on behalf of such shareholders for injury to the corporation.

Draft article 11, paragraph (b), gives effect to the exception allowing the State of nationality of the shareholders in a corporation to exercise diplomatic protection on their behalf where the State of incorporation is itself responsible for inflicting injury on the corporation. The exception is limited to cases where incorporation was required by the State inflicting the injury on the corporation as a precondition for doing business there.

There is support for such an exception in State practice, arbitral awards and doctrine. Significantly the strongest support for intervention on the part of the State of nationality of the shareholders comes from three claims in which the injured corporation had been compelled to incorporate in the wrongdoing State: Delagoa Bay Railway, Mexican Eagle and El Triunfo. While there is no suggestion in the language of these claims that intervention is to be limited to such circumstances, there is no doubt that it is in such cases that intervention is most needed. As the Government of the United Kingdom replied to the Mexican argument in Mexican Eagle that a State might not intervene on behalf of its shareholders in a Mexican company:

"If the doctrine were admitted that a Government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad."

In Barcelona Traction, Spain, the respondent State, was not the State of nationality of the injured company. Consequently, the exception under discussion was not before the Court. Nevertheless, the Court did make passing reference to this exception:

"It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction."

Judges Fitzmaurice, Tanaka and Jessup expressed full support in their separate opinions in Barcelona Traction for the right of the State of nationality of the shareholders to intervene when the company was injured by the State of incorporation.

While both Fitzmaurice and Jessup conceded that the need for such a rule was particularly strong where incorporation was required as a precondition for doing business in the State of


140 Ibid.
141 Ibid.
142 Ibid.

145 Ibid., pp. 72-75.
146 Ibid., p. 134.
147 Ibid., pp. 191-193.
148 Ibid., pp. 191-192.
149 Judge Wellington Koo likewise supported this position in the Case concerning the Barcelona Traction, Light and Power Company Limited, Preliminary Objections, I.C.J. Reports 1964, p. 58, para. 20.
150 I.C.J. Reports 1970, p. 73, paras. 15 and 16.
incorporation, neither was prepared to limit the rule to such circumstances. Judges Padilla Nervo,151 Morelli152 and Ammoun,153 on the other hand, were vigorously opposed to the exception.

(11) Developments relating to the proposed exception in the post-Barcelona Traction period have occurred mainly in the context of treaties. Nevertheless they do indicate support for the notion that the shareholders of a company may intervene against the State of incorporation of the company when it has been responsible for causing injury to the company.154 In the Case Concerning Elettronica Sicula S.p.A. (ELS)155 a Chamber of the International Court of Justice allowed the United States to bring a claim against Italy in respect of damages suffered by an Italian company whose shares were wholly owned by two American companies. The Court avoided pronouncing on the compatibility of its finding with that of Barcelona Traction or on the proposed exception left open in Barcelona Traction despite the fact that Italy objected that the company whose rights were alleged to have been violated was incorporated in Italy and that the United States sought to protect the rights of shareholders in the company.156 This silence might be explained on the ground that the Chamber was not concerned with the evaluation of customary international law but with the interpretation of a bilateral Treaty of Friendship, Commerce and Navigation which provided for the protection of United States shareholders abroad. On the other hand, the proposed exception was clearly before the Chamber.157 It is thus possible to infer support for the exception in favour of the right of the State of shareholders in a corporation to intervene against the State of incorporation when it is responsible for causing injury to the corporation.158

(12) Before Barcelona Traction there was support for the proposed exception, but opinions were divided over whether, or to what extent, State practice and arbitral decisions recognized it. Although arbitral decisions affirmed the principle contained in the exception these decisions were often based on special agreements between States granting a right to shareholders to claim compensation and, as a consequence, were not necessarily indicative of a general rule of customary international law.159 The obiter dictum in Barcelona Traction and the separate opinions of Judges Fitzmaurice, Jessup and Tanaka have undoubtedly added to the weight of authority in favour of the exception. Subsequent developments, albeit in the context of treaty interpretation, have confirmed this trend.160 In these circumstances it would be possible to sustain a general exception on the basis of judicial opinion. However, draft article 11, paragraph (b), does not go this far. Instead it limits the exception to what has been described as a “Calvo corporation”, a corporation whose incorporation, like the Calvo Clause, is designed to protect it from the rules of international law relating to diplomatic protection. It limits the exception to the situation in which the corporation had, at the date of the injury (a further restrictive feature), the nationality of the State alleged to be responsible for causing the injury and incorporation in that State was required by it as a precondition for doing business there. It is not necessary that the law of that State require incorporation. Other forms of compulsion might also result in a corporation being “required” to incorporate in that State.

151 Ibid., pp. 257-259.
152 Ibid., pp. 240-241.
153 Ibid., p. 318.
156 Ibid., pp. 64 (para. 106), 79 (para. 132).
157 This is clear from an exchange of opinions between Judges Oda, ibid., pp. 87-88 and Schwebel, ibid., p. 94 on the subject.

159 See the submission to this effect by the United States in A/CONF.4/56, pp. 34-35.
160 According to the United Kingdom’s 1985 Rules Applying to International Claims, “where a United Kingdom national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national, and that State injures the company, Her Majesty’s Government may intervene to protect the interests of the United Kingdom national” (Rule VI), reprinted in ICLQ, vol. 37 (1988), p. 1007 and reproduced in document A/CONF.4/56/1/Add.1, Annex.
Article 12

Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Commentary

(1) That shareholders qualify for diplomatic protection when their own rights are affected was recognized by the Court in *Barcelona Traction* when it stated:

“... an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected. ... The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to a declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action.”

The Court was not, however, called upon to consider this matter any further because Belgium made it clear that it did not base its claim on an infringement of the direct rights of the shareholders.

(2) The issue of the protection of the direct rights of shareholders came before the Chamber of the International Court of Justice in the *ELSI* case. However, in that case, the rights in question, such as the rights of the shareholders to organize, control and manage the company, were to be found in the Treaty of Friendship, Commerce and Navigation that the Chamber was called on to interpret and the Chamber failed to expound on the rules of customary international law on this subject. In *Agotexim*, the European Court of Human Rights, like the Court in *Barcelona Traction*, acknowledged the right of shareholders to protection in respect of the direct violation of their rights, but held that *in casu* no such violation had occurred.

(3) Draft article 12 makes no attempt to provide an exhaustive list of the rights of shareholders as distinct from those of the corporation itself. In *Barcelona Traction* the International Court mentioned the most obvious rights of shareholders - the right to a declared dividend, the right to attend and vote at general meetings and the right to share in the residual assets of the company on liquidation - but made it clear that this list is not exhaustive. This means that it is left to courts to determine, on the facts of individual cases, the limits of such rights. Care will, however, have to be taken to draw clear lines between shareholders’ rights and corporate rights, particularly in respect of the right to participate in the management of corporations. That draft article 12 is to be interpreted restrictively is emphasized by the phrases “the rights of the shareholders as such” and rights “as distinct from those of the corporation itself”.

(4) Draft article 12 does not specify the legal order that must determine which rights belong to the shareholder as distinct from the corporation. In most cases this is a matter to be decided by the municipal law of the State of incorporation. Where the company is incorporated in the wrongdoing State, however, there may be a case for the invocation of the general principles of company law in force in the country to ensure that the rights of foreign shareholders are not subjected to discriminatory treatment.

Article 13

Other legal persons

The principles contained in this chapter shall be applicable, as appropriate, to the diplomatic protection of legal persons other than corporations.

Commentary

(1) The provisions of this Chapter have hitherto focused on a particular species of legal person, the corporation. There are two explanations for this. First, corporations, unlike other legal persons, have certain common, uniform features: they are profit-making enterprises whose capital is generally represented by shares, in which there is a firm distinction between the separate entity of the corporation and the shareholders, with limited liability attaching to the latter. Secondly, it is mainly the corporation, unlike the public enterprise, the university, the municipality, the foundation and other such legal persons, that engages in foreign trade and investment and whose activities fuel not only the engines of international economic life but also the machinery of international dispute settlement. Diplomatic protection in respect of legal persons is mainly about the protection of foreign investment. This is why the corporation is the legal person that occupies centre stage in the field of diplomatic protection and why the present set of draft articles do - and should - concern themselves largely with this entity.

(2) In the ordinary sense of the word, “person” is a human being. In the legal sense, however, a “person” is any being, object, association or institution which the law endows with the capacity of acquiring rights and incurring duties. A legal system may confer legal personality on whatever object or association it pleases. There is no consistency or uniformity among legal systems in the conferment of legal personality.

(3) There is jurisprudential debate about the legal nature of juristic personality and, in particular, about the manner in which a legal person comes into being. The fiction theory maintains that no juristic person can come into being without a formal act of incorporation by the State. This means that a body other than a natural person may obtain the privileges of personality by an act of State, which by a fiction of law equates it to a natural person, subject to such limitations as the law may impose. According to the realist theory, on the other hand, corporate existence is a reality and does not depend on State recognition. If an association or body acts in fact as a separate legal entity, it becomes a juristic person, with all its attributes, without requiring grant of legal personality by the State. Whatever the merits of the realist theory, it is clear that, to exist, a legal person must have some recognition by law, that is, by some municipal law system. This has been stressed by both the European Court of Justice and the International Court of Justice.

(4) Given the fact that legal persons are the creatures of municipal law, it follows that there are today a wide range of legal persons with different characteristics, including corporations, public enterprises, universities, schools, foundations, churches, municipalities, non-profit-making associations, non-governmental organizations and even partnerships (in some countries). The impossibility of finding common, uniform features in all these legal persons provides one explanation for the fact that writers on both public and private international law largely confine their consideration of legal persons in the context of international law to the corporation. Despite this, regard must be had to legal persons other than corporations in the context of diplomatic protection. The case law of the Permanent Court of International Justice shows that a commune (municipality) or university may in certain circumstances qualify as legal persons and as nationals of a State. There is no reason why such legal persons should not qualify for diplomatic protection if injured abroad, provided that they are autonomous entities not forming part of the apparatus of the protecting State. Non-profit-making foundations, comprising assets set aside by a donor or testator for a charitable purpose, constitute legal persons without members. Today many foundations fund projects abroad to promote health, welfare, women’s rights, human rights and the environment in developing countries. Should such a legal person be subjected to an internationally wrongful act by the host State, it is

165 Barcelona Traction Case (Judgment), at pp. 34-35, para. 38.
166 In Certain German Interests in Polish Upper Silesia case (Merits) the Permanent Court held that the commune of Ratibor fell within the category of “German national” within the meaning of the German-Polish Convention concerning Upper Silesia of 1922, P.C.I.J. Reports, Series A/B, No. 7, pp. 73-75.
167 In Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v. The State of Czechoslovakia Judgment) the Permanent Court held that the Peter Pázmány University was a Hungarian national in terms of art. 250 of the Treaty of Trianon and therefore entitled to the restitution of property belonging to it, P.C.I.J. Reports, Series A/B, No. 61, pp. 208, 227-232.
168 As diplomatic protection is a process reserved for the protection of natural or legal persons not forming part of the State, it follows that in most instances the municipality, as a local branch of government, and the university, funded and, in the final resort, controlled by the State, will not qualify for diplomatic protection, although it may be protected by other rules dealing with the problem of State organs. Private universities would, however, qualify for diplomatic protection, as would private schools, if they enjoyed legal personality under municipal law.
probable that it would be granted diplomatic protection by the State under whose laws it has been created. Non-governmental organizations engaged in causes abroad would appear to fall into the same category as foundations.\textsuperscript{171}

(5) The diversity of goals and structures in legal persons other than corporations makes it impossible to draft separate and distinct provisions to cover the diplomatic protection of different kinds of legal persons. The wisest, and only realistic, course is to draft a provision that extends the principles of diplomatic protection adopted for corporations to other legal persons - subject to the changes necessary to take account of the different features of each legal person. The proposed provision seeks to achieve this. It provides that the principles governing the State of nationality of corporations and the application of the principle of continuous nationality to corporations, contained in the present Chapter, will apply, “as appropriate”, to the diplomatic protection of legal persons other than corporations. This will require the necessary competent authorities or courts to examine the nature and functions of the legal person in question in order to decide whether it would be “appropriate” to apply any of the provisions of the present Chapter to it. Most legal persons other than corporations do not have shareholders so only drafts articles 9 and 10 may appropriately be applied to them. If, however, such a legal person does have shareholders draft articles 11 and 12 may also be applied to it.\textsuperscript{172}

\textbf{PART THREE}

\textbf{LOCAL REMEDIES}

\textbf{Article 14}

\textbf{Exhaustion of local remedies}

1. A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.

2. “Local remedies” means legal remedies which are open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.

\textsuperscript{171} See, further, K. Doehring, “Diplomatic Protection of Non-Governmental Organizations”, in M. Rama-Montaldo (ed), 

\textsuperscript{172} This would apply to the limited liability company known in civil law countries which is a hybrid between a corporation and a partnership.

3. Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

\textbf{Commentary}

(1) Draft article 14 seeks to codify the rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the exercise of diplomatic protection. This rule was recognized by the International Court of Justice in the \textit{Interhandel} case as “a well-established rule of customary international law”\textsuperscript{173} and by a Chamber of the International Court in the \textit{Elettronica Sicula (ELS)} case as “an important principle of customary international law”.\textsuperscript{174} The exhaustion of local remedies rule ensures that “the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system.”\textsuperscript{175} The International Law Commission has previously considered the exhaustion of local remedies in the context of its work on State responsibility and concluded that it is a “principle of general international law” supported by judicial decisions, State practice, treaties and the writings of jurists.\textsuperscript{176}

(2) Both natural and legal persons are required to exhaust local remedies. A foreign company financed partly or mainly by public capital is also required to exhaust local remedies. Non-nationals of the State exercising protection, entitled to diplomatic protection in the exceptional circumstances provided for in draft article 8, are also required to exhaust local remedies.

(3) The phrase “all local remedies” must be read subject to draft article 15 which describes the exceptional circumstances in which local remedies need not be exhausted.

\textsuperscript{173} \textit{Interhandel} case (\textit{Switzerland v. United States of America}) Preliminary objections, \textit{I.C.J. Reports} 1959, p. 6 at p. 27.

\textsuperscript{174} \textit{I.C.J. Reports} 1989, p. 15 at p. 42, para. 50.

\textsuperscript{175} \textit{Interhandel} case, at p. 27.

(4) The remedies available to an alien that must be exhausted before diplomatic protection can be exercised will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule governing all situations. Paragraph 2 seeks to describe, in broad terms, the main kind of legal remedies that must be exhausted. In the first instance it is clear that the foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Even if there is no appeal as of right to a higher court, but such a court has a discretion to grant leave to appeal, the foreign national must still apply for leave to appeal to that court. Courts in this connection include both ordinary and special courts since “the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress”.179

(5) Administrative remedies must also be exhausted. The injured alien is, however, only required to exhaust such remedies which may result in a binding decision. He is not required to approach the executive for relief in the exercise of its discretionary powers. Local remedies do not include remedies whose “purpose is to obtain a favour and not to vindicate a right”180 nor do they include remedies of grace181 unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Requests for clemency and resort to an ombudsman generally fall into this category.182

177 In the Ambatielo Claim of 6 March 1956 the arbitral tribunal declared that “[I]t is the whole system of legal protection, as provided by municipal law, which must have been put to the test”, UNRIA, vol. XII, p. 83 at p. 120. See further on this subject, C.F. Amerasinghe, Local Remedies in International Law, 2nd ed. (Cambridge: Cambridge University Press, 2004), pp. 182-192.

178 This would include the certiorari process before the United States Supreme Court.


182 See Avena and Other Mexican Nationals (Mexico v. United States of America), at paras. 135-143.

(6) In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise the basic arguments he intends to raise in international proceedings in the municipal proceedings. In the ELSI case the Chamber of the International Court of Justice stated that:

“for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.”183

This test is preferable to the stricter test enunciated in the Finnish Ships Arbitration that:

“all the contentions of fact and propositions of law which are brought forward by the claimant Government … must have been investigated and adjudicated upon by the municipal courts”.184

(7) The claimant State must therefore produce the evidence available to it to support the essence of its claim in the process of exhausting local remedies.185 The international remedy afforded by diplomatic protection cannot be used to overcome faulty preparation or presentation of the claim at the municipal level.186

(8) Draft article 14 does not take cognizance of the “Calvo Clause”;187 a device employed mainly by Latin-American States in the late nineteenth century and early twentieth century, to confine an alien to local remedies by compelling him to waive recourse to international remedies in respect of disputes arising out of a contract entered into with the host State. The validity of such a clause has been vigorously disputed by capital-exporting States188 on the ground that the alien has no right, in accordance with the rule in Maroonnatis, to waive a right that belongs to the State and not its national. Despite this, the “Calvo Clause” was viewed as a regional custom

183 J.C.J. Reports 1889, p. 15 at para. 59.
185 Ambatielo Claim, at p. 120.
187 Named after a distinguished Argentine jurist, Carlos Calvo (1824-1906).
in Latin-America and formed part of the national identity of many States. The “Calvo Clause” is difficult to reconcile with international law if it is to be interpreted as a complete waiver of recourse to international protection in respect of an action by the host State constituting an internationally wrongful act (such as denial of justice) or where the injury to the alien was of direct concern to the State of nationality of the alien. 189 The objection to the validity of the “Calvo Clause” in respect of general international law are certainly less convincing if one accepts that the right protected within the framework of diplomatic protection are those of the individual protected and not those of the protecting State. 190

(9) Paragraph 3 provides that the exhaustion of local remedies rule applies only to cases in which the claimant State has been injured “indirectly”, that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim. 191

(10) In practice it is difficult to decide whether the claim is “direct” or “indirect” where it is “mixed”, in the sense that it contains elements of both injury to the State and injury to the nationals of the State. Many disputes before the International Court of Justice have presented the phenomenon of the mixed claim. In the Hostages case, 192 there was a direct violation on the part of the Islamic Republic of Iran of the duty it owed to the United States of America to protect its diplomats and consuls, but at the same time there was injury to the person of the nationals (diplomats and consuls) held hostage; and in the Interhandel case, there were claims brought by Switzerland relating to a direct wrong to itself arising out of breach of a treaty and to an indirect wrong resulting from an injury to a national corporation. In the Hostages case the Court treated the claim as a direct violation of international law; and in the Interhandel case the Court found that the claim was preponderantly indirect and that Interhandel had failed to exhaust local remedies. In the Arrest Warrant of 11 August 2000 case there was a direct injury to the Democratic Republic of the Congo (DRC) and its national (the Foreign Minister) but the Court held that the claim was not brought within the context of the protection of a national so it was not necessary for the DRC to exhaust local remedies. 193 In the Avena case Mexico sought to protect its nationals on death row in the United States through the medium of the Vienna Convention on Consular Relations, arguing that it had “itself suffered, directly and through its nationals” as a result of the United States’ failure to grant consular access to its nationals under article 36 (1) of the Convention. The Court upheld this argument because of the “interdependence of the rights of the State and individual rights”. 194

(11) In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant. In the ELSI case a Chamber of the International Court of Justice rejected the argument of the United States that part of its claim was premised on the violation of a treaty and that it was therefore unnecessary to exhaust local remedies, holding that:

“the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett [United States corporations]”. 195

Closely related to the preponderance test is the sine qua non or “but for” test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered negatively, the claim is an indirect one and local remedies must be exhausted. There is, however, little to distinguish the preponderance test from the “but for” test. If a claim is preponderantly based on injury to a national this is evidence of the fact that the claim would not have been brought but for the injury to the national. In these circumstances one test only is provided for in paragraph 3, that of preponderance.

(12) Other “tests” invoked to establish whether the claim is direct or indirect are not so much tests as factors that must be considered in deciding whether the claim is preponderantly weighted in favour of a direct or an indirect claim or whether the claim would not have been brought but for the injury to the national. The principal factors to be considered in making this assessment

190 See paragraph (5) of commentary to draft article 1.
191 See generally on this subject, C.F. Amerasinghe, Local Remedies in International Law, op. cit., pp. 145-168.
192 Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980, p. 3

195 I.C.J. Reports 1989, p. 15 at p. 43, para. 52. See also, the Interhandel case, I.C.J. Reports 1959, at p. 28.
are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a Government official, diplomatic official or State property, the claim will normally be direct, and where the State seeks monetary relief on behalf of its national as a private individual the claim will be indirect.

(13) Paragraph 3 makes it clear that local remedies are to be exhausted not only in respect of an international claim but also in respect of a request for a declaratory judgment brought preponderantly on the basis of an injury to a national. Although there is support for the view that where a State makes no claim for damages for an injured national, but simply requests a decision on the interpretation and application of a treaty, there is no need for local remedies to be exhausted, there are cases in which States have been required to exhaust local remedies where they have sought a declaratory judgment relating to the interpretation and application of a treaty alleged to have been violated by the respondent State in the course of, or incidental to, its unlawful treatment of a national.

(14) Draft article 14 requires that the injured person must himself have exhausted all local remedies. This does not preclude the possibility that the exhaustion of local remedies may result from the fact that another person has submitted the substance of the same claim before a court of the respondent State.

Article 15

Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;

(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;

(d) The injured person is manifestly precluded from pursuing local remedies;

(e) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

Commentary

(1) Draft article 15 deals with the exceptions to the exhaustion of local remedies rule. Paragraphs (a) to (b), which cover circumstances in which local courts offer no prospect of redress, and paragraphs (c) to (d), which deal with circumstances which make it unfair or unreasonable that an injured alien should be required to exhaust local remedies as a precondition for the bringing of a claim, are clear exceptions to the exhaustion of local remedies rule. Paragraph (e) deals with a different situation - that which arises where the respondent State has waived compliance with the local remedies rule.

Paragraph (a)

(2) Paragraph (a) deals with the exception to the exhaustion of local remedies rule sometimes described, in broad terms, as the “futility” or “ineffectiveness” exception. Three options require consideration for the formulation of a rule describing the circumstances in which local remedies need not be exhausted because of failures in the administration of justice:

(i) the local remedies are obviously futile;

(ii) the local remedies offer no reasonable prospect of success;

(iii) the local remedies provide no reasonable possibility of effective redress.

All three of these options enjoy some support among the authorities.

(3) The “obvious futility” test, expounded by Arbitrator Bagge in the Finnish Ships Arbitration, sets too high a threshold. On the other hand, the test of “no reasonable prospect of
success”, accepted by the European Commission of Human Rights in several decisions, is too generous to the claimant. This leaves the third option which avoids the stringent language of “obvious futility” but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of effective redress offered by the local remedies. This test has its origin in a separate opinion of Sir Hersch Lauterpacht in the Norwegian Loans case and is supported by the writings of jurists. The test, however, fails to include the element of availability of local remedies which was endorsed by the Commission in its articles on Responsibility of States for Internationally Wrongful Acts and is sometimes considered as a component of this rule by courts and writers. For this reason the test in paragraph (a) is expanded to require that there are no “reasonably available local remedies” to provide effective redress or that the local remedies provide no reasonable possibility of such redress. In this form the test is supported by judicial decisions which have held that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question; the national legislation justifying the acts of which the alien complains will not be

reviewed by local courts; the local courts are notoriously lacking in independence; there is a consistent and well-established line of precedents adverse to the alien; the local courts do not have the competence to grant as appropriate and adequate remedy to the alien; or the respondent State does not have an adequate system of judicial protection.

(4) In order to meet the requirements of paragraph (a) it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief. This must be determined in the context of the local law and the prevailing circumstances. This is a question to be decided by the competent international tribunal charged with the task of examining the question whether local remedies have been exhausted. The decision on this matter must be made on the assumption that the claim is meritorious.

Paragraph (b)

(5) That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in allowing a local remedy

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210 Robert E. Brown Claim of 23 November 1923, UNRRIA, vol. VI, p. 120; Velásquez Rodríguez case, Inter-American Court of Human Rights, Series C, No. 4, paras. 56-78, p. 291 at pp. 304-309.
214 Finnish Ships Arbitration, at p. 1504; Ambatielos Claim, at pp. 119-120.
to be implemented is confirmed by codification attempts, human rights instruments and practice, judicial decisions and scholarly opinion. It is difficult to give an objective content or meaning to “undue delay”, or to attempt to prescribe a fixed time limit within which local remedies are to be implemented. Each case must be judged on its own facts. As the British Mexican Claims Commission stated in the El Oro Mining case:

“The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter.”

(6) Paragraph (b) makes it clear that the delay in the remedial process is attributable to the State alleged to be responsible for an injury to an alien. The phrase “remedial process” is preferred to that of “local remedies” as it is meant to cover the entire process by which local remedies are invoked and implemented and through which local remedies are channelled.

Paragraph (c)

(8) There is support in the literature for the proposition that in all cases in which the exhaustion of local remedies has been required there has been some link between the injured individual and the respondent State, such as voluntary physical presence, residence, ownership of property or a contractual relationship with the respondent State. Proponents of this view maintain that the nature of diplomatic protection and the local remedies rule has undergone major changes in recent times. Whereas the early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State and could therefore be expected to exhaust local remedies in accordance with the philosophy that the national going abroad should normally be obliged to accept the local law as he finds it, including the means afforded for the redress of wrong, an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in the Ukraine in 1986, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of an aircraft that has accidentally strayed into a State’s airspace (as illustrated by the Aerial Incident in which Bulgaria shot down an El Al flight that had accidentally entered its airspace). The basis for such a voluntary link or territorial connection rule is the assumption of risk by the alien in a foreign State. It is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he would be expected to exhaust local remedies.

(9) Neither judicial authority nor State practice provide clear guidance on the existence of such an exception to the exhaustion of local remedies rule. While there are tentative dicta in


218 Ibid., at p. 198.

support of the existence of such an exception in the Interhandel220 and Salem221 cases, in other cases222 tribunals have upheld the applicability of the local remedies rule despite the absence of a voluntary link between the injured alien and the respondent State. In both the Norwegian Loans case223 and the Aerial Incident case (Israel v. Bulgaria)224 arguments in favour of the voluntary link requirement were forcefully advanced, but in neither case did the International Court make a decision on this matter. In the Trail Smelter case,225 involving transboundary pollution in which there was no voluntary link or territorial connection, there was no insistence by Canada on the exhaustion of local remedies. This case and others226 in which local remedies were dispensed with where there was no voluntary link have been interpreted as lending support to the requirements of voluntary submission to jurisdiction as a precondition for the application of the local remedies rule. The failure to insist on the application of the local remedies rule in these cases can, however, be explained on the basis that they provide examples of direct injury, in which local remedies do not need to be exhausted, or on the basis that the arbitration agreement in question did not require local remedies to be exhausted.

(10) Paragraph (c) does not use the term “voluntary link” to describe this exception as this emphasizes the subjective intention of the injured individual rather than the absence of an objectively determinable connection between the individual and the host State. In practice it would be difficult to prove such a subjective criterion. Hence paragraph (c) requires the existence of a “relevant connection” between the injured alien and the host State and not a voluntary link. This connection must be “relevant” in the sense that it must relate in some way to the injury suffered. A tribunal will be required to examine not only the question whether the injured individual was present, resided or did business in the territory of the host State but whether, in the circumstances, the individual by his conduct, had assumed the risk that if he suffered an injury it would be subject to adjudication in the host State. The word “relevant” best allows a tribunal to consider the essential elements governing the relationship between the injured alien and the host State in the context of the injury in order to determine whether there had been an assumption of risk on the part of the injured alien. There must be no “relevant connection” between the injured individual and the respondent State at the date of the injury.

Paragraph (d)

(11) Paragraph (d) is designed to give a tribunal the power to dispense with the requirement of exhaustion of local remedies where, in all the circumstances of the case, it would be manifestly unreasonable to expect compliance with the rule. This paragraph, which is an exercise in progressive development, must be narrowly construed, with the burden of proof on the injured person to show merely that there are serious obstacles and difficulties in the way of exhausting local remedies but that he is “manifestly” precluded from pursuing such remedies. No attempt is made to provide a comprehensive list of factors that might qualify for this exception. Circumstances that may manifestly preclude the exhaustion of local remedies possibly include the situation in which the injured person is prevent by the respondent State from entering its territory, either by law or by threats to his or her personal safety, and thereby denying him the opportunity to bring proceedings in local courts. Or where criminal syndicates in the respondent State obstruct him from bringing such proceedings. Although the injured person is expected to bear the costs of legal proceedings before the courts of the respondent State there may be circumstances in which such costs are prohibitively high and “manifestly preclude” compliance with the exhaustion of local remedies rule.227

Paragraph (e)

(12) A State may be prepared to waive the requirement that local remedies be exhausted. As the purpose of the rule is to protect the interests of the State accused of mistreating an alien, it

220 Here the International Court stated: “it has been considered necessary that the State where the violation occurred should also have an opportunity to redress it by its own means”, I.C.J. Reports 1959, at p. 27. Emphasis is added.

221 In the Salem case an arbitral tribunal declared that “[a]s a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence”, UNRIAA, vol. II, p. 1165 at p. 1202.


227 On the implications of costs for the exhauston of local remedies, see Loeven Group Inc. v. United States of America, at para. 166.
follows that a State may waive this protection itself. The Inter-American Court of Human Rights has stated:

“In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defence and, as such, waivable, even tacitly.”

(13) Waiver of local remedies may take many different forms. It may appear in a bilateral or multilateral treaty entered into before or after the dispute arises; it may appear in a contract between the alien and the respondent State; it may be express or implied; or it may be inferred from the conduct of the respondent State in circumstances in which it can be described as estoppel or forfeiture.

(14) An express waiver may be included in an ad hoc arbitration agreement concluded to solve an already existing dispute or in a general treaty providing that disputes arising in the future are to be settled by arbitration or some other form of international dispute settlement. It may also be included in a contract between a State and an alien. There is a general agreement that an express waiver of the local remedies is valid. Waivers are a common feature of contemporary State practice and many arbitration agreements contain waiver clauses. Probably the best-known example is to be found in article 26 of the Convention on the Settlement of Investment Disputes, which provides:

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

It is generally agreed that express waivers, whether contained in an agreement between States or in a contract between State and alien are irrevocable, even if the contract is governed by the law of the host State.

(16) Waiver of local remedies must not be readily implied. In the ELSI case a Chamber of the International Court of Justice stated in this connection that it was:

“unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.”

(16) Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions and the writings of jurists support such a conclusion. No general rule can be laid down as to when an intention to waive local remedies may be implied. Each case must be determined in the light of the language of the instrument and the circumstances of its adoption. Where the respondent State has agreed to submit disputes to arbitration that may arise in future with the applicant State, there is support for the view that such an agreement “does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the Contracting Parties espouses the claim of its national”. That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the Chamber of the International Court of Justice in the ELSI case. A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. In such a case it may be contended that such a waiver may be implied if the respondent State entered into an arbitration agreement with the applicant

234 I.C.J. Reports 1989, p. 15. In the Panayiotis-Saklitakis Railway case, the Permanent Court of International Justice held that acceptance of the Optional Clause under art. 36, para. 2, of the Statute of the Court did not constitute implied waiver of the local remedies rule, P.C.I.J. Series A/B, 1939, No. 76, p. 19 (as had been argued by Judge van Eysinga in a dissenting opinion, ibid., pp. 35-36).
State covering disputes relating to the treatment of nationals after the injury to the national who is the subject of the dispute and the agreement is silent on the retention of the local remedies rule.

(17) Although there is support for the proposition that the conduct of the respondent State during international proceedings may result in that State being estopped from requiring that local remedies be exhausted, paragraph (e) does not refer to estoppel in its formulation of the rule governing waiver on account of the uncertainty surrounding the doctrine of estoppel in international law. It is wiser to allow conduct from which a waiver of local remedies might be inferred to be treated as implied waiver.

PART FOUR
MISCELLANEOUS PROVISIONS

Article 16

Actions or procedures other than diplomatic protection

The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

Commentary

(1) The customary international law rules on diplomatic protection and the rules governing the protection of human rights are complementary. The present draft articles are therefore not intended to exclude or to trump the rights of States, including both the State of nationality and States other than the State of nationality of an injured individual, to protect the individual under either customary international law or a multilateral or bilateral human rights treaty or other treaty. They are also not intended to interfere with the rights of natural and legal persons or other entities, involved in the protection of human rights, to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.

(2) A State may protect a non-national against the State of nationality of an injured individual or a third State in inter-State proceedings under the International Convention on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and People’s Rights. The same conventions allow a State to protect its own nationals in inter-State proceedings. Moreover, customary international law allows States to protect the rights of non-nationals by protest, negotiation and, if a jurisdictional instrument so permits, legal proceedings. The view taken by the International Court of Justice in the 1966 South West Africa case, holding that a State may not bring legal proceedings to protect the rights of non-nationals has to be qualified in the light of the articles on Responsibility of States for internationally wrongful acts. Article 48 (1) (b) of the articles on Responsibility of States for Internationally Wrongful Acts permits a State other than the injured State to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole, without complying with the requirements for the exercise of diplomatic protection.

(3) The individual is also endowed with rights and remedies to protect him or herself against the injuring State, whether the individual’s State of nationality or another State, in terms of

237 Article 11.
239 Article 24.
240 Article 45.
243 Commentary to article 48, footnote 766.
244 See further the separate opinion of Judge Simma in the Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), I.C.J. Reports 2005, paras. 35-41.
245 Article 48 (1) (b) is not subject to article 44 of the articles on Responsibility of States for internationally wrongful acts which requires a State invoking the responsibility of another State to comply with the rules relating to the nationality of claims and to exhaust local remedies. Nor is it subject to the present draft articles (cf. E. Milzno “Diplomatic Protection and Human Rights before the International Court of Justice: Re-Fashioning Tradition”, Netherlands Yearbook of International Law, vol. 35 (2005), p. 85 at pp. 103-108).
international human rights conventions. This is most frequently achieved by the right to petition an international human rights monitoring body.\(^{246}\)

(4) Individual rights under international law may also arise outside the framework of human rights. In the \textit{La Grand} case the International Court of Justice held that article 36 of the Vienna Convention on Consular Relations “creates individual rights, which by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person”;\(^{247}\) and in the \textit{Avena} case the Court further observed “that violations of the rights of the individual under article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual”.\(^{248}\) A saving clause was inserted in the articles on Responsibility of States for internationally wrongful acts - article 33 - to take account of this development in international law.\(^{249}\)

(5) The actions or procedures referred to in draft article 16 include those available under both universal and regional human rights treaties as well as any other relevant treaty. Draft article 16 does not, however, deal with domestic remedies.

(6) The right to assert remedies other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act will normally vest in a State, natural or legal person, with the term “legal person” including both corporations and other legal persons of the kind contemplated in draft article 13. However, there may be “other legal entities” not enjoying legal personality that may be endowed with the right to bring claims for injuries suffered as a result of an internationally wrongful act. Loosely-formed victims’ associations provide an example of such “another entity” which have on occasion been given standing before international bodies charged with the enforcement of human rights. Intergovernmental bodies may also in certain circumstances belong to this category; so too may national liberation movements.

(7) Draft article 16 makes it clear that the present draft articles are without prejudice to the rights that States, natural and legal persons or other entities may have to secure redress for injury suffered as a result of an internationally wrongful act by procedures other than diplomatic protection. Where, however, a State resorts to such procedures it does not necessarily abandon its right to exercise diplomatic protection in respect of a person if that person should be a national or person referred to in draft article 8.

\textbf{Article 17}

\textbf{Special rules of international law}

The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.

\textbf{Commentary}

(1) Some treaties, particularly those dealing with the protection of foreign investment, contain special rules on the settlement of disputes which exclude or depart substantially from the rules governing diplomatic protection. Such treaties abandon or relax the conditions relating to the exercise of diplomatic protection, particularly the rules relating to the nationality of claims and the exhaustion of local remedies. Bilateral investment treaties (BITs) and the multilateral Convention on the Settlement of Investment Disputes between States and Nationals of Other States are the primary examples of such treaties.

(2) Today foreign investment is largely regulated and protected by BITs.\(^{250}\) The number of BITs has grown considerably in recent years and it is today estimated that there are nearly 2,000 such agreements in existence. An important feature of the BIT is its procedure for the settlement of investment disputes. Some BITs provide for the direct settlement of the investment dispute between the investor and the host State, before either an \textit{ad hoc} tribunal or a tribunal established


\(^{247}\) \textit{La Grand} (\textit{Germany v. United States of America}), at p. 494, para. 77.

\(^{248}\) \textit{Case concerning Avena and Other Mexican Nationals} (\textit{Mexico v. United States of America}), at p. 26, para. 40.

\(^{249}\) This article reads: “This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”.

\(^{250}\) This was acknowledged by the International Court of Justice in the \textit{Barcelona Traction} case, at p. 47, para. 90.
by the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Other BITs provide for the settlement of investment disputes by means of arbitration between the State of nationality of the investor (corporation or shareholder) and the host State over the interpretation or application of the relevant provision of the BIT. The dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic protection and dispense with the conditions for the exercise of diplomatic protection.251

(3) Draft article 17 makes it clear that the present draft articles do not apply to the alternative special regime for the protection of foreign investors provided for in bilateral and multilateral investment treaties. The provision is formulated so that the draft articles do not apply “to the extent that” they are inconsistent with the provisions of a BIT. To the extent that the draft articles remain consistent with the BIT in question, they continue to apply.

Draft article 17 refers to “treaty provisions” rather than to “treaties” as treaties other than those specifically designed for the protection of investments may regulate the protection of investments, such as treaties of Friendship, Commerce and Navigation.

Article 18

Protection of ships’ crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

Commentary

(1) The purpose of draft article 18 is to affirm the right of the State or States of nationality of a ship’s crew to exercise diplomatic protection on their behalf, while at the same time acknowledging that the State of nationality of the ship also has a right to seek redress on their behalf, irrespective of their nationality, when they have been injured in the course of an injury to a vessel resulting from an internationally wrongful act. It has become necessary to affirm the right of the State of nationality to exercise diplomatic protection on behalf of the members of a ship’s crew in order to preclude any suggestion that this right has been replaced by that of the State of nationality of the ship. At the same time it is necessary to recognize the right of the State of nationality of the ship to seek redress in respect of the members of the ship’s crew. Although this cannot be characterized as diplomatic protection in the absence of the bond of nationality between the flag State of a ship and the members of a ship’s crew, there is nevertheless a close resemblance between this type of protection and diplomatic protection.

(2) There is support in the practice of States, in judicial decisions and in the writings of publicists,252 for the position that the State of nationality of a ship (the flag State) may seek redress for members of the crew of the ship who do not have its nationality. There are also policy considerations in favour of such an approach.

(3) The early practice of the United States, in particular, lends support to such a custom. Under American law foreign seamen were traditionally entitled to the protection of the United States while serving on American vessels. The American view was that once a seaman enlisted on a ship, the only relevant nationality was that of the flag State.253 This unique status of foreigners serving on American vessels was traditionally reaffirmed in diplomatic

251 Article 27 (1) of the ICSID Convention provides: “No contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.”


communications and consular regulations of the United States. Doubts have, however, been raised, including by the United States, as to whether this practice provides evidence of a customary rule.

(4) International arbitral awards are inconclusive on the right of a State to extend protection to non-national seamen, but tend to lean in favour of such right rather than against it. In McCredy (US) v. Mexico the umpire, Sir Edward Thornton, held that “seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve”. In the “I’m Alone” case, which arose from the sinking of a Canadian vessel by a United States coast guard ship, the Canadian Government successfully claimed compensation on behalf of three non-national crew members, asserting that where a claim was on behalf of a vessel, members of the crew were to be deemed, for the purposes of the claim, to be of the same nationality as the vessel. In the Reparation for Injuries advisory opinion two judges, in their separate opinions, accepted the right of a State to exercise protection on behalf of alien crew members.

(5) In 1999, the International Tribunal for the Law of the Sea handed down its decision in the MV “Saiga” (No. 2) case (Saint Vincent and the Grenadines v. Guinea) which provides support for the right of the flag State to seek redress for non-national crew members. The dispute in this case arose out of the arrest and detention of the Saiga by Guinea, while it was supplying oil to fishing vessels off the coast of Guinea. The Saiga was registered in St. Vincent and the Grenadines (“St. Vincent”) and its master and crew were Ukrainian nationals. There were also three Senegalese workers on board at the time of the arrest. Following the arrest, Guinea detained the ship and crew. In proceedings before the International Tribunal for the Law of the Sea, Guinea objected to the admissibility of St. Vincent’s claim, inter alia, on the ground that the injured crew members were not nationals of St. Vincent. The Tribunal dismissed these challenges to the admissibility of the claim and held that Guinea had violated the rights of St. Vincent by arresting and detaining the ship and its crew. It ordered Guinea to pay compensation to St. Vincent for damages to the Saiga and for injury to the crew.

(6) Although the Tribunal treated the dispute mainly as one of direct injury to St. Vincent, the Tribunal’s reasoning suggests that it also saw the matter as a case involving the protection of the crew something akin to, but different from, diplomatic protection. Guinea clearly objected to the admissibility of the claim in respect of the crew on the ground that it constituted a claim for diplomatic protection in respect of non-nationals of St. Vincent. St. Vincent, equally clearly, insisted that it had the right to protect the crew of a ship flying its flag “irrespective of their nationality”. In dismissing Guinea’s objection the Tribunal stated that the United Nations Convention on the Law of the Sea in a number of relevant provisions, including article 292, drew no distinction between nationals and non-nationals of the flag State. It stressed that “the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant”.

(7) There are cogent policy reasons for allowing the flag State to seek redress for the ship’s crew. This was recognized by the Law of the Sea Tribunal in Saiga when it called attention to “the transient and multinational composition of ships’ crews” and stated that large ships “could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue”. Practical considerations relating to the bringing of claims should not be

258 AJIL vol. 29 (1935), 326.
261 Ibid., para. 98.
262 Ibid., para. 103.
263 Ibid., para. 104.
266 Ibid., para. 106.
267 Ibid., para. 107.
overlooked. It is much easier and more efficient for one State to seek redress on behalf of all crew members than to require the States of nationality of all crew members to bring separate claims on behalf of their nationals.

(8) Support for the right of the flag State to seek redress for the ship’s crew is substantial and justified. It cannot, however, be categorized as diplomatic protection. Nor should it be seen as having replaced diplomatic protection. Both diplomatic protection by the State of nationality and the right of the flag State to seek redress for the crew should be recognized, without priority being accorded to either. Ships’ crews are often exposed to hardships emanating from the flag State, in the form of poor working conditions, or from third States, in the event of the ship being arrested. In these circumstances they should receive the maximum protection that international law can offer.

(9) The right of the flag State to seek redress for the ship’s crew is not limited to redress for injuries sustained during or in the course of an injury to the vessel but extends also to injuries sustained in connection with an injury to the vessel resulting from an internationally wrongful act, that is as a consequence of the injury to the vessel. Thus such a right would arise where members of the ship’s crew are illegally arrested and detained after the illegal arrest of the ship itself.

**Article 19**

**Recommended practice**

A State entitled to exercise diplomatic protection according to the present draft articles, should:

(a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;

(b) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and

(c) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

**Commentary**

(1) There are certain practices on the part of States in the field of diplomatic protection which have not yet acquired the status of customary rules and which are not susceptible to transformation into rules of law in the exercise of progressive development of the law. Nevertheless they are desirable practices, constituting necessary features of diplomatic protection, that add strength to diplomatic protection as a means for the protection of human rights and foreign investment. These practices are recommended to States for their consideration in the exercise of diplomatic protection in draft article 19, which recommends that States “should” follow certain practices. The use of recommendatory, and not prescriptive, language of this kind is not unknown to treaties, although it cannot be described as a common feature of treaties. 268

(2) Subparagraph (a), recommends to States that they should give consideration to the possibility of exercising diplomatic protection on behalf of a national who suffers significant injury. The protection of human beings by means of international law is today one of the principal goals of the international legal order, as was reaffirmed by the 2005 World Summit Outcome resolution adopted by the General Assembly on 24 October 2005. 269 This protection may be achieved by many means, including consular protection, resort to international human rights treaties mechanisms, criminal prosecution or action by the Security Council or other international bodies - and diplomatic protection. Which procedure or remedy is most likely to achieve the goal of effective protection will, inevitably, depend on the circumstances of each case. When the protection of foreign nationals is in issue, diplomatic protection is an obvious remedy to which States should give serious consideration. After all it is the remedy with the longest history and has a proven record of effectiveness. Draft article 19, subparagraph (a), serves as a reminder to States that they should consider the possibility of resorting to this remedial procedure.

(3) A State is not under international law obliged to exercise diplomatic protection on behalf of a national who has been injured as a result of an internationally wrongful act attributable to

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268 Article 36 (3) of the Charter of the United Nations, for instance, provides that in recommending appropriate procedures for the settlement of disputes, “the Security Council should also take into consideration that legal disputes should be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court” (emphasis added). Conventions on the law of the sea also employ the term “should” rather than “shall”. Article 3 of the 1958 Geneva Convention on the High Seas, United Nations, Treaty Series, vol. 450, p. 11, provides that “in order to enjoy freedom of the seas on equal terms with coastal States, States having no sea coast should have free access to the sea” (emphasis added). See, too, articles 27, 28, 43 and 123 of the 1982 United Nations Convention on the Law of the Sea.

269 A/RES/60/1, paras. 119-120, 138-140.
another State. The discretionary nature of the State’s right to exercise diplomatic protection is affirmed by draft article 2 of the present draft articles and has been asserted by the International Court of Justice\textsuperscript{270} and national courts,\textsuperscript{271} as shown in the commentary to draft article 2. Despite this there is growing support for the view that there is some obligation, however imperfect, on States, either under international law or national law, to protect their nationals abroad when they are subjected to significant human rights violations. The Constitutions of many States recognize the right of the individual to receive diplomatic protection for injuries suffered abroad,\textsuperscript{272} which must carry with it the corresponding duty of the State to exercise protection. Moreover, a number of national court decisions indicate that although a State has a discretion whether to exercise diplomatic protection or not, there is an obligation on that State, subject to judicial review, to do something to assist its nationals, which may include an obligation to give due consideration to the possibility of exercising diplomatic protection.\textsuperscript{273} In Kaunda and Others v. President of the Republic of South Africa the South Africa Constitutional Court stated that:

“There may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable and a court would order the government to take appropriate action.”\textsuperscript{274}

In these circumstances it is possible to seriously suggest that international law already recognizes the existence of some obligation on the part of a State to consider the possibility of exercising diplomatic protection on behalf of a national who has suffered a significant injury abroad. If customary international law has not yet reached this stage of development then draft article 19, subparagraph (a), must be seen as an exercise in progressive development.

(4) Subparagraph (b), provides that a State “should”, in the exercise of diplomatic protection, “take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought”. In practice States exercising diplomatic protection do have regard to the moral and material consequences of an injury to an alien in assessing the damages to be claimed.\textsuperscript{275} In order to do this it is obviously necessary to consult with the injured person. So, too, with the decision whether to demand satisfaction, restitution or compensation by way of reparation. This has led some scholars to contend that the admonition contained in draft article 19, subparagraph (b), is already a rule of customary international law.\textsuperscript{276} If it is not, draft article 19, subparagraph (b), must also be seen as an exercise in progressive development.

(5) Subparagraph (c) provides that States should transfer any compensation received from the responsible State in respect of an injury to a national to the injured national. This recommendation is designed to encourage the widespread perception that States have an absolute discretion in such matters and are under no obligation to transfer moneys received for a claim based on diplomatic protection to the injured national. This perception has its roots in the Mavrommatis rule and a number of judicial pronouncements. In terms of the Mavrommatis Palestine Concessions dictum a State asserts its own right in exercising diplomatic protection and becomes “the sole claimant”.\textsuperscript{277} Consequently, logic dictates that no restraints are placed on the State, in the interests of the individual, in the settlement of the claim or the payment of any compensation received. That the State has “complete freedom of action” in its exercise of diplomatic protection is confirmed by the Barcelona Traction case.\textsuperscript{278} Despite the fact that the logic of Mavrommatis is undermined by the practice of calculating the amount of damages

\textsuperscript{270} Barcelona Traction case, at p. 44.


\textsuperscript{275} Chorzow Factory case (Merits), P.C.I.J. Reports, Series A. No. 17, p. 28; separate opinion of Judge Morelli in Barcelona Traction case, I.C.J. Reports 1970, p. 223.


\textsuperscript{277} P.C.I.J. Reports 1924, Series A, No. 2, p. 2.

\textsuperscript{278} I.C.J. Reports 1970, p. 3 at p. 44.
claimed on the basis of the injury suffered by the individual, 279 which is claimed to be a rule of customary international law, 280 the view persists that the State has an absolute discretion in the disposal of compensation received. This is illustrated by the dictum of Umpire Parker in the US-German Mixed Claims Commission in Administrative Decision V:

“In exercising such control [the nation] is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation and must exercise an untrammeled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised and the private owner will be bound by the action taken. *Even if payment is made to the espousing nation in pursuance of the award, it has complete control over the fund so paid to and held by it and may, to prevent fraud, correct a mistake or protect the national honour, at its election return the fund to the nation paying it or otherwise dispose of it.*” 281

Similar statements are to be found in a number of English judicial decisions, 282 which are seen by some to be an accurate statement of international law. 283

It is by no means clear that State practice accords with the above view. On the one hand, States agree to lump sum settlements in respect of multiple individual claims which in practice result in individual claims receiving considerably less than was claimed. 284 On the other hand, some States have enacted legislation to ensure that compensation awards are fairly distributed to individual claimants. Moreover, there is clear evidence that in practice States do pay moneys received in diplomatic claims to their injured nationals. In *Administrative Decision V*, Umpire Parker stated:

“... But where a demand is made on behalf of a designated national, and an award and payment is made on that specific demand, the fund so paid is not a national fund in the sense that the title vests in the nation receiving it entirely free from any obligation to account to the private claimant, on whose behalf the claim was asserted and paid and who is the real owner thereof. Broad and misleading statements susceptible of this construction are found in cases where lump-sum awards and payments have been made to the demanding nation covering numerous claims put forward by it and where the tribunal making the award did not undertake to adjudicate each claim or to allocate any specified amount to any designated claim. It is not believed that any case can be cited in which an award has been made by an international tribunal in favour of the demanding nation on behalf of its designated national in which the nation receiving payment of such award has, in the absence of fraud or mistake, hesitated to account to the national designated, or those claiming under him, for the full amount of the award received. So far as the United States is concerned it would seem that the Congress has treated funds paid the nation in satisfaction of specific claims as held ‘in trust for citizens of the United States or others.’” 285

That this is the practice of States is confirmed by scholars. 286 Further evidence of the erosion of the State’s discretion is to be found in the decisions of arbitral tribunals which prescribe how the award is to be divided. 287 Moreover in 1994 the European Court of Human Rights decided in *Beaumartin v. France* 288 that an international agreement making provision for compensation could give rise to an enforceable right on the part of the injured persons to compensation.

279 Chorzow Factory case (Merits) P.C.I.J. Reports 1928, Series A, No. 17, at p. 28.
280 See the authors cited in footnote 276 above.

(7) Subparagraph (c) acknowledges that it would not be inappropriate for a State to make reasonable deductions from the compensation transferred to injured persons. The most obvious justification for such deductions would be to recoup the costs of State efforts to obtain compensation for its nationals, or to recover the cost of goods or services provided by the State to them.

(8) Although there is some support for curtailing the absolute right of the State to withhold payment of compensation received to the injured national in national legislation, judicial decisions and doctrine, this probably does not constitute a settled practice. Nor is there any sense of obligation on the part of States to limit their freedom of disposal of compensation awards. On the other hand, public policy, equity and respect for human rights support the curtailment of the States discretion in the disbursement of compensation. It is against this background that draft article 19, subparagraph (c), has been adopted. While it is an exercise in progressive development it is supported by State practice and equity.
International Court of Justice

Nottebohm (Liechtenstein v. Guatemala)
Second Phase, Judgment

_I.C.J. Reports 1955_
COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE NOTTEBOHM
(LIECHTENSTEIN c. GUATEMALA)

DEUXIÈME PHASE

ARRÊT DU 6 AVRIL 1955

1955

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

NOTTEBOHM CASE
(LIECHTENSTEIN v. GUATEMALA)
SECOND PHASE
JUDGMENT OF APRIL 6th, 1955

Le présent arrêt doit être cité comme suit :
«Affaire Nottebohm (deuxième phase), Arrêt du 6 avril 1955:
C. I. J. Recueil 1955, p. 4.»

This Judgment should be cited as follows :
“Nottebohm Case (second phase), Judgment of April 6th, 1955:
I.C.J. Reports 1955, p. 4.”

No de vente : Sales number 131
IN INTERNATIONAL COURT OF JUSTICE

YEAR 1955

April 6th, 1955

NOTTEBOHM CASE
(LIECHTENSTEIN v. GUATEMALA)

SECOND PHASE

Proceedings instituted by Application.—Objection to admissibility.—Final Conclusions of the Parties.—Nationality as a condition for the exercise of diplomatic protection and for international judicial proceedings.—Liechtenstein Nationality Law of January 4th, 1934.—Naturalization in Liechtenstein.—Domestic jurisdiction with regard to nationality.—Refusal by Guatemala to recognize nationality acquired by naturalization in Liechtenstein.—Conditions to be satisfied in order that nationality conferred upon an individual by a State may be relied upon as against another State and give a title to the exercise of protection against that State.—Real and effective character of nationality.—Real link between the naturalized person and the naturalizing State.

JUDGMENT

Present: President Eackworth; Vice-President Badawi; Judges Basdevant, Zoričić, Klaestad, Read, Hsu Mo, Armand-Ugon, Kojzvnikov, Sir Muhammad Zafirulla Khan, Moreno Quintana, Cordova; M. Guggenheim and M. García Bauer, Judges ad hoc; Registrar López Oliván.

In the Nottebohm Case,

between

de Principality of Liechtenstein,

represented by:

Dr. Erwin H. Loewenfeld, LL.B., Solicitor of the Supreme Court, as Agent,

assisted by:

Professor Georges Sauser-Hall, Honorary Professor at the Universities of Geneva and of Neuchâtel,

Mr. James E. S. Fawcett, D.S.C., of the English Bar,

Mr. Kurt Lipstein, Ph.D., of the English Bar, as Counsel,

and

de Republic of Guatemala,

represented by:

M. V. S. Pinto J., Minister Plenipotentiary, as Agent,

assisted by:

Mme. Henri Rolin, Professor of Law at the Free University of Brussels,

M. Adolfo Molina Orantes, Dean of the Faculty of Jurisprudence of the University of Guatemala, as Counsel,

and by

Mme. A. Dupont-Willemin, of the Geneva Bar, as Secretary,

The Court,

composed as above,

delivers the following Judgment:

By its Judgment of November 18th, 1953, the Court rejected the Preliminary Objection raised by the Government of the Republic of Guatemala to the Application of the Government of the Principality of Liechtenstein. At the same time it fixed time-limits for the further pleadings on the merits. These time-limits were subsequently extended by Orders of January 15th, May 8th and September 13th, 1954. The second phase of the case was ready
for hearing on November 2nd, 1954, when the Rejoinder of the Government of Guatemala was filed.

Public hearings were held on February 10th, 11th, 14th to 19th, 22nd to 24th and on March 2nd, 3rd, 4th, 7th and 8th, 1955. The Court included on the Bench M. Paul Guggenheim, Professor at the Graduate Institute of International Studies of Geneva and a Member of the Permanent Court of Arbitration, chosen as Judge ad hoc by the Government of Liechtenstein, and M. Carlos García Bauer, Professor of the University of San Carlos, former Chairman of the Guatemalan Delegation to the General Assembly of the United Nations, chosen as Judge ad hoc by the Government of Guatemala.

The Agent for the Government of Guatemala having filed a number of new documents, after the closure of the written proceedings, without the consent of the other Party, the Court, in accordance with the provisions of Article 48, paragraph 2, of its Rules, had, after hearing the Parties, to give its decision. Dr. Loewenfeld and Mr. Fawcett, on behalf of the Government of Liechtenstein, and M. Rolin, on behalf of the Government of Guatemala, addressed the Court on this question at the hearings on February 10th and 11th, 1955. The decision of the Court was given at the opening of the hearing on February 14th, 1955. Having taken note of the fact that during the course of the hearings the Agent of the Government of Liechtenstein had given his consent to the production of certain of the new documents; taking into account the special circumstances in connection with the search for, and classification and presentation of, the documents in respect of which consent had been refused, the Court permitted the production of all the documents and reserved to the Agent of the Government of Liechtenstein the right, if he so desired, to avail himself of the opportunity provided for in the second paragraph of Article 48 of the Rules of Court, after having heard the contentions of the Agent of the Government of Guatemala based on these documents, and after such lapse of time as the Court might, on his request, deem just. The Agent of the Government of Liechtenstein, availing himself of this right, filed a number of documents on February 26th, 1955.

At the hearings on February 14th, 1955, and at the subsequent hearings, the Court heard the oral arguments and replies of Dr. Loewenfeld, Professor Sauser-Hall, Mr. Fawcett and Mr. Lipstein, on behalf of the Government of Liechtenstein, and of M. Pinto, M. Rolin and M. Molina, on behalf of the Government of Guatemala.

The following Submissions were presented by the Parties:

On behalf of the Government of Liechtenstein:

in the Memorial:

“The Government of Liechtenstein submit that the Court should adjudicate and declare that:

1. The Government of Guatemala in arresting, detaining, expelling and refusing to readmit Mr. Nottebohm and in seizing and retaining his property without compensation acted in breach of their obligations under international law and consequently in a manner requiring the payment of reparation.

2. In respect of the wrongful arrest, detention, expulsion and refusal to readmit Mr. Nottebohm the Government of Guatemala should pay to the Government of Liechtenstein:

(i) special damages amounting, according to the data received so far, to not less than 20,000 Swiss francs;

(ii) general damages to the amount of 645,000 Swiss francs.

3. In respect of the seizure and retention of the property of Mr. Nottebohm, the Government of Guatemala should submit an account of the profits accruing in respect of the various parts of the property since the dates on which they were seized and should pay the equivalent in Swiss francs (with interest at 6 %, from the date of accrual) of such sum as may be found in that account to be owing by them. Further, the Government of Guatemala should pay damages (at present estimated at 300,000 Swiss francs per annum) representing the additional income which in the opinion of the Court would have been earned by the property if it had remained under the control of its lawful owner.

4. Further, the Government of Guatemala should restore to Mr. Nottebohm all his property which they have seized and retained together with damages for the deterioration of that property. Alternatively, they should pay to the Government of Liechtenstein the sum of 6,750,556 Swiss francs representing the estimated present market value of the seized property had it been maintained in its original condition.”

in the Reply:

“May it please the Court to hold and declare,

As to the pleas of non-admissibility of the claim of Liechtenstein in respect of Mr. Nottebohm:

(1) that there is a dispute between Liechtenstein and Guatemala which is the subject-matter of the application to the Court by the Government of Liechtenstein and that it is admissible for adjudication by the Court without further diplomatic exchanges or negotiations between the Parties;

(2) that the naturalization of Mr. Nottebohm in Liechtenstein on October 20th, 1939, was granted in accordance with the municipal law of Liechtenstein and was not contrary to international law; that in consequence Mr. Nottebohm was from that date divested of his German nationality; and that Liechtenstein’s claim on behalf of Mr. Nottebohm as a national of Liechtenstein is admissible before the Court;

(3) that the plea by Guatemala of the non-exhaustion of local remedies by Mr. Nottebohm is excluded by the prorogation in this case of the jurisdiction of the Court; or alternatively that
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the plea goes properly not to the admissibility of Liechtenstein's claim on his behalf but to the merits of that claim;

(4) that in any event Mr. Nottebohm exhausted all the local remedies in Guatemala which he was able or required to exhaust under the municipal law of Guatemala and under international law.

As to the merits of its claim, the Government of Liechtenstein
repeats the Final Conclusions set out in its Memorial at p. 51 and with reference to paragraphs 2, 3 and 4 of those Final Conclusions, will further ask the Court to order, under Article 50 of the Statute, such inquiry as may be necessary into the account of profits and quantification of damages."

as final Submissions presented at the hearing of March 4th, 1955:

"May it please the Court,
I. as to the pleas of non-admissibility of the claim of Liechtenstein in respect of Mr. Frederic Nottebohm:

(1) to hold and declare that there is a dispute between Liechtenstein and Guatemala, that it forms the subject-matter of the present application to the Court by the Government of Liechtenstein and that it is admissible for adjudication by the Court without further diplomatic communication or negotiations between the parties;

(2) to find and declare that the naturalization of Mr. Frederic Nottebohm in Liechtenstein on October 13th, 1939, was not contrary to international law; and that Liechtenstein's claim on behalf of Mr. Nottebohm as a national of Liechtenstein is admissible before the Court;

(3) to hold and declare:

(a) that in regard to the person of Mr. Frederic Nottebohm he was prevented from exhausting the local remedies and that in any case such remedies would have been ineffective;

(b) (aa) that in regard to the properties in respect to which no decision was given by the Minister upon the application for exoneration, lodged by Mr. Frederic Nottebohm, Mr. Frederic Nottebohm has exhausted the remedies which were available to him in Guatemala and which he was required to exhaust under the municipal law of Guatemala and under international law;

(bb) that in regard to the properties in which a decision was given by the Minister, Mr. Frederic Nottebohm was not required to exhaust the local remedies under international law;

(4) if the Court should not hold and declare in favour of conclusion (3) above to declare nevertheless

that the claim is admissible since the facts disclose a breach of international law by Guatemala in the treatment of the person and property of Mr. Frederic Nottebohm.

II. As to the Merits of its claim:

(5) to adjourn the oral pleadings for not less than three months in order that the Government of Liechtenstein may obtain and assemble documents in support of comments on the new documents produced by the Government of Guatemala;

(6) to request the Government of Guatemala to produce the original or certified copy of the original of the 1922 agreements referred to in the agreements of 8th January, 1924 (Document numbered VIII) and of 15th March, 1938 (Document numbered XI);

(7) to fix in due course a date for the completion of the oral hearings on the Merits;

(8) if the Court should not make any Order as requested in (5)-(7), the Government of Liechtenstein repeats the final conclusions set out in its Memorial at page 51, and with reference to the paragraphs 2, 3 and 4 of those final conclusions further asks the Court to order under Article 50 of the Statute such enquiry as may be necessary into the account of profits and quantification of damages."

On behalf of the Government of Guatemala:

in the Counter-Memorial:

"May it please the Court,
subject to all reservations and without prejudice,
As to admissibility:

(i) to declare that the claim of the Principality of Liechtenstein is inadmissible

(ii) by reason of the absence of any prior diplomatic negotiations;

(iii) because the Principality of Liechtenstein has failed to prove that M. Nottebohm, for whose protection it is acting, properly acquired Liechtenstein nationality in accordance with the law of the Principality;

because, even if such proof were provided, the legal provisions which would have been applied cannot be regarded as in conformity with international law;

and because M. Nottebohm appears in any event not to have lost, or not validly to have lost, his German nationality;

(iii) on the ground of M. Nottebohm's failure to exhaust local remedies;

In the alternative, on the Merits:

to hold that neither in the legislative measures of Guatemala applied in the case of M. Nottebohm, nor in the administrative or
judicial measures taken with regard to him in pursuance of the
said laws, there has been proved any fault such as to involve
the responsibility of the Respondent State to the Principality of
Liechtenstein;

Consequently, to dismiss the claim of the Principality of
Liechtenstein;

In the further alternative, as to the question of the amount claimed:

To hold that there is no case for damages, except in relation to
the property personally owned by Friedrich Nottebohm, and
excluding the shares which he possessed in the firm of Nottebohm
Hermanos, and

further to declare that the Government of Guatemala shall
be discharged from all responsibility on its acting in accordance
with the provisions of Decree No. 900, which contains the law
relating to Agrarian reform.”

in the Rejoinder:

“May it please the Court,
subject to all reservations and without prejudice, as to admissibility:

to declare that the claim of the Principality of Liechtenstein is
inadmissible

(1) on the ground of the absence of any prior diplomatic negotia-
tions.

In the alternative, on this point:

to declare it inadmissible on this ground at least in so far as it
relates to reparation for injury allegedly caused to the person of
Friedrich Nottebohm

(2) on the ground that Nottebohm is not of Liechtenstein na-
tionality.

In the alternative on this point:

to order the production by Liechtenstein of the original docu-
ments in the archives of the central administration and the communal
administration of Maure, together with the records of the Diet
relating to the naturalization of Nottebohm

(3) on the ground of the failure previously to exhaust the local
remedies.

In the alternative on this point:

to declare that this contention is well founded at least in respect
of reparation for injury allegedly caused to the person of Nottebohm
and for the expropriation of property other than his immovable
property and his interests in the immovable property held in the
name of the firm of Nottebohm Hermanos.

In the alternative, on the Merits:

to hold that the laws of Guatemala applied to M. Nottebohm
have violated no rule of international law and that no fault has
been established on the part of the Guatemalan authorities in

their conduct in relation to him such as to involve the responsi-
bility of the Respondent State;

consequently, to dismiss the claim of Liechtenstein.

In the further alternative, in the event of the ordering of an
expert opinion to determine the quantum of damages:

to hold that the amount of damages to be awarded should be
calculated in accordance with the Guatemalan law, namely, Decree
520 and, in respect of certain immovable property, the Agrarian
Reform Law.”

as final Submissions presented at the hearing of March 7th, 1955:

“May it please the Court,
subject to all reservations and without prejudice,
as to admissibility:

to declare that the claim of the Principality of Liechtenstein is
inadmissible

(1) on the ground of the absence of any prior diplomatic negotia-
tions between the Principality of Liechtenstein and Guatemala
such as would disclose the existence of a dispute between the two
States before the filing of the Application instituting proceedings;

in the alternative on this point:

to declare that the claim of the Principality on this ground is
inadmissible, at least in so far as it relates to reparation for injury
allegedly caused to the person of Friedrich Nottebohm;

(2) (a) on the ground that Mr. Nottebohm, for whose protection
the Principality of Liechtenstein is acting before the Court, has
not properly acquired Liechtenstein nationality in accordance
with the law of the Principality;

(b) on the ground that naturalization was not granted to
Mr. Nottebohm in accordance with the generally recognized prin-
ciples in regard to nationality;

(c) in any case, on the ground that Mr. Nottebohm appears to
have solicited Liechtenstein nationality fraudulently, that is to
say, with the sole object of acquiring the status of a neutral national
before returning to Guatemala, and without any genuine intention
to establish a durable link, excluding German nationality, between
the Principality and himself;

in the alternative on this point:

to invite Liechtenstein to produce to the Court, within a time-
limit to be fixed by the latter, all original documents in the archives
relating to the naturalization of Nottebohm and, in particular,
the convocations of members of the Diet to the sitting on Octo-
ber 14th, 1939, and those of the Assembly of Maure citizens on
October 15th, 1939, the agenda and minutes of the aforesaid sittings,
together with the instrument conferring naturalization allegedly
signed by His Highness the Prince Regnant;

(3) on the ground of the non-exhaustion by Friedrich Nottebohm
of the local remedies available to him under the Guatemalan
legislation, whether in regard to his person or his property, even if
it should appear that the complaints against Guatemala were concerned with an alleged original breach of international law;

in the alternative on this point:

to declare that this contention is well founded, at least in respect of reparation for injury allegedly caused to the person of Nottebohm, and to the property, other than immovable property, or shares that he may have owned in immovable property registered as belonging to the Nottebohm Hermanos Company;

in the further alternative on the Merits:

to declare that there is no occasion to order the supplementary enquiry proposed, since it was incumbent on the Principality, on its own initiative, to discover the nature of Friedrich Nottebohm’s interests in the Nottebohm Hermanos Company and the successive changes effected in the status of that Company and in its direct or indirect relations with the Nottebohm Company of Hamburg;

to hold that no violation of international law has been shown to have been committed by Guatemala in regard to Mr. Nottebohm, either in respect of his property or his person;

more especially in regard to the liquidation of his property, to declare that Guatemala was not obliged to regard the naturalization of Friedrich Nottebohm in the Principality of Liechtenstein as binding upon her, or as a bar to his treatment as an enemy national in the circumstances of the case;

consequently, to dismiss the claim of Liechtenstein together with her conclusions;

as a final alternative in regard to the amount of the damages claimed:


to record a finding on behalf of Guatemala that she expressly disputes the proposed valuations, which have no valid justification."

* * *

By the Application filed on December 17th, 1931, the Government of Liechtenstein instituted proceedings before the Court in which it claimed restitution and compensation on the ground that the Government of Guatemala had “acted towards the person and property of Mr. Friedrich Nottebohm, a citizen of Liechtenstein, in a manner contrary to international law”. In its Counter-Memorial, the Government of Guatemala contended that this claim was inadmissible on a number of grounds, and one of its objections to the admissibility of the claim related to the nationality of the person for whose protection Liechtenstein had seised the Court.

It appears to the Court that this plea in bar is of fundamental importance and that it is therefore desirable to consider it at the outset.

Guatemala has referred to a well-established principle of international law, which it expressed in Counter-Memorial, where it is stated that “it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection”. This sentence is taken from a Judgment of the Permanent Court of International Justice (Series A/B, No. 76, p. 16), which relates to the form of diplomatic protection constituted by international judicial proceedings.

Liechtenstein considers itself to be acting in conformity with this principle and contends that Nottebohm is its national by virtue of the naturalization conferred upon him.

* * *

Nottebohm was born at Hamburg on September 16th, 1881. He was German by birth, and still possessed German nationality when, in October 1939, he applied for naturalization in Liechtenstein.

In 1905 he went to Guatemala. He took up residence there and made that country the headquarters of his business activities, which increased and prospered; these activities developed in the field of commerce, banking and plantations. Having been an employee in the firm of Nottebohm Hermanos, which had been founded by his brothers Juan and Arturo, he became their partner in 1912 and later, in 1917, he was made head of the firm. After 1905 he sometimes went to Germany on business and to other countries for holidays. He continued to have business connections in Germany. He paid a few visits to a brother who had lived in Liechtenstein since 1931. Some of his other brothers, relatives and friends were in Germany, others in Guatemala. He himself continued to have his fixed abode in Guatemala until 1943, that is to say, until the occurrence of the events which constitute the basis of the present dispute.

In 1939, after having provided for the safeguarding of his interests in Guatemala by a power of attorney given to the firm of Nottebohm Hermanos on March 22nd, he left that country at a date fixed by Counsel for Liechtenstein as at approximately the end of March or the beginning of April, when he seems to have gone to Hamburg, and later to have paid a few brief visits to Vaduz where he was at the beginning of October 1939. It was then, on October 9th, a little more than a month after the opening of the second World War marked by Germany’s attack on Poland, that his attorney, Dr. Marxer, submitted an application for naturalization on behalf of Nottebohm.

The Liechtenstein Law of January 4th, 1934, lays down the conditions for the naturalization of foreigners, specifies the supporting documents to be submitted and the undertakings to be given and defines the competent organs for giving a decision and the procedure to be followed. The Law specifies certain mandatory requirements, namely, that the applicant for naturalization should prove: (1)
“that the acceptance into the Home Corporation (Heimatverband) of a Liechtenstein commune has been promised to him in case of acquisition of the nationality of the State”; (2) that he will lose his former nationality as a result of naturalization, although this requirement may be waived under stated conditions. It further makes naturalization conditional upon compliance with the requirement of residence for at least three years in the territory of the Principality, although it is provided that “this requirement can be dispensed with in circumstances deserving special consideration and by way of exception”. In addition, the applicant for naturalization is required to submit a number of documents, such as evidence of his residence in the territory of the Principality, a certificate of good conduct issued by the competent authority of the place of residence, documents relating to his property and income and, if he is not a resident in the Principality, proof that he has concluded an agreement with the Revenue authorities, “subsequent to the revenue commission of the presumptive home commune having been heard”. The Law further provides for the payment by the applicant of a naturalization fee, which is fixed by the Princely Government and amounts to at least one half of the sum payable by the applicant for reception into the Home Corporation of a Liechtenstein commune, the promise of such reception constituting a condition under the Law for the grant of naturalization.

The Law reveals concern that naturalization should only be granted with knowledge of all the pertinent facts, in that it expressly provides for an inquiry into the relations of the applicant with the country of his former nationality, as well as into all other personal and family circumstances, and adds that “the grant of nationality is barred where these relations and circumstances are such as to cause apprehension that prejudice of any kind may ensue to the State by reason of the admission to nationality”.

As to the consideration of the application by the competent organs and the procedure to be followed by them, the Law provides that the Government, after having examined the application and the documents pertaining thereto, and after having obtained satisfactory information concerning the applicant, shall submit the application to the Diet. If the latter approves the application, the Government shall submit the requisite request to the Prince, who alone is entitled to confer nationality of the Principality.

Finally, the Law empowers the Princely Government, within a period of five years from the date of naturalization, to withdraw Liechtenstein nationality from any person who may have acquired it if it appears that the requirements laid down in the Law were not satisfied; it likewise provides that the Government may at any time deprive a person of his nationality if the naturalization was fraudulently obtained.

This was the legal position with regard to applications for naturalization at the time when Nottebohm’s application was submitted.

On October 9th, 1939, Nottebohm, “resident in Guatemala since 1905 (at present residing as a visitor with his brother, Hermann Nottebohm, in Vaduz)”, applied for admission as a national of Liechtenstein and, at the same time, for the previous conferment of citizenship in the Commune of Mauren. He sought dispensation from the condition of three years’ residence as prescribed by law, without indicating the special circumstances warranting such waiver. He submitted a statement of the Crédit Suisse in Zurich concerning his assets, and undertook to pay 25,000 Swiss francs to the Commune of Mauren, 12,500 Swiss francs to the State, to which was to be added the payment of dues in connection with the proceedings. He further stated that he had made “arrangements with the Revenue Authorities of the Government of Liechtenstein for the conclusion of a formal agreement to the effect that he will pay an annual tax of naturalization amounting to Swiss francs 1,000, of which Swiss francs 600 are payable to the Commune of Mauren and Swiss francs 400 are payable to the Principality of Liechtenstein, subject to the proviso that the payments of these taxes will be set off against ordinary taxes which will fall due if the applicant takes up residence in one of the Communes of the Principality”. He further undertook to deposit as security a sum of 30,000 Swiss francs. He also gave certain general information as to his financial position and indicated that he would never become a burden to the Commune whose citizenship he was seeking.

Lastly, he requested “that naturalization proceedings be initiated and concluded before the Government of the Principality and before the Commune of Mauren without delay, that the application be then placed before the Diet with a favourable recommendation and, finally, that it be submitted with all necessary expedition to His Highness the Reigning Prince”.

On the original typewritten application which has been produced in a photostatic copy, it can be seen that the name of the Commune of Mauren and the amounts to be paid were added by hand, a fact which gave rise to some argument on the part of Counsel for the Parties. There is also a reference to the “Vorausverständnis” of the Reigning Prince obtained on October 13th, 1939, which Liechtenstein interprets as showing the decision to grant naturalization, which interpretation has, however, been questioned. Finally, there is annexed to the application an otherwise blank sheet bearing the signature of the Reigning Prince, “Franz Josef”, but without any date or other explanation.

A document dated October 15th, 1939, certifies that on that date the Commune of Mauren conferred the privilege of its citizenship upon Mr. Nottebohm and requested the Government to transmit it to the Diet for approval. A certificate of October 17th, 1939,
evidences the payment of the taxes required to be paid by Mr. Nottebohm. On October 20th, 1939, Mr. Nottebohm took the oath of allegiance and a final arrangement concerning liability to taxation was concluded on October 23rd.

This was the procedure followed in the case of the naturalization of Nottebohm.

A certificate of nationality has also been produced, signed on behalf of the Government of the Principality and dated October 25th, 1939, to the effect that Nottebohm was naturalized by Supreme Resolution of the Reigning Prince dated October 13th, 1939.

Having obtained a Liechtenstein passport, Nottebohm had it visa-ed by the Consul General of Guatemala in Zurich on December 1st, 1939, and returned to Guatemala at the beginning of 1940, where he resumed his former business activities and in particular the management of the firm of Nottebohm Hermanos.

* * *

Relying on the nationality thus conferred on Nottebohm, Liechtenstein considers itself entitled to seize the Court of its claim on his behalf, and its Final Conclusions contain two submissions in this connection. Liechtenstein requests the Court to find and declare, first, “that the naturalization of Mr. Frederic Nottebohm in Liechtenstein on October 13th, 1939, was not contrary to international law”, and, secondly, “that Liechtenstein’s claim on behalf of Mr. Nottebohm as a national of Liechtenstein is admissible before the Court”.

The Final Conclusions of Guatemala, on the other hand, request the Court “to declare that the claim of the Principality of Liechtenstein is inadmissible”, and set forth a number of grounds relating to the nationality of Liechtenstein granted to Nottebohm by naturalization.

Thus, the real issue before the Court is the admissibility of the claim of Liechtenstein in respect of Nottebohm. Liechtenstein’s first submission referred to above is a reason advanced for a decision by the Court in favour of Liechtenstein, while the several grounds given by Guatemala on the question of nationality are intended as reasons for the inadmissibility of Liechtenstein’s claim. The present task of the Court is limited to adjudicating upon the admissibility of the claim of Liechtenstein in respect of Nottebohm on the basis of such reasons as it may itself consider relevant and proper.

In order to decide upon the admissibility of the Application, the Court must ascertain whether the nationality conferred on Nottebohm by Liechtenstein by means of a naturalization which took place in the circumstances which have been described, can be validly invoked as against Guatemala, whether it bestows upon Liechtenstein a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala and therefore entitles it to seize the Court of a claim relating to him. In this connection, Counsel for Liechtenstein said: “the essential question is whether Mr. Nottebohm, having acquired the nationality of Liechtenstein, that acquisition of nationality is one which must be recognized by other States”. This formulation is accurate, subject to the twofold reservation that, in the first place, what is involved is not recognition for all purposes but merely for the purposes of the admissibility of the Application, and, secondly, that what is involved is not recognition by all States but only by Guatemala.

The Court does not propose to go beyond the limited scope of the question which it has to decide, namely whether the nationality conferred on Nottebohm can be relied upon as against Guatemala in justification of the proceedings instituted before the Court. It must decide this question on the basis of international law; to do so is consistent with the nature of the question and with the nature of the Court’s own function.

* * *

In order to establish that the Application must be held to be admissible, Liechtenstein has argued that Guatemala formerly recognized the naturalization which it now challenges and cannot therefore be heard to put forward a contention which is inconsistent with its former attitude.

Various documents, facts and actions have been relied upon in this connection.

Reliance has been placed on the fact that, on December 15th, 1939, the Consul General of Guatemala in Zurich entered a visa in the Liechtenstein passport of Mr. Nottebohm for his return to Guatemala; that on January 29th, 1940, Nottebohm informed the Ministry of External Affairs in Guatemala that he had adopted the nationality of Liechtenstein and therefore requested that the entry relating to him in the Register of Aliens should be altered accordingly, a request which was granted on January 31st; that on February 9th, 1940, a similar amendment was made to his identity document, and lastly, that a certificate to the same effect was issued to him by the Civil Registry of Guatemala on July 1st, 1940.

The acts of the Guatemalan authorities just referred to proceeded on the basis of the statements made to them by the person concerned. The one led to the other. The only purpose of the first, as appears from Article 9 of the Guatemalan law relating to pass-
ports, was to make possible or facilitate entry into Guatemala, and nothing more. According to the Aliens Act of January 25th, 1936, Article 49, entry in the Register “constitutes a legal presumption that the alien possesses the nationality there attributed to him, but evidence to the contrary is admissible”. All of these acts have reference to the control of aliens in Guatemala and not to the exercise of diplomatic protection. When Notteboom thus presented himself before the Guatemalan authorities, the latter had before them a private individual: there did not thus come into being any relationship between governments. There was nothing in all this to show that Guatemala then recognized that the naturalization conferred upon Notteboom gave Liechtenstein any title to the exercise of protection.

Although the request sent by Notteboom Hermanos to the Minister of Finance and Public Credit on September 13th, 1940, with reference to the inclusion of the firm on the British Statutory List, referred to the fact that only one of the partners was “a national of Liechtenstein/Switzerland”, this point was only made incidentally, and the whole request was based on the consideration that the firm “is a wholly Guatemalan business” and on the interests of the “national economy”. It was on this basis that the matter was discussed, and no reference whatsoever was made to any intervention by the Government of Liechtenstein at that time.

Similarly unconnected with the exercise of protection was the Note addressed on October 18th, 1943, by the Minister of External Affairs to the Swiss Consul who, having understood that the registration documents indicated that Notteboom was a Swiss citizen of Liechtenstein, requested, in a Note of September 25th, 1943, that this matter might be clarified. He received the reply that there was no such indication of Swiss nationality in the documents and, although the Consul had referred to the representation of the interests of the Principality abroad by the representatives of the Swiss Government, the reply sent to him made no allusion to the exercise, by or on behalf of Liechtenstein, of protection in favour of Notteboom.

When, on October 20th, 1943, the Swiss Consul asked that “Mr. Walter Schellenberg of Swiss nationality and Mr. Federico Notteboom of Liechtenstein”, who had been transferred to the United States Military Base for the purpose of being deported, should, “as citizens of neutral countries”, be returned home, the Minister of External Affairs of Guatemala replied, on October 22nd, that the action taken was attributable to the authorities of the United States, and made no reference to the nationality of Notteboom.

In a letter of the Swiss Consul of December 15th, 1944, to the Minister of External Affairs, reference is made to the entry on the Black Lists of “Frederick Notteboom, a national of Liechtenstein”. Neither the text of these lists nor any extract therefrom has been produced, but this is not germane to the present discussion. The important fact is that Guatemala, in its reply dated December 20th, 1944, expressly stated that it could not “recognize that Mr. Notteboom, a German subject habitually resident in Guatemala, has acquired the nationality of Liechtenstein without changing his habitual residence”. The Court has not at present to consider the validity of the ground put forward for disputing Notteboom’s nationality, which was subsequently put forward to justify the cancellation of his registration as a citizen of the “Condado” of Liechtenstein. It is sufficient for it to note that there is here an express denial by Guatemala of Notteboom’s Liechtenstein nationality.

Notteboom’s name having been removed from the Register of Resident Aliens, his relative Karl Heinz Notteboom Stoltz, on July 24th, 1946, requested the cancellation of the decision and the restoration of Notteboom’s name to the Register as a citizen of Liechtenstein, putting forward a number of considerations, essentially based on the exclusive right of Liechtenstein to decide as to the nationality in question and the duty of Guatemala to conform to such decision. Far from accepting the considerations thus put forward, the Minister of External Affairs rejected the request, on August 1st, 1946, merely saying that it was pointless, since Notteboom was no longer a resident of Guatemala.

There is nothing here to show that before the institution of proceedings Guatemala had recognized Liechtenstein’s title to exercise protection in favour of Notteboom and that it is thus precluded from denying such a title.

Nor can the Court find any recognition of such title in the communication signed by the Minister of External Affairs of Guatemala, addressed to the President of the Court, on September 9th, 1952. In this communication reference is made to measures taken against Notteboom “who claims to be a national of the claimant State” (“quien se alega ser ciudadano del Estado reclamante”). Then, reference having been made to the claim presented by the Government of the Principality of Liechtenstein with regard to these measures, it is stated that the Government of Guatemala “is quite willing to begin negotiations with the Government of the said Principality with a view to arriving at an amicable solution, either in the sense of a direct settlement, an arbitration or judicial settlement”. It would constitute an obstacle to the opening of negotiations for the purpose of reaching a settlement of an international dispute or of concluding a special agreement for arbitration and would hamper the use of the means of settlement recommended by Article 33 of the Charter of the United Nations, to interpret an offer to have recourse
to such negotiations or such means, consent to participate in them or actual participation, as implying the abandonment of any defence which a party may consider it is entitled to raise or as implying acceptance of any claim by the other party, when no such abandonment or acceptance has been expressed and where it does not indisputably follow from the attitude adopted. The Court cannot see in the communication of September 9th, 1952, any admission by Guatemala of the possession by Nottebohm of a nationality which it clearly disputed in its last official communication on this subject, namely, the letter of December 20th, 1944, to the Swiss Consul, still less can it find any recognition of Liechtenstein's title, based on such nationality, to exercise its protection and to seize the Court in the present case.

* * *

Since no proof has been adduced that Guatemala has recognized the title to the exercise of protection relied upon by Liechtenstein as being derived from the naturalization which it granted to Nottebohm, the Court must consider whether such an act of granting nationality by Liechtenstein directly entails an obligation on the part of Guatemala to recognize its effect, namely, Liechtenstein's right to exercise its protection. In other words, it must be determined whether that unilateral act by Liechtenstein is one which can be relied upon against Guatemala in regard to the exercise of protection. The Court will deal with this question without considering that of the validity of Nottebohm's naturalization according to the law of Liechtenstein.

It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation. It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain. Furthermore, nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.

But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seize the Court.

The naturalization of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction. The question to be decided is whether that act has the international effect here under consideration.

International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions: this is the case, for instance, of a judgment given by the competent court of a State which it is sought to invoke in another State.

In the present case it is necessary to determine whether the naturalization conferred on Nottebohm can be successfully invoked against Guatemala, whether, as has already been stated, it can be relied upon as against that State, so that Liechtenstein is thereby entitled to exercise its protection in favour of Nottebohm against Guatemala.

When one State has conferred its nationality upon an individual and another State has conferred its own nationality on the same person, it may occur that each of these States, considering itself to have acted in the exercise of its domestic jurisdiction, adheres to its own view and bases itself thereon in so far as its own actions are concerned. In so doing, each State remains within the limits of its domestic jurisdiction.

This situation may arise on the international plane and fall to be considered by international arbitrators or by the courts of a third State. If the arbitrators or the courts of such a State should confine themselves to the view that nationality is exclusively within the domestic jurisdiction of the State, it would be necessary for them to find that they were confronted by two contradictory assertions made by two sovereign States, assertions which they would consequently have to regard as of equal weight, which would obliged them to allow the contradiction to subsist and thus fail to resolve the conflict submitted to them.

In most cases arbitrators have not strictly speaking had to decide a conflict of nationality as between States, but rather to determine whether the nationality invoked by the applicant State was one which could be relied upon as against the respondent State, that is to say, whether it entitled the applicant State to exercise protection. International arbitrators, having before them allegations of nationality by the applicant State which were contested by the respondent State, have sought to ascertain whether nationality had been conferred by the applicant State in circumstances such as to give rise to an obligation on the part
of the respondent State to recognize the effect of that nationality. In order to decide this question arbitrators have evolved certain principles for determining whether full international effect was to be attributed to the nationality invoked. The same issue is now before the Court: it must be resolved by applying the same principles.

The courts of third States, when confronted by a similar situation, have dealt with it in the same way. They have done so not in connection with the exercise of protection, which did not arise before them, but where two different nationalities have been invoked before them they have had, not indeed to decide such a dispute as between the two States concerned, but to determine whether a given foreign nationality which had been invoked before them was one which they ought to recognize.

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.

Similarly, the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality.

The same tendency prevails in the writings of publicists and in practice. This notion is inherent in the provisions of Article 3, paragraph 2, of the Statute of the Court. National laws reflect this tendency when, inter alia, they make naturalization dependent on conditions indicating the existence of a link, which may vary in their purpose or in their nature but which are essentially concerned with this idea. The Liechtenstein Law of January 4th, 1934, is a good example.

The practice of certain States which refrain from exercising protection in favour of a naturalized person when the latter has, in fact, by his prolonged absence, severed his links with what is no longer for him anything but his nominal country, manifests the view of these States that, in order to be capable of being invoked against another State, nationality must correspond with the factual situation. A similar view is manifested in the relevant provisions of the bilateral nationality treaties concluded between the United States of America and other States since 1868, such as those sometimes referred to as the Bancroft Treaties, and in the Pan-American Convention, signed at Rio de Janeiro on August 13th, 1906, on the status of naturalized citizens who resume residence in their country of origin.

The character thus recognized on the international level as pertaining to nationality is in no way inconsistent with the fact that international law leaves it to each State to lay down the rules governing the grant of its own nationality. The reason for this is that the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each State. On the other hand, a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States.

The requirement that such a concordance must exist is to be found in the studies carried on in the course of the last thirty years upon the initiative and under the auspices of the League of Nations and the United Nations. It explains the provision which the Conference for the Codification of International Law, held at The Hague in 1930, inserted in Article 1 of the Convention relating to the Conflict of Nationality Laws, laying down that the law enacted by a State for the purpose of determining who are its nationals "shall be recognized by other States in so far as it is consistent with .... international custom, and the principles of law generally recognized with regard to nationality". In the same spirit, Article 5 of the Convention refers to criteria of the individual's genuine connections for the purpose of resolving questions of dual nationality which arise in third States.

According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.
Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State. As the Permanent Court of International Justice has said and has repeated, “by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law” (P.C.I.J., Series A, No. 2, p. 12, and Series A/B, Nos. 20-21, p. 17).

* * *

Since this is the character which nationality must present when it is invoked to furnish the State which has granted it with a title to the exercise of protection and to the institution of international judicial proceedings, the Court must ascertain whether the nationality granted to Nottebohm by means of naturalization is of this character or, in other words, whether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter.

Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have far-reaching consequences and involve profound changes in the destiny of the individual who obtains it. It concerns him personally, and to consider it only from the point of view of its repercussions with regard to his property would be to misunderstand its profound significance. In order to appraise its international effect, it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him.

At the time of his naturalization does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State?

The essential facts appear with sufficient clarity from the record. The Court considers it unnecessary to have regard to the documents purporting to show that Nottebohm had or had not retained his interests in Germany, or to have regard to the alternative submission of Guatemala relating to a request to Liechtenstein to produce further documents. It would further point out that the Government of Liechtenstein, in asking in its Final Conclusions for an adjournment of the oral proceedings and an opportunity to present further documents, did so only for the eventuality of the Application being held to be admissible and not for the purpose of throwing further light upon the question of the admissibility of the Application.

The essential facts are as follows:

At the date when he applied for naturalization Nottebohm had been a German national from the time of his birth. He had always retained his connections with members of his family who had remained in Germany and he had always had business connections with that country. His country had been at war for more than a month, and there is nothing to indicate that the application for naturalization then made by Nottebohm was motivated by any desire to dissociate himself from the Government of his country.

He had been settled in Guatemala for 34 years. He had carried on his activities there. It was the main seat of his interests. He returned there shortly after his naturalization, and it remained the centre of his interests and of his business activities. He stayed there until his removal as a result of war measures in 1943. He subsequently attempted to return there, and he now complains of Guatemala’s refusal to admit him. There, too, were several members of his family who sought to safeguard his interests.

In contrast, his actual connections with Liechtenstein were extremely tenuous. No settled abode, no prolonged residence in that country at the time of his application for naturalization: the application indicates that he was paying a visit there and confirms the transient character of this visit by its request that the naturalization proceedings should be initiated and concluded without delay. No intention of settling there was shown at that time or realized in the ensuing weeks, months or years—on the contrary, he returned to Guatemala very shortly after his naturalization and showed every intention of remaining there. If Nottebohm went to Liechtenstein in 1946, this was because of the refusal of Guatemala to admit him. No indication is given of the grounds warranting the waiver of the condition of residence, required by the 1934 Nationality Law, which waiver was implicitly granted to him. There is no allegation of any economic interests or of any activities exercised or to be exercised in Liechtenstein, and no manifestation of any intention whatsoever to transfer all or some of his interests and his business activities to Liechtenstein. It is unnecessary in this connection to attribute much importance to the promise to pay the taxes levied at the time of his naturalization. The only links to be discovered between the Principality and Nottebohm are the short sojourns already referred to and the presence in Vaduz of one of his brothers; but his brother’s presence is referred
to in his application for naturalization only as a reference to his good conduct. Furthermore, other members of his family have asserted Nottebohm’s desire to spend his old age in Guatemala.

These facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.

Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm’s membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations—other than fiscal obligations—and exercising the rights pertaining to the status thus acquired.

Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala and its claim must, for this reason, be held to be inadmissible.

The Court is not therefore called upon to deal with the other pleas in bar put forward by Guatemala or the Conclusions of the Parties other than those on which it is adjudicating in accordance with the reasons indicated above.

For these reasons,

The Court,

by eleven votes to three,

Holds that the claim submitted by the Government of the Principality of Liechtenstein is inadmissible.
International Court of Justice

Interhandel
(Switzerland v. United States of America)
Preliminary Objections, Judgment

*I.C.J. Reports 1959*
COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DE L'INTERHANDEL
(SUISSE C. ÉTATS-UNIS D'AMÉRIQUE)
(EXCEPTIONS PRÉLIMINAIRES)

ARRÊT DU 21 MARS 1959

1959

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

INTERHANDEL CASE
(SWITZERLAND v. UNITED STATES OF AMERICA)
(PRELIMINARY OBJECTIONS)

JUDGMENT OF MARCH 21st, 1959

Le présent arrêt doit être cité comme suit:

« Affaire de l'Interhandel,

This Judgment should be cited as follows:

“Interhandel Case,

N° de vente : 205
Sales number 205
INTERNATIONAL COURT OF JUSTICE

YEAR 1959

March 21st, 1959

INTERHANDEL CASE
(SWITZERLAND v. UNITED STATES OF AMERICA)
(PRELIMINARY OBJECTIONS)

Declarations of acceptance of compulsory jurisdiction of Court.—Reservation ratione temporis with regard to date on which dispute arose.—Operation of principle of reciprocity.—Domestic jurisdiction of United States and scope of reservation (b) of its declaration of acceptance of compulsory jurisdiction of Court.—Application of rule of exhaustion of local remedies.

JUDGMENT

Present: President Klaestad; Vice-President Zafirulla Khan; Judges Basdevant, Hackworth, Winiarski, Badawi, Armand-Ugon, Kojevnikov, Sir Hersch Lauterpacht, Moreno Quintana, Córdova, Wellington Koo, Sipropoulos, Sir Percy Spender; Judge ad hoc CARRY; Deputy-Registrar Garnier-Coignet.

INTERHANDEL CASE (JUDGMENT OF 21 III 59)

In the Interhandel case,

between

the Swiss Confederation,

represented by

M. Georges Sauser-Hall, Professor emeritus of the Universities of Geneva and Neuchâtel,

as Agent,

and by

M. Paul Guggenheim, Professor at the Law Faculty of the University of Geneva and at the Graduate Institute of International Studies,

as Co-Agent,

assisted by

M. Henri Thévenaz, Professor of International Law at the University of Neuchâtel,

as Counsel and Expert,

and

M. Michael Gelzer, Doctor of Laws,

M. Hans Miesch, Doctor of Laws, First Secretary of Embassy,

as Experts,

and

the United States of America,

represented by

the Honorable Loftus Becker, Legal Adviser of the Department of State,

as Agent,

assisted by

Mr. Stanley D. Metzger, Assistant Legal Adviser for Economic Affairs, Department of State,

Mr. Sidney B. Jacoby, Professor of Law, Georgetown University,

as Counsel,

The Court,

composed as above,

delivers the following Judgment:

On October 2nd, 1957, the Ambassador of the Swiss Confederation to the Netherlands filed with the Registrar an Application dated October 1st instituting proceedings in the Court relating to a dispute which had arisen between the Swiss Confederation and the United
States of America with regard to the claim by Switzerland to the restitution by the United States of the assets of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel).

The Application, which invoked Article 36, paragraph 2, of the Statute and the acceptance of the compulsory jurisdiction of the Court by the United States of America on August 26th, 1946, and by Switzerland on July 28th, 1948, was, in accordance with Article 40, paragraph 2, of the Statute, communicated to the Government of the United States of America. In accordance with paragraph 3 of the same Article, the other Members of the United Nations and the non-Member States entitled to appear before the Court were notified.

Time-limits for the filing of the Memorial and the Counter-Memorial were fixed by an Order of the Court on October 24th, 1957, and subsequently extended at the request of the Parties by an Order of January 15th, 1958. The Memorial of the Swiss Government was filed within the time-limit fixed by that Order. Within the time-limit fixed for the filing of the Counter-Memorial, the Government of the United States of America filed preliminary objections to the jurisdiction of the Court. On June 26th, 1958, an Order recording that the proceedings on the merits were suspended under the provisions of Article 62 of the Rules of Court, granted the Swiss Government a time-limit expiring on September 22nd, 1958, for the submission of a written statement of its observations and submissions on the preliminary objections. The written statement was filed on that date and the case became ready for hearing in respect of the preliminary objections.

The Court not including upon the Bench a judge of Swiss nationality, the Swiss Government, pursuant to Article 31, paragraph 2, of the Statute, chose M. Paul Carry, Professor of Commercial Law at the University of Geneva, to sit as Judge ad hoc in the present case.

Hearings were held on November 5th, 6th, 8th, 10th, 11th, 12th, 14th and 17th, 1958, in the course of which the Court heard the oral arguments and replies of the Honorable Loftus Becker, on behalf of the Government of the United States of America, and of M. Sauser-Hall and M. Guggenheim, on behalf of the Swiss Government.

In the course of the written and oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Swiss Confederation, in the Application:

"May it please the Court:

To communicate the present Application instituting proceedings to the Government of the United States of America, in accordance with Article 40, paragraph 2, of the Statute of the Court;

To adjudge and declare, whether the Government of the United States of America appears or not, after considering the contentions of the Parties,

1. that the Government of the United States of America is under an obligation to restore the assets of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) to that company;

2. in the alternative, that the dispute is one which is fit for submission for judicial settlement, arbitration or conciliation under the conditions which it will be for the Court to determine.

The Swiss Federal Council further reserves the right to supplement and to modify its submissions."

On behalf of the same Government, in the Memorial:

"May it please the Court to adjudge and declare:

A. Principal Submissions

1. that the Government of the United States of America is under an obligation to restore the assets of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel);

2. in the alternative, that in case the Court should not consider that proof of the non-enemy character of the property of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) has been furnished, an expert selected by the Court should be designated, in accordance with Article 50 of the Statute of the Court, with the task of

(a) examining the documents put at the disposal of the American Courts by Interhandel,

(b) examining the files and accounting records of the Sturzenegger Bank the seizure of which was ordered by the public authorities (Ministère public) of the Swiss Confederation on June 15th, 1950, subject to the reservation, however, that the expert in his expert opinion shall refer only to such documents as relate to the Interhandel case and shall be instructed to observe absolute secrecy concerning the documents of the Sturzenegger Bank, its clients and all other individuals and legal persons if such documents are not relevant to the case pending before the Court,

for the purpose of enabling the Court to determine the enemy or non-enemy character of the Interhandel assets in the General Aniline and Film Corporation.

B. Alternative Submissions in case the Court should not sustain the Swiss request to examine the merits of the dispute

1. (a) that the Court has jurisdiction to decide whether the dispute is one which is fit for submission either to the arbitral tribunal provided for in Article VI of the
Washington Accord of 1946, or to the arbitral tribunal provided for by the Treaty of Arbitration and Conciliation between Switzerland and the United States of February 16th, 1931;

(b) that in case of an affirmative reply to submission (a) either the arbitral tribunal provided for in the Washington Accord or the tribunal provided for in the Treaty of Arbitration and Conciliation of 1931, has jurisdiction to examine the dispute, and that the choice of one or the other tribunal belongs to the applicant State;

2. in the alternative:

(a) that the Court has jurisdiction to decide whether the dispute is fit to be submitted to the arbitral tribunal provided for by Article VI of the Washington Accord of 1946;

(b) that in case of an affirmative reply to submission (a) the said tribunal has jurisdiction to examine the dispute;

3. in the further alternative:

(a) that the Court has jurisdiction to decide whether the dispute is fit to be submitted to the arbitral tribunal provided for by the Treaty of Arbitration and Conciliation of 1931 between the Swiss Confederation and the United States of America;

(b) that in case of an affirmative reply to submission (a) the said tribunal has jurisdiction to examine the dispute;

4. in the final alternative:

that the dispute between the Swiss Confederation and the United States of America should be submitted to the examination of the Permanent Commission of Conciliation provided for in Articles II-IV of the Treaty of Arbitration and Conciliation of 1931.

The Swiss Federal Council furthermore reserves the right to supplement and to amend the preceding submissions."

On behalf of the Government of the United States of America, in the Preliminary Objections:

"May it please the Court to judge and decide:

(1) First Preliminary Objection

that there is no jurisdiction in the Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that the dispute arose before August 26th, 1948, the date on which the acceptance of the Court's compulsory jurisdiction by this country became effective:

(2) Second Preliminary Objection

that there is no jurisdiction in the Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that the dispute arose before July 28th, 1948, the date on which the acceptance of the Court's compulsory jurisdiction by this country became binding on this country as regards Switzerland;

(3) Third Preliminary Objection

that there is no jurisdiction in this Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that Interhandel, whose case Switzerland is espousing, has not exhausted the local remedies available to it in the United States courts;

(4) Fourth Preliminary Objection

(a) that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the sale or disposition of the vested shares of General Aniline and Film Corporation (including the passing of good and clear title to any person or entity), for the reason that such sale or disposition has been determined by the United States of America, pursuant to paragraph (b) of the Conditions attached to this country's acceptance of this Court's jurisdiction, to be a matter essentially within the domestic jurisdiction of this country; and

(b) that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the seizure and retention of the vested shares of General Aniline and Film Corporation, for the reason that such seizure and retention are, according to international law, matters within the domestic jurisdiction of the United States.

The United States of America reserves the right to supplement or to amend the preceding submissions, and, generally, to submit any further legal argument."

On behalf of the Swiss Government, in its Observations and Submissions:

"May it please the Court to adjudge and declare:

1. to dismiss the first preliminary objection of the United States of America;

2. to dismiss the second preliminary objection of the United States of America;

3. either to dismiss, or to join to the merits, the third preliminary objection of the United States of America;

4. either to dismiss, or to join to the merits, preliminary objection 4 (a) of the United States of America;

5. either to dismiss, or to join to the merits, preliminary objection 4 (b) of the United States of America."
The Swiss Federal Council maintains and confirms its main and alternative submissions as set out on pages 67 and 68 of the Memorial of the Swiss Confederation of March 3rd, 1958.

The Swiss Federal Council supplements its main submissions by the following alternative submission:

The Swiss Federal Council requests the Court to declare that the property, rights and interests which the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) possesses in General Aniline and Film Corporation have the character of non-enemy (Swiss) property, and consequently to declare that by refusing to return the said property the Government of the United States of America is in breach of Article IV, paragraph 1, of the Washington Accord of May 25th, 1946, and of the obligations binding upon it under the general rules of international law.

The Swiss Federal Council further reserves the right to supplement and to modify the preceding submissions.

On behalf of the same Government, Submissions deposited in the Registry on November 3rd, 1958:

"A. Principal Submissions"

1. that the Government of the United States of America is under an obligation to restore the assets of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel);

2. in the alternative, that in case the Court should not consider that proof of the non-enemy character of the property of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) has been furnished, an expert selected by the Court should be designated, in accordance with Article 50 of its Statute, with the task of:
   (a) examining the documents put at the disposal of the American courts by Interhandel,
   (b) examining the files and accounting records of the Sturzenegger Bank, the seizure of which was ordered by the public authorities (Ministère public) of the Swiss Confederation on June 15th, 1950, subject to the reservation, however, that the expert in his expert opinion shall refer only to such documents as relate to the Interhandel case, and shall be instructed to observe absolute secrecy concerning the documents of the Sturzenegger Bank, its clients and all other individuals and legal persons, if such documents are not relevant to the case pending before the Court,

for the purpose of enabling the Court to determine the enemy or non-enemy character of the Interhandel assets in the General Aniline and Film Corporation.

B. Alternative Principal Submission

The Swiss Federal Council requests the Court to declare that the property, rights and interests which the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) possesses in General Aniline and Film Corporation have the character of non-enemy (Swiss) property, and consequently to declare that by refusing to return the said property, the Government of the United States is acting contrary to the decision of January 5th, 1948, of the Swiss Authority of Review based on the Washington Accord, and is in breach of Article IV, paragraph 1, of the Washington Accord of May 25th, 1946, and of the obligations binding upon it under the general rules of the law of nations.

C. Submissions regarding the Submissions of the Government of the United States following its Preliminary Objections

1. To dismiss the first preliminary objection of the United States of America;

2. To dismiss the second preliminary objection of the United States;

3. Either to dismiss, or to join to the merits, the third preliminary objection of the United States of America;

4. Either to dismiss, or to join to the merits, the preliminary objection 4 (a) of the United States of America;

   either to dismiss, or to join to the merits, the preliminary objection 4 (b) of the United States of America;

In the alternative

should the Court uphold one or the other of the preliminary objections of the United States of America, to declare its competence in any case to decide whether the United States of America is under an obligation to submit the dispute regarding the validity of the Swiss Government’s claim either to the arbitral procedure provided for in Article VI of the Washington Accord of 1946, or to the Arbitral Tribunal provided for in the 1931 Treaty of Arbitration and Conciliation, or to the Conciliation Commission provided for in the same Treaty, and to fix the subsequent procedure.

D. Submissions on the merits in the event of the Court accepting one or other of the preliminary objections of the United States of America and accepting jurisdiction in conformity with the alternative submission as under C

1. To declare that the United States of America is under an obligation to submit the dispute for examination either to the arbitral procedure of the Washington Accord or to the Tribunal provided for in the Arbitration and Conciliation Treaty of 1931, and that the choice of one or the other Tribunal belongs to the Applicant State.

2. In the alternative:

that the United States of America is under an obligation to submit the dispute to the arbitral procedure provided for in Article VI of the Washington Accord of 1946.
3. *In the further alternative:*

that the United States of America is under an obligation to submit the dispute to the Arbitral Tribunal provided for in the Arbitration and Conciliation Treaty of 1933 between the Swiss Confederation and the United States of America.

4. *In the final alternative:*

that the United States of America is under an obligation to submit the dispute for examination by the Permanent Conciliation Commission provided for in Articles II-IV of the Arbitration and Conciliation Treaty of 1933.

At the hearing on November 6th, 1958, the Agent for the Government of the United States of America reaffirmed the submissions set forth in the Preliminary Objections.

For his part, the Agent for the Swiss Government repeated, at the hearing on November 12th, 1958, the submissions he had filed on November 3rd, whilst reserving his right to modify them after hearing any explanations that might be put forward on behalf of the Government of the United States of America.

At the hearing on November 14th, 1958, the Agent for the Government of the United States of America reaffirmed and maintained his earlier submissions whilst emphasizing that the preliminary objections were directed against all of the alternative submissions as well as the principal submissions made on behalf of the Swiss Government.

Finally, at the hearing on November 17th, 1958, the Agent for the Swiss Government maintained the submissions he had filed in the Registry on November 3rd, 1958, which thus acquired the character of final submissions.

* * *

The declarations by which the Parties accepted the compulsory jurisdiction of the Court are as follows:

Declaration of the United States of America of August 14th, 1946 (in force since August 26th, 1946):

"I, Harry S. Truman, President of the United States of America, declare on behalf of the United States of America, under Article 36, paragraph 2, of the Statute of the International Court of Justice, and in accordance with the Resolution of August 2, 1946, of the Senate of the United States of America (two-thirds of the Senators present concurring therein), that the United States of America recognizes 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 all legal disputes hereafter arising 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;

Provided, that this declaration shall not apply to

(a) Disputes of the solution of which the Parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

(b) Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or

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

Provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration."

Declaration of Switzerland of July 6th, 1948 (in force since July 28th, 1948):

"The Swiss Federal Council, duly authorized for that purpose by a Federal decree which was adopted on 12 March 1948 by the Federal Assembly of the Swiss Confederation and became operative on 17 June 1948,

hereby declares that the Swiss Confederation recognizes 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 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.

This declaration, which is made under Article 36 of the Statute of the International Court of Justice, shall take effect from the date on which the Swiss Confederation becomes a party to that Statute and shall have effect as long as it has not been abrogated subject to one year's notice."

* * *

The present proceedings are concerned only with the preliminary objections raised by the Government of the United States of
America. It is nevertheless convenient to set out briefly the facts and circumstances as submitted by the Parties which constitute the origin of the present dispute.

By its decisions of February 16th and April 24th, 1942, based on the Trading with the Enemy Act of October 6th, 1917, as amended, the Government of the United States vested almost all of the shares of General Aniline and Film Corporation (briefly referred to as the GAF), a company incorporated in the United States, on the ground that these shares in reality belonged to the I.G. Farbenindustrie company of Frankfurt or that the GAF was in one way or another controlled by that enemy company.

It is not disputed that until 1940 I.G. Farben controlled the GAF through the Société internationale pour entreprises chimiques S.A. (I.G. Chemie), entered in the Commercial Register of the Canton of Bâle-Ville in 1928. However, according to the contention of the Swiss Government, the links between the German company I.G. Farben and the Swiss company I.G. Chemie were finally severed by the cancellation of the contract for an option and for the guarantee of dividends, a cancellation which was effected in June 1940, that is, well before the entry of the United States into the war. The Swiss company adopted the name of Société internationale pour participations industrielles et commerciales S.A. (briefly referred to as Interhandel). Article 2 of its Statute as modified in 1940 defines its object as follows: "The enterprise is a holding company. Its object is participation in industrial and commercial undertakings of every kind, especially in the chemical field, in Switzerland and abroad, but excluding banking and the professional purchase and sale of securities." The largest item in the assets of Interhandel is its participation in the GAF. Approximately 75% of the GAF "A" shares and all its issued "B" shares are said to belong to Interhandel. A considerable part, approximately 90%, of these shares and a sum of approximately $1,800,000 dollars, have been vested by the Government of the United States.

Towards the end of the war, under a provisional agreement between Switzerland, the United States of America, France and the United Kingdom, property in Switzerland belonging to Germans in Germany was blocked (Decree of the Federal Council of February 16th, 1945). The Swiss Compensation Office was entrusted with the task of uncovering property in Switzerland belonging to Germans or controlled by them. In the course of these investigations, the question of the character of Interhandel was raised, but as a result of investigations carried out in June and July, 1945, the Office, considering it to have been proved that Interhandel had severed its ties with the German company, did not regard it as necessary to undertake the blocking of its assets.

For its part, the Government of the United States, considering that Interhandel was still controlled by I.G. Farben, continued to seek evidence of such control. In these circumstances the Federal Department of Public Economy and the Federal Political Department ordered the Swiss Compensation Office provisionally to block the assets of Interhandel; this was done on October 30th, 1945. The Office then carried out a second investigation (November 1945-February 1946) which led to the same conclusion as had the first.

On May 25th, 1946, an agreement was concluded between the three Allied Powers and Switzerland (the Washington Accord). Under one of the provisions of the Accord, Switzerland undertook to pursue its investigations and to liquidate German property in Switzerland. It was the Compensation Office which was "empowered to uncover, take into possession, and liquidate German property" (Accord, Annex II, A), in collaboration with a Joint Commission "composed of representatives of each of the four Governments" (Annex, II, B). The Accord lays down the details of that collaboration (Annex II, C, D, E, F) and provides that, in the event of disagreement between the Joint Commission and the Compensation Office or if the party in interest so desires, the matter may within a period of one month be submitted to a Swiss Authority of Review composed of three members and presided over by a Judge. "The decisions of the Compensation Office, or of the Authority of Review, should the matter be referred to it, shall be final" (Annex, III).

In the event, however, of disagreement with the Swiss Authority of Review on certain given matters, "the three Allied Governments may, within one month, require the difference to be submitted to arbitration" (Annex, III).

The Washington Accord further provides:

"Article IV, paragraph i.

The Government of the United States will unblock Swiss assets in the United States. The necessary procedure will be determined without delay.

Article VI.

In case differences of opinion arise with regard to the application or interpretation of this Accord which cannot be settled in any other way, recourse shall be had to arbitration."

After the conclusion of the Washington Accord, discussions with regard to Interhandel between the Swiss Compensation Office and the Joint Commission as well as between representatives of Switzerland and the United States were continued without reaching any conclusion accepted by the two parties. The Office, while declaring itself ready to examine any evidence as to the German character of Interhandel which might be submitted to it, continued to accept the results of its two investigations; the Joint Commission challenged
these results and continued its investigations. By its decision of January 9th, 1948, given on appeal by Interhandel, the Swiss Authority of Review annulled the blocking with retroactive effect. It had invited the Joint Commission to participate in the procedure, but the latter had declined the invitation. This question was not referred to the arbitration provided for in the Washington Accord.

In these circumstances, the Swiss Government considered itself entitled to regard the decision of the Swiss Authority of Review as a final one, having the force of res judicata vis-à-vis the Powers parties to the Washington Accord. Consequently, in a Note of May 4th, 1948, to the Department of State, the Swiss Legation at Washington invoked this decision and the Washington Accord to request the Government of the United States to restore to Interhandel the property which had been vested in the United States. On July 26th, 1948, the Department of State rejected this request, contending that the decision of the Swiss Authority of Review did not affect the assets vested in the United States and claimed by I.G. Chemie. On September 7th, 1948, in a Note to the Department of State, the Swiss Legation in Washington, still relying on its interpretation of the Washington Accord, maintained that the decision of the Swiss Authority of Review recognizing Interhandel as a Swiss company was legally binding upon the signatories of that Accord. It expressed the hope that the United States Government would accordingly release the assets of Interhandel in the United States, failing which the Swiss Government would have to submit the question to the arbitral procedure laid down in Article VI of the Washington Accord. On October 12th, 1948, the Department of State replied to that communication, maintaining its previous view that the decision of the Swiss Authority of Review was inapplicable to property vested in the United States. It added that United States law in regard to the seizure and disposal of enemy property authorized non-enemy foreigners to demand the restitution of vested property and to apply for it to the courts. On October 21st, 1948, Interhandel, relying upon the provisions of the Trading with the Enemy Act, instituted proceedings in the United States District Court for the District of Columbia. Direct discussion between the two Governments was then interrupted until April 9th, 1953, on which day the Swiss Government sent to the Government of the United States a Note questioning the procedure applied in the United States in the Interhandel case, stating that this procedure had led to a deadlock, and suggesting negotiations for a satisfactory settlement.

Up to 1957 the proceedings in the United States courts had made little progress on the merits. Interhandel, though it had produced a considerable number of the documents called for, did not produce all of them; it contended that the production of certain documents was prohibited by the Swiss authorities as constituting an offence under Article 273 of the Swiss Criminal Code and as violating banking secrecy (Article 47 of the Federal Law of November 8th, 1934). The action brought by Interhandel was the subject of a number of appeals in the United States courts and in a Memorandum appended to the Note addressed by the Department of State to the Swiss Minister on January 11th, 1957, it was said that Interhandel had finally failed in its suit. It was then that the Swiss Government, on October 2nd, 1957, addressed to the Court the Application instituting the present proceedings. The assertion in the Note of January 11th, 1957, that Interhandel’s claim was finally rejected proved, however, to be premature, as the Court will have occasion to point out in considering the Third Objection of the United States.

As stated, the exchange of notes with regard to Interhandel which had taken place in 1948, was resumed in 1953. In its Note of April 9th, 1953, the Swiss Legation at Washington suggested negotiations between the two Governments with a view to arriving amicably at a just and practical solution of the problem of Interhandel; these suggestions were repeated in the Notes of December 1st, 1954, and March 1st, 1955; they were not accepted by the Department of State. Finally, the Swiss Note of August 9th, 1956, formulated proposals for the settlement of the dispute either by means of arbitration or conciliation as provided for in the Treaty between Switzerland and the United States of February 16th, 1931, or by means of arbitration as provided for in the Washington Accord. This approach did not meet with the approval of the Government of the United States, which rejected it in its Note, already referred to, of January 11th, 1957.

* * *

The subject of the claim as set forth in the final submissions presented on behalf of the Swiss Government, and disregarding certain items of a subsidiary character which can be left aside for the moment, is expressed essentially in two propositions:

(1) as a principal submission, the Court is asked to adjudge and declare that the Government of the United States is under an obligation to restore the assets of the Société internationale pour participations industrielles et commerciales S.A. (Interhandel);

(2) as an alternative submission, the Court is asked to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or to a conciliation procedure in accordance with certain conditions set forth first in the principal submissions and then in the alternative submissions.

The Government of the United States has put forward four preliminary objections to the Court’s dealing with the claims of the Swiss Government. Before proceeding to examine these objections, the Court must direct its attention to the claim, formulated for the
first time in the Observations and Submissions of the Swiss Government, which is in the following terms:

“The Swiss Federal Council requests the Court to declare that the property, rights and interests which the Société internationale pour participations industrielles et commerciales S.A. (Interhandel) possesses in General Aniline and Film Corporation have the character of non-enemy (Swiss) property, and consequently to declare that by refusing to return the said property the Government of the United States of America is in breach of Article IV, paragraph 1, of the Washington Accord of May 25th, 1945, and of the obligations binding it under the general rules of international law.”

In its final Submissions, deposited in the Registry on November 3rd, 1958, the Swiss Government gives the following explanation with regard to this claim:

“The Swiss Government, after examining the Preliminary Objections of the United States of America, has come to the conclusion that these involve the modification of the Swiss Government’s principal and alternative Submissions, which are as follows.”

The claim in question, however, which is described as “alternative principal Submission”, does not constitute a mere modification; it constitutes a new claim involving the merits of the dispute. Article 62, paragraph 3, of the Rules of Court, however, is categorical:

“Upon receipt by the Registrar of a preliminary objection filed by a party, the proceedings on the merits shall be suspended.”

Consequently, the new Swiss submission relating to a request for a declaratory judgment, presented after the suspension of the proceedings on the merits, cannot be considered by the Court at the present stage of the proceedings.

** First Preliminary Objection 

The First Objection of the Government of the United States seeks a declaration that the Court is without jurisdiction on the ground that the present dispute arose before August 26th, 1946, the date on which the acceptance of the compulsory jurisdiction of the Court by the United States came into force. The declaration of the United States does indeed relate to legal disputes “hereafter arising”. The Government of the United States maintains that the dispute goes back at least to the middle of the year 1945, and that divergent opinions as to the character of Interhandel were exchanged between the American and Swiss authorities on a number of occasions before August 26th, 1946.

The Court would recall that the subject of the present dispute is indicated by the Application and in the Principal Final Submission of the Swiss Government which seeks the return to Interhandel of the assets vested in the United States. An examination of the documents reveals that a request to this effect was formulated by Switzerland for the first time in the Note of the Swiss Legation at Washington dated May 4th, 1948. The negative reply, which the Department of State describes as its final and considered view, is dated July 26th, 1948. Two other Notes exchanged shortly afterwards (on September 7th and October 12th of that same year) confirm that the divergent views of the two Governments were concerned with a clearly-defined legal question, namely, the restitution of Interhandel’s assets in the United States, and that the negotiations to this end rapidly reached a deadlock. Thus the dispute now submitted to the Court can clearly be placed at July 26th, 1948, the date of the first negative reply which the Government of the United States described as its final and considered view rejecting the demand for the restitution of the assets. Consequently the dispute arose subsequently to the date of the entry into force of the Declaration of the United States.

During the period indicated by the Government of the United States (the years 1945 and 1946), the exchanges of views between the Swiss authorities on the one hand and the Allied and, in the first place, the American authorities, on the other, related to the search for, and the blocking and liquidation of, German property and interests in Switzerland; the question of the Swiss or German character of Interhandel was the subject of investigations and exchanges of views for the purpose of reaching a decision as to the fate of the assets in Switzerland of that company. It was only after the decision of the Swiss Authority of Review of January 5th, 1948, definitely recognizing the non-enemy character of the assets of Interhandel and, in consequence, putting an end to the provisional blocking of these assets in Switzerland, had, in the opinion of the Federal Government, acquired the authority of res judicata, that that Government, for the first time addressed to the United States its claim for the restitution of Interhandel’s assets in the United States.

The discussions regarding Interhandel between the Swiss and American authorities in 1945, 1946 and 1947 took place within the framework of the collaboration established between them prior to the Washington Accord and defined in that Accord. The representatives of the Joint Commission and those of the Swiss Compensation Office communicated to each other the results of their enquiries and investigations, and discussed their opinions with regard to Interhandel, without arriving at any final conclusions. Thus, for instance, the minute of the meeting of the Joint Commission on September 8th, 1947, records:

“The representatives of the Swiss Compensation Office stated that their investigations had yielded only negative results and
that they were still waiting for the Allies to furnish their documents which the Swiss Compensation Office was ready to discuss with the Allied experts.”

The Court cannot see in these discussions between the Allied and Swiss officials a dispute between Governments which had already arisen with regard to the restitution of the assets claimed by Interhandel in the United States; the facts and situations which have led to a dispute must not be confused with the dispute itself; the documents relating to this collaboration between the Allied and Swiss authorities for the purpose of liquidating German property in Switzerland are not relevant to the solution of the question raised by the first objection of the United States.

The First Preliminary Objection must therefore be rejected so far as the principal submission of Switzerland is concerned.

In the Alternative Submission, Switzerland asks the Court to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or conciliation.

In raising its objection ratione temporis to the Application of the Swiss Government, the Government of the United States has no distinguished between the principal claim and the alternative claim in the Application. It is, however, clear that the alternative claim, in spite of its close connection with the principal claim, is nevertheless a separate and distinct claim relating not to the substance of the dispute, but to the procedure for its settlement.

The point here in dispute is the obligation of the Government of the United States to submit to arbitration or to conciliation an obligation the existence of which is asserted by Switzerland and denied by the United States. This part of the dispute can only have arisen subsequently to that relating to the restitution of Interhandel’s assets in the United States, since the procedure proposed by Switzerland and rejected by the United States was conceived as a means of settling the first dispute. In fact, the Swiss Government put forward this proposal for the first time in its Note of August 9th, 1956, and the Government of the United States rejected it by its Note of January 11th, 1957.

With regard to the Alternative Submission of Switzerland, the First Preliminary Objection cannot therefore be upheld.

*   *   *

Second Preliminary Objection

According to this Objection, the present dispute, even if it is subsequent to the date of the Declaration of the United States, arose before July 28th, 1948, the date of the entry into force of the Swiss Declaration. The argument set out in the Preliminary Objections is as follows:

“...The United States Declaration, which was effective August 26th, 1946, contained the clause limiting the Court’s jurisdiction to disputes ‘hereafter arising’, while no such qualifying clause is contained in the Swiss Declaration which was effective July 28th, 1948. But the reciprocity principle ... requires that as between the United States and Switzerland the Court’s jurisdiction be limited to disputes arising after July 28th, 1948... Otherwise, retroactive effect would be given to the compulsory jurisdiction of the Court.”

In particular, it was contended with regard to disputes arising after August 26th, 1946, but before July 28th, 1948, that “Switzerland, as a Respondent, could have invoked the principle of reciprocity and claimed that, in the same way as the United States is not bound to accept the Court’s jurisdiction with respect to disputes arising before its acceptance, Switzerland, too, could not be required to accept the Court’s jurisdiction in relation to disputes arising before its acceptance.”

Reciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own Declaration but which the other Party has expressed in its Declaration. For example, Switzerland, which has not expressed in its Declaration any reservation ratione temporis, while the United States has accepted the compulsory jurisdiction of the Court only in respect of disputes subsequent to August 26th, 1946, might, if in the position of Respondent, invoke by virtue of reciprocity against the United States the American reservation if the United States attempted to refer to the Court a dispute with Switzerland which had arisen before August 26th, 1946. This is the effect of reciprocity in this connection. Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends. It cannot justify a State, in this instance, the United States, in relying upon a restriction which the other Party, Switzerland, has not included in its own Declaration.

The Second Preliminary Objection must therefore be rejected so far as the Principal Submission of Switzerland is concerned.

Since it has already been found that the dispute concerning the obligation of the United States to agree to arbitration or conciliation did not arise until 1957, the Second Preliminary Objection must also be rejected so far as the Alternative Submission of Switzerland is concerned.

*   *   *

Fourth Preliminary Objection

Since the Fourth Preliminary Objection of the United States relates to the jurisdiction of the Court in the present case, the Court will proceed to consider it before the Third Objection which
is an objection to admissibility. This Fourth Objection really consists of two objections which are of different character and of unequal scope. The Court will deal in the first place with part (b) of this Objection.

The Government of the United States submits "that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the seizure and retention of the vested shares of General Aniline and Film Corporation, for the reason that such seizure and retention are, according to international law, matters within the domestic jurisdiction of the United States".

In challenging before the Court the seizure and retention of these shares by the authorities of the United States, the Swiss Government invokes the Washington Accord and general international law.

In order to determine whether the examination of the grounds thus invoked is excluded from the jurisdiction of the Court for the reason alleged by the United States, the Court will base itself on the course followed by the Permanent Court of International Justice in its Advisory Opinion concerning Nationality Decrees issued in Tunis and Morocco (Series B, No. 4), when dealing with a similar divergence of view. Accordingly, the Court does not, at the present stage of the proceedings, intend to assess the validity of the grounds invoked by the Swiss Government or to give an interpretation of their interpretation of the accord which may be perceived to be in conflict with the merits of the dispute. The Court will confine itself to considering whether the grounds invoked by the Swiss Government are such as to justify the provisional conclusion that they may be of relevance in this case and, if so, whether questions relating to the validity and interpretation of those grounds are questions of international law.

With regard to its principal Submission that the Government of the United States is under an obligation to restore the assets of Interhandel in the United States, the Swiss Government invokes Article IV of the Washington Accord. The Government of the United States contends that this accord relates only to German property in Switzerland, and that Article IV is of no relevance whatever in the present dispute.

By Article IV of this international agreement, the United States has assumed the obligation to unblock Swiss assets in the United States. The Parties are in disagreement with regard to the meaning of the term "unblock" and the term "Swiss assets". The interpretation of these terms is a question of international law which affects the merits of the dispute. At the present stage of the proceedings it is sufficient for the Court to note that Article IV of the Washington Accord may be of relevance for the solution of the present dispute and that its interpretation relates to international law.

The Government of the United States submits that according to international law the seizure and retention of enemy property in time of war are matters within the domestic jurisdiction of the United States and are not subject to any international supervision. All the authorities and judicial decisions cited by the United States refer to enemy property; but the whole question is whether the assets of Interhandel are enemy or neutral property. There having been a formal challenge based on principles of international law by a neutral State which has adopted the cause of its national, it is not open to the United States to say that their decision is final and not open to challenge; despite the American character of the Company, the shares of which are held by Interhandel, this is a matter which must be decided in the light of the principles and rules of international law governing the relations between belligerents and neutrals in time of war.

In its alternative Submission, the Swiss Government requests the Court to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or conciliation. The Swiss Government invokes Article VI of the Washington Accord, which provides: "In case differences of opinion arise with regard to the application or interpretation of this accord which cannot be settled in any other way, recourse shall be had to arbitration." It also invokes the Treaty of Arbitration and Conciliation between Switzerland and the United States, dated February 16th, 1932. Article I of this Treaty provides: "Every dispute arising between the Contracting Parties, of whatever nature it may be, shall, when ordinary diplomatic proceedings have failed, be submitted to arbitration or to conciliation, as the Contracting Parties may at the time decide." The interpretation and application of these provisions relating to arbitration and conciliation involve questions of international law.

Part (b) of the Fourth Preliminary Objection must therefore be rejected.

Part (a) of the Fourth Objection seeks a finding from the Court that it is without jurisdiction to entertain the Application of the Swiss Government, for the reason that the sale or disposition by the Government of the United States of the shares of the GAF which have been vested as enemy property "has been determined by the United States of America, pursuant to paragraph (b) of the Conditions attached to this country's acceptance of this Court's jurisdiction, to be a matter essentially within the domestic jurisdiction of this country". The Preliminary Objections state that: "Such declination encompasses all issues raised in the Swiss Application and Memorial (including issues raised by the Swiss-United States Treaty of 1931 and the Washington Accord of 1946)", but they add: "In so far as the determination of the issues would affect the sale or disposition of the shares". And they immediately go on to say: "However, the determination pursuant to paragraph (b) of the Conditions attached to this country's acceptance of the Court's
compulsory jurisdiction is made only as regards the sale or disposition of the assets.

During the oral arguments, the Agent for the United States continued to maintain that the scope of part (a) of the Fourth Objection was limited to the sale and disposition of the shares. At the same time, while insisting that local remedies were once more available to Interhandel and that, pending the final decision of the Courts of the United States, the disputed shares could not be sold, he declared on several occasions that part (a) of the Fourth Objection has lost practical significance, that “it has become somewhat academic”, and that it is “somewhat moot”.

Although the Agent for the United States maintained the Objection throughout the oral arguments, it appears to the Court that, thus presented, part (a) of the Fourth Objection only applies to the claim of the Swiss Government regarding the restitution of the assets of Interhandel which have been vested in the United States. Having regard to the decision of the Court set out below in respect of the Third Preliminary Objection of the United States, it appears to the Court that part (a) of the Fourth Preliminary Objection is without object at the present stage of the proceedings.

* * *

Third Preliminary Objection

The Third Preliminary Objection seeks a finding that “there is no jurisdiction in this Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that Interhandel, whose case Switzerland is espousing, has not exhausted the local remedies available to it in the United States courts”.

Although framed as an objection to the jurisdiction of the Court, this Objection must be regarded as directed against the admissibility of the Application of the Swiss Government. Indeed, by its nature it is to be regarded as a plea which would become devoid of object if the requirement of the prior exhaustion of local remedies were fulfilled.

The Court has indicated in what conditions the Swiss Government, basing itself on the idea that Interhandel’s suit had been finally rejected in the United States courts, considered itself entitled to institute proceedings by its Application of October 2nd, 1957. However, the decision given by the Supreme Court of the United States on October 14th, 1957, on the application of Interhandel made on August 6th, 1957, granted a writ of certiorari and re-admitted Interhandel into the suit. The judgment of that Court on June 16th, 1958, reversed the judgment of the Court of Appeals dismissing Interhandel’s suit and remanded the case to the District Court. It was thenceforth open to Interhandel to avail itself again of the remedies available to it under the Trading with the Enemy Act, and to seek the restitution of its shares by proceedings in the United States courts. Its suit is still pending in the United States courts. The Court must have regard to the situation thus created.

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system. A fortiori the rule must be observed when domestic proceedings are pending, as in the case of Interhandel, and when the two actions, that of the Swiss company in the United States courts and that of the Swiss Government in this Court, in its principal Submission, are designed to obtain the same result: the restitution of the assets of Interhandel vested in the United States.

The Swiss Government does not challenge the rule which requires that international judicial proceedings may only be instituted following the exhaustion of local remedies, but contends that the present case is one in which an exception to this rule is authorized by the rule itself.

The Court does not consider it necessary to dwell upon the assertion of the Swiss Government that “the United States itself has admitted that Interhandel had exhausted the remedies available in the United States courts”. It is true that the representatives of the Government of the United States expressed this opinion on several occasions, in particular in the memorandum annexed to the Note of the Secretary of State of January 11th, 1957. This opinion was based upon a view which has proved unfounded. In fact, the proceedings which Interhandel had instituted before the courts of the United States were then in progress.

However, the Swiss Government has raised against the Third Objection certain considerations which require examination. In the first place, it is contended that the rule is not applicable for the reason that the measure taken against Interhandel and regarded as contrary to international law is a measure which was taken not by a subordinate authority but by the Government of the United States. However, the Court must attach decisive importance to the fact that the laws of the United States make available to interested persons who consider that they have been deprived of their rights by measures taken in pursuance of the Trading with the Enemy Act, adequate remedies for the defence of their rights against the Executive.
It has also been contended on behalf of the Swiss Government that in the proceedings based upon the Trading with the Enemy Act, the United States courts are not in a position to adjudicate in accordance with the rules of international law and that the Supreme Court, in its decision of June 16th, 1958, made no reference to the many questions of international law which, in the opinion of the Swiss Government, constitute the subject of the present dispute. But the decisions of the United States courts bear witness to the fact that United States courts are competent to apply international law in their decisions when necessary. In the present case, when the dispute was brought to this Court, the proceedings in the United States courts had not reached the merits, in which considerations of international law could have been profitably relied upon.

The Parties have argued the question of the binding force before the courts of the United States of international instruments which, according to the practice of the United States, fall within the category of Executive Agreements; the Washington Accord is said to belong to that category. At the present stage of the proceedings it is not necessary for the Court to express an opinion on the matter. Neither is it practicable, before the final decision of the domestic courts, to anticipate what basis they may adopt for their judgment.

Finally, the Swiss Government laid special stress on the argument that the character of the principal Submissions of Switzerland is that of a claim for the implementation of the decision given on January 5th, 1948, by the Swiss Authority of Review and based on the Washington Accord, a decision which the Swiss Government regards as an international judicial decision. ‘When an international decision has not been executed, there are no local remedies to exhaust, for the injury has been caused directly to the injured State.’ It has therefore contended that the failure by the United States to implement the decision constitutes a direct breach of international law, causing immediate injury to the rights of Switzerland as the Applicant State. The Court notes in the first place that to implement a decision is to apply its operative part. In the operative part of its decision, however, the Swiss Authority of Review ‘Decrees: (1) that the Appeal is sustained and the decision subjecting the appellant to the blocking of German property in Switzerland is annulled...’ The decision of the Swiss Authority of Review relates to the unblocking of the assets of Interhandel in Switzerland; the Swiss claim is designed to secure the restitution of the assets of Interhandel in the United States. Without prejudging the validity of any arguments which the Swiss Government seeks or may seek to base upon that decision, the Court would confine itself to observing that such arguments do not deprive the dispute which has been referred to it of the character of a dispute in which the Swiss Government appears as having adopted the cause of its national, Interhandel, for the purpose of securing the restitution to that company of assets vested by the Government of the United States. This is one of the very cases which give rise to the application of the rule of the exhaustion of local remedies.

For all these reasons, the Court upholds the Third Preliminary Objection so far as the principal Submission of Switzerland is concerned.

In its alternative claim, the Swiss Government asks the Court to declare its competence to decide whether the United States is under an obligation to submit the dispute to arbitration or conciliation. The Government of the United States contends that this claim, while not identical with the principal claim, is designed to secure the same object, namely, the restitution of the assets of Interhandel in the United States, and that for this reason the Third Objection applies equally to it. It maintains that the rule of the exhaustion of local remedies applies to each of the principal and alternative submissions which seek ‘a ruling by this Court to the effect that some other international tribunal now has jurisdiction to determine that very same issue, even though that issue is at the same time being actively litigated in the United States courts’.

The Court considers that one interest, and one alone, that of Interhandel, which has led the latter to institute and to resume proceedings before the United States courts, has induced the Swiss Government to institute international proceedings. This interest is the basis for the present claim and should determine the scope of the action brought before the Court by the Swiss Government in its alternative form as well as in its principal form. On the other hand, the grounds on which the rule of the exhaustion of local remedies is based are the same, whether in the case of an international court, arbitral tribunal, or conciliation commission. In these circumstances, the Court considers that any distinction so far as the rule of the exhaustion of local remedies is concerned between the various claims or between the various tribunals is unfounded.

It accordingly upholds the Third Preliminary Objection also as regards the alternative Submission of Switzerland.

For these reasons,

THE COURT,

by ten votes to five, rejects the First Preliminary Objection of the Government of the United States of America;

unanimously, rejects the Second Preliminary Objection;

by ten votes to five, finds that it is not necessary to adjudicate on part (a) of the Fourth Preliminary Objection:

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by fourteen votes to one, 
rejects part (b) of the Fourth Preliminary Objection; and 

by nine votes to six, 
upholds the Third Preliminary Objection and holds that the Application of the Government of the Swiss Confederation is inadmissible.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-first day of March, one thousand nine hundred and fifty-nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Swiss Confederation and the Government of the United States of America, respectively.

(Signed) Helge Klaestad, 
President.

(Signed) Garnier-Coignet, 
Deputy-Registrar.

Judge Basdevant states that he concurs in the decision that the Application is inadmissible as that decision is set forth in the operative part of the Judgment, but he adds that his opinion on this point was reached in a way which, in certain respects, differs from that followed by the Court. Basing himself on the provisions of the Statute and of the Rules of Court, he considered that, in order to assess the validity of the objections advanced, he should direct his attention to the subject of the dispute and not to any particular claim put forward in connection with the dispute. The subject of the dispute and the subject of the claim are explicitly differentiated in Article 32, paragraph 2, of the Rules of Court. Accordingly, he has directed his attention to the statement in the Application to the effect that the latter submits to the Court the dispute relating to “the restitution by the United States of the assets” of Interhandel. This indication of the subject of the dispute, which is confirmed by an examination of the correspondence, reveals the scope of the dispute, shows that it is not limited to whatever may have been discussed at any particular moment between the two Governments and consequently throws a light upon the date at which the dispute between them arose. He was thus led to the conclusion that the dispute to which the Application relates did not arise until after July 28th, 1948, and this factual finding is sufficient to justify the rejection of the first two preliminary objections.

Judge Kojevnikov states that he concurs in the Judgment of the Court so far as the First, Second, Third and part (a) of the Fourth Preliminary Objections of the Government of the United States are concerned. He is, however, unable to concur in the reasoning of the Judgment relating to the Second Preliminary Objection since, in his opinion, the Judgment should have been based not on the question of reciprocity, which is of very great importance, but upon the factual circumstances which show that the legal character of the dispute between the Swiss Government and the Government of the United States was clearly defined only after July 28th, 1948, the date of the entry into force of the Swiss Declaration.

Judge Kojevnikov is further of the opinion that the Third Objection should have been upheld by the Court, not only as a contention relating to the admissibility of the Application, but also with regard to the jurisdiction of the Court.

Finally, he considers that part (b) of the Fourth Preliminary Objection, having regard to its subject-matter, ought not to have
been rejected but, in the present case, should have been joined to the merits if the Court had not upheld the Third Objection.

M. Carry, Judge ad hoc, states that he regrets that he cannot subscribe to the decisions taken by the Court on the Third and part (a) of the Fourth Objections of the Government of the United States. He agrees generally with the dissenting opinion of President Klaestad.

He considers that in any event the Third Objection should not have been upheld in so far as it was directed against the alternative claim of the Swiss Government relating to arbitration or conciliation. He regards that claim as separate and distinct from the principal claim, since it did not relate to the merits of the dispute but only to the procedure for its settlement. By this claim the Court was invited to pass only upon the arbitrability of the dispute, not on the obligation of the United States to return the assets of Interhandel. That latter question was within the exclusive jurisdiction of the tribunal to be seised. It follows, in his opinion, that the rule relating to the exhaustion of local remedies was not applicable to the alternative claim of the Swiss Government, inasmuch as, by that claim, the applicant State sought to secure from the international tribunal a result different from that which Interhandel is seeking to obtain in the American courts. The question of exhaustion of local remedies is one which could arise only before the arbitral tribunal seised of the case: the Court should not, in his opinion, encroach upon the jurisdiction of that tribunal.

Judges Hackworth, Córdova, Wellington Koo and Sir Percy Spender, availing themselves of the right conferred upon them by Article 57 of the Statute, append to the Judgment of the Court statements of their separate opinions.

Vice-President Zafrulla Khan states that he agrees with Judge Hackworth.

President Klaestad and Judges Winiarski, Armand-Ugon, Sir Hersch Lauterpacht and Spiropoulos, availing themselves of the right conferred upon them by Article 57 of the Statute, append to the Judgment of the Court statements of their dissenting opinions.

**(Initialled)** H. K.

**(Initialled)** G.-C.
International Court of Justice

Barcelona Traction, Light and Power Company, Limited
(Belgium v. Spain)
Second Phase, Judgment

*I.C.J. Reports 1970*
CASE CONCERNING
THE BARCELONA TRACTION, LIGHT
AND POWER COMPANY, LIMITED
(NEW APPLICATION: 1962)
(BELGIUM v. SPAIN)
SECOND PHASE
JUDGMENT OF 5 FEBRUARY 1970
INTERNATIONAL COURT OF JUSTICE

YEAR 1970

5 February 1970

CASE CONCERNING
THE BARCELONA TRACTION, LIGHT
AND POWER COMPANY, LIMITED

(NEW APPLICATION: 1962)
(BELGIUM v. SPAIN)
SECOND PHASE

In the case concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962),

between
the Kingdom of Belgium,
represented by
Chevalier Y. Devadder, Legal Adviser to the Ministry of Foreign Affairs and External Trade,
as Agent,
Mr. H. Rolin, Professor emeritus of the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
as Co-Agent and Counsel,
assisted by
Mrs. S. Bastid, Professor in the Faculty of Law of the University of Paris
Mr. J. Van Ryn, Professor in the Faculty of Law of the Free University of Brussels and Advocate at the Belgian Court of Cassation,
Mr. M. Grégoire, Advocate at the Brussels Court of Appeal,
Mr. F. A. Mann, Honorary Professor in the Faculty of Law of the University of Bonn, Solicitor of the Supreme Court, England,
Mr. M. Virally, Professor in the Faculties of Law of the Universities of Geneva and Strasbourg and at the Graduate Institute of International Studies in Geneva,
Mr. E. Lauterpacht, Lecturer in the University of Cambridge, Member of the English Bar,
Mr. A. S. Pattillo, Q.C., Member of the Ontario Bar (Canada),
Mr. M. Slusny, Lecturer in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
Mr. P. Van Ommeslaghe, Professeur extraordinaire in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
as Counsel,
Mr. M. Waelbroeck, Professeur extraordinaire in the Faculty of Law of the Free University of Brussels,
Mr. J. Kirkpatrick, Lecturer in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
as Assistant Counsel and Secretary,
and by
Mr. L. Prieto-Castro, Professor in the Faculty of Law of the University of
Madrid,
Mr. M. Olivencia Ruiz, Professor in the Faculty of Law of the University of
Seville,
Mr. J. Girón Tena, Professor in the Faculty of Law of the University of
Valladolid,
as Expert-Counsel in Spanish Law,
and
the Spanish State,
represented by
Mr. J. M. Castro-Rial, Professor, Legal Adviser to the Ministry of Foreign
Affairs,
as Agent,
assisted by
Mr. R. Ago, Professor of International Law in the Faculty of Law of the
University of Rome,
Mr. M. Bos, Professor of International Law in the Faculty of Law of the
University of Utrecht,
Mr. P. Cahier, Professor of International Law at the Graduate Institute of
International Studies in Geneva,
Mr. J. Carreras Llansana, Professor in the Faculty of Law of the University of
Navarre,
Mr. F. de Castro y Bravo, Professor, Legal Adviser to the Ministry of
Foreign Affairs,
Mr. J. M. Gil-Robles Quiñones, Professor in the Faculty of Law of the
University of Oviedo,
Mr. M. Gimeno Fernández, Judge of the Supreme Court, Madrid,
Mr. P. Guggenheim, Professor of International Law at the Graduate Institute
of International Studies in Geneva,
Mr. E. Jiménez de Aréchaga, Professor of International Law in the Faculty
of Law of the University of Montevideo,
Mr. A. Malintoppi, Professor of International Law in the Faculty of Political
Science of the University of Florence,
Mr. F. Ramírez, Secretary-General of the Spanish Institute of Foreign
Exchange, Madrid,
Mr. P. Reuter, Professor in the Faculty of Law of the University of Paris,
Mr. J. M. Rivas Fresnedo, Inspector and Expert, Ministry of Finance, Madrid,
Mr. J. L. Sureda Carrión, Professor in the Faculty of Law of the University of
Barcelona,
Mr. D. Triay Moll, Inspector and Expert, Ministry of Finance, Madrid,
Mr. R. Uria González, Professor in the Faculty of Law of the University of
Madrid,
Sir Humphrey Waldock, C.M.G., O.B.E., Q.C., Chichele Professor of
Public International Law in the University of Oxford,
Mr. P. Well, Professor in the Faculty of Law of the University of Paris,
as Counsel or Advocates,
and by
Mr. J. M. Lacleta y Muñoz, Secretary of Embassy,
Mr. L. Martínez-Aguiló, Secretary of Embassy,
as Secretaries,
The Court,
composed as above,
delivers the following Judgment:
1. In 1958 the Belgian Government filed with the International Court of
Justice an Application against the Spanish Government seeking reparation for
damage allegedly caused to the Barcelona Traction, Light and Power Com-
pany, Limited, on account of acts said to be contrary to international law
committed by organs of the Spanish State. After the filing of the Belgian
Memorial and the submission of preliminary objections by the Spanish Govern-
ment, the Belgian Government gave notice of discontinuance of the proceed-
ings, with a view to negotiations between the representatives of the private
interests concerned. The case was removed from the Court’s General List on
10 April 1961.
2. On 19 June 1962, the negotiations having failed, the Belgian Government
submitted to the Court a new Application, claiming reparation for the damage
allegedly sustained by Belgian nationals, shareholders in the Barcelona Traction
company, on account of acts said to be contrary to international law
committed in respect of the company by organs of the Spanish State. On 15
March 1963 the Spanish Government raised four preliminary objections to the
Belgian Application.
3. By its Judgment of 24 July 1964, the Court rejected the first two prelimi-
inary objections. The first was to the effect that the discontinuance, under
Article 69, paragraph 2, of the Court’s Rules, of previous proceedings relative
to the same events in Spain, disentitled the Belgian Government from bringing
the present proceedings. The second was to the effect that even if this was
not the case, the Court was not competent, because the necessary jurisdictional
basis requiring Spain to submit to the jurisdiction of the Court did not exist.
The Court joined the third and fourth objections to the merits. The third was
to the effect that the claim is inadmissible because the Belgian Government
lacks any jus standi to intervene or make a judicial claim on behalf of Belgian
interests in a Canadian company, assuming that the Belgian character of
such interests were established, which is denied by the Spanish Government.
The fourth was to the effect that even if the Belgian Government has the nec-
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essary jus standi, the claim still remains inadmissible because local remedies
in respect of the acts complained of were not exhausted.
4. Time-limits for the filing of the further pleadings were fixed or, at the
request of the Parties, extended by Orders of 28 July 1964, 11 June 1965,
12 January 1966, 23 November 1966, 12 April 1967, 15 September 1967 and
24 May 1968, in the last-mentioned of which the Court noted with regret that
the time-limits originally fixed by the Court for the filing of the pleadings had
not been observed, whereby the written proceedings had been considerably
prolonged. The written proceedings finally came to an end on 1 July 1968
with the filing of the Rejoinder of the Spanish Government.
5. Pursuant to Article 31, paragraph 3, of the Statute, Mr. Willem Riphagen, Professor of International Law at the Rotterdam School of Economics, and Mr. Enrique C. Armand-Ugon, former President of the Supreme Court of Justice of Uruguay and a former Member of the International Court of Justice, were chosen by the Belgian and Spanish Governments respectively to sit as judges ad hoc.

6. Pursuant to Article 44, paragraph 2, of the Rules of Court, the pleadings and annexed documents were, after consultation of the Parties, made available to the Governments of Chile, Peru and the United States of America. Pursuant to paragraph 3 of the same Article, the pleadings and annexed documents were, with the consent of the Parties, made accessible to the public as from 10 April 1969.

7. At 64 public sittings held between 15 April and 22 July 1969 the Court heard oral arguments and replies by Chevalier Devadder, Agent, Mr. Rolin, co-Agent and Counsel, Mrs. Bastid, Mr. Van Ryn, Mr. Grégoire, Mr. Mann, Mr. Virally, Mr. Lauterpaucht, and Mr. Pattillo, Counsel, on behalf of the Belgian Government and by Mr. Castro-Rial, Agent, Mr. Agó, Mr. Carreras Mr. Gil-Rubles, Mr. Guggenheim, Mr. Jiménez de Aréchaga, Mr. Malintoppi, Mr. Reuter, Mr. Sureda, Mr. Uria, Sir Humphrey Waldock and Mr. Weil, Counsel or Advocates, on behalf of the Spanish Government.

* * *

8. The Barcelona Traction, Light and Power Company, Limited, is a holding company incorporated in 1911 in Toronto (Canada), where it has its head office. For the purpose of creating and developing an electric power production and distribution system in Catalonia (Spain), it formed a number of operating, financing and concession-holding subsidiary companies. Three of these companies, whose shares it owned wholly or almost wholly, were incorporated under Canadian law and had their registered offices in Canada (Ebro Irrigation and Power Company, Limited, Catalanian Land Company, Limited and International Utilities Finance Corporation, Limited); the others were incorporated under Spanish law and had their registered offices in Spain. At the time of the outbreak of the Spanish Civil War the group, through its operating subsidiaries, supplied the major part of Catalonia's electricity requirements.

9. According to the Belgian Government, some years after the First World War Barcelona Traction's share capital came to be very largely held by Belgian nationals—natural or juristic persons—and a very high percentage of the shares has since then continuously belonged to Belgian nationals, particularly the Société Internationale d'Énergie Hydro-Electrique (Sidro), whose principal shareholder, the Société Financière de Transports et d’Entreprises Industrielles (Sofina), is itself a company in which Belgian interests are preponderant. The fact that large blocks of shares were for certain periods transferred to American nominees, to protect these securities in the event of invasion of Belgian territory during the Second World War, is not, according to the Belgian contention, of any relevance in this connection, as it was Belgian nationals, particularly Sidro, who continued to be the real owners. For a time the shares were vested in a trustee, but the Belgian Government maintains that the trust terminated in 1946. The Spanish Government contends, on the contrary, that the Belgian nationality of the shareholders is not proven and that the trustee or the nominees must be regarded as the true shareholders in the case of the shares concerned.

10. Barcelona Traction issued several series of bonds, some in pesetas but principally in sterling. The issues were secured by trust deeds, with the National Trust Company, Limited, of Toronto as trustee of the sterling bonds, the security consisting essentially of a charge on bonds and shares of Ebro and other subsidiaries and of a mortgage executed by Ebro in favour of National Trust. The sterling bonds were serviced out of transfers to Barcelona Traction effected by the subsidiary companies operating in Spain.

11. In 1936 the servicing of the Barcelona Traction bonds was suspended on account of the Spanish civil war. In 1940 payment of interest on the peseta bonds was resumed with the authorization of the Spanish exchange control authorities (required because the debt was owed by a foreign company), but authorization for the transfer of the foreign currency necessary for the servicing of the sterling bonds was refused and those interest payments were never resumed.

12. In 1945 Barcelona Traction proposed a plan of compromise which provided for the reimbursement of the sterling debt. When the Spanish authorities refused to authorize the transfer of the necessary foreign currency, this plan was twice modified. In its final form, the plan provided, inter alia, for an advance redemption by Ebro of Barcelona Traction peseta bonds, for which authorization was likewise required. Such authorization was refused by the Spanish authorities. Later, when the Belgian Government complained of the refusals to authorize foreign currency transfers, without which the debts on the bonds could not be honoured, the Spanish Government stated that the transfers could not be authorized unless it was shown that the foreign currency was to be used to repay debts arising from the genuine importation of foreign capital into Spain, and that this had not been established.

13. On 9 February 1948 three Spanish holders of recently acquired Barcelona Traction sterling bonds petitioned the court of Reus (Province of Tarragona) for a declaration adjudging the company bankrupt, on account of failure to pay the interest on the bonds. The petition was admitted by an order of 10 February 1948 and a judgment declaring the company bankrupt was given on 12 February. This judgment included provisions appointing a commissioner in bankruptcy and an interim
receiver and ordering the seizure of the assets of Barcelona Traction, Ebro and Compañía Barcelonesa de Electricidad, another subsidiary company.

14. The shares of Ebro and Barcelonesa had been deposited by Barcelona Traction and Ebro with the National Trust company of Toronto as security for their bond issues. All the Ebro and the Barcelonesa ordinary shares were held outside Spain, and the possession taken of them was characterized as "mediate and constructive civil possession", that is to say was not accompanied by physical possession. Pursuant to the bankruptcy judgment the commissioner in bankruptcy at once dismissed the principal management personnel of the two companies and during the ensuing weeks the interim receiver appointed Spanish directors and declared that the companies were thus "normalized". Shortly after the bankruptcy judgment the petitioners brought about the extension of the taking of possession and related measures to the other subsidiary companies.

15. Proceedings in Spain to contest the bankruptcy judgment and the related decisions were instituted by Barcelona Traction, National Trust, the subsidiary companies and their directors or management personnel. However Barcelona Traction, which had not received a judicial notice of the bankruptcy proceedings, and was not represented before the Reus court in February, took no proceedings in the courts until 18 June 1948. In particular it did not enter a plea of opposition against the bankruptcy judgment within the time-limit of eight days from the date of publication of the judgment laid down in Spanish legislation. On the grounds that the notification and publication did not comply with the relevant legal requirements, the Belgian Government contends that the eight-day time-limit had never begun to run.

16. Motions contesting the jurisdiction of the Reus court and of the Spanish courts as a whole, in particular by certain bondholders, had a suspensive effect on the actions for redress; a decision on the question of jurisdiction was in turn delayed by lengthy proceedings brought by the Genora company, a creditor of Barcelona Traction, disputing Barcelona Traction's right to be a party to the proceedings on the jurisdictional issue. One of the motions contesting jurisdiction was not finally dismissed by the Barcelona court of appeal until 1963, after the Belgian Application had been filed with the International Court of Justice.

17. In June 1949, on an application by the Namel company, with the intervention of the Genora company, the Barcelona court of appeal gave a judgment making it possible for the meeting of creditors to be convened for the election of the trustees in bankruptcy, by excluding the necessary procedure from the suspensive effect of the motion contesting jurisdiction. Trustees were then elected, and procured decisions that new shares of the subsidiary companies should be created, cancelling the shares located outside Spain (December 1949), and that the head offices of Ebro and Catalanion Land should henceforth be at Barcelona and not Toronto. Finally in August 1951 the trustees obtained court authorization to sell "the totality of the shares, with all the rights attaching to them, representing the corporate capital" of the subsidiary companies, in the form of the newly created share certificates. The sale took place by public auction on 4 January 1952 on the basis of a set of General Conditions and became effective on 17 June 1952. The purchaser was a newly formed company, Fuerzas Eléctricas de Cataluña, S.A. (Fecsa), which thereupon acquired complete control of the undertaking in Spain.

18. Proceedings before the court of Reus, various courts of Barcelona and the Spanish Supreme Court, to contest the sale and the operations which preceded or followed it, were taken by, among others, Barcelona Traction, National Trust and the Belgian company Sidro as a shareholder in Barcelona Traction, but without success. According to the Spanish Government, up to the filing of the Belgian Application, 2,736 orders had been made in the case and 494 judgments given by lower and 37 by higher courts. For the purposes of this Judgment it is not necessary to go into these orders and judgments.

19. After the bankruptcy declaration, representations were made to the Spanish Government by the British, Canadian, United States and Belgian Governments.

20. The British Government made representations to the Spanish Government on 23 February 1948 concerning the bankruptcy of Barcelona Traction and the seizure of its assets as well as those of Ebro and Barcelonesa, stating its interest in the situation of the bondholders resident in the United Kingdom. It subsequently supported the representations made by the Canadian Government.

21. The Canadian Government made representations to the Spanish Government in a series of diplomatic notes, the first being dated 27 March 1948 and the last 21 April 1952; in addition, approaches were made on a less official level in July 1954 and March 1955. The Canadian Government first complained of the denials of justice said to have been committed in Spain towards Barcelona Traction, Ebro and National Trust, but it subsequently based its complaints more particularly on conduct towards the Ebro company said to be in breach of certain treaty provisions applicable between Spain and Canada. The Spanish Government did not respond to a Canadian proposal for the submission of the dispute to arbitration and the Canadian Government subsequently confined itself, until the time when its interposition entirely ceased, to endeavouring to promote a settlement by agreement between the private groups concerned.

22. The United States Government made representations to the Spanish Government on behalf of Barcelona Traction in a note of 22 July 1949, in support of a note submitted by the Canadian Government the previous day. It subsequently continued its interposition through the diplomatic channel and by other means. Since references were made by the United States Government in these representations to the presence of
American interests in Barcelona Traction, the Spanish Government draws the conclusion that, in the light of the customary practice of the United States Government to protect only substantial American investments abroad, the existence must be presumed of such large American interests as to rule out a preponderance of Belgian interests. The Belgian Government considers that the United States Government was motivated by a more general concern to secure equitable treatment of foreign investments in Spain, and in this context cites, \textit{inter alia}, a note of 5 June 1967 from the United States Government.

23. The Spanish Government having stated in a note of 26 September 1949 that Ebro had not furnished proof as to the origin and genuineness of the bond debts, which justified the refusal of foreign currency transfers, the Belgian and Canadian Governments considered proposing to the Spanish Government the establishment of a tripartite committee to study the question. Before this proposal was made, the Spanish Government suggested in March 1950 the creation of a committee on which, in addition to Spain, only Canada and the United Kingdom would be represented. This proposal was accepted by the United Kingdom and Canadian Governments. The work of the committee led to a joint statement of 11 June 1951 by the three Governments to the effect, \textit{inter alia}, that the attitude of the Spanish administration in not authorizing the transfers of foreign currency was fully justified. The Belgian Government protested against the fact that it had not been invited to nominate an expert to take part in the enquiry, and reserved its rights; in the proceedings before the Court it contended that the joint statement of 1951, which was based on the work of the committee, could not be set up against it, being \textit{res inter alios acta}.

24. The Belgian Government made representations to the Spanish Government on the same day as the Canadian Government, in a note of 27 March 1948. It continued its diplomatic intervention until the rejection by the Spanish Government of a Belgian proposal for submission to arbitration (end of 1951). After the admission of Spain to membership in the United Nations (1955), which, as found by the Court in 1964, rendered operative again the clause of compulsory jurisdiction contained in the 1927 Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration, the Belgian Government attempted further representations. After the rejection of a proposal for a special agreement, it decided to refer the dispute unilaterally to this Court.

* * *

25. In the course of the written proceedings, the following submissions were presented by the Parties:
III. to adjudge and declare, in the event of the annulment of the consequences of the acts complained of proving impossible, that the Spanish State shall be under an obligation to pay to the Belgian State, by way of compensation, a sum equivalent to 88 per cent. of the sum of $88,600,000 arrived at in paragraph 379 of the present Memorial, this compensation to be increased by an amount corresponding to all the incidental damage suffered by the said Belgian nationals as the result of the acts complained of, including the deprivation of enjoyment of rights, the expenses incurred in the defence of their rights and the equivalent in capital and interest of the amount of Barcelona Traction bonds held by Belgian nationals and of their other claims on the companies in the group which it was not possible to recover owing to the acts complained of; 

in the Reply:

"May it please the Court, rejecting any other submissions of the Spanish State which are broader or to a contrary effect, 

(1) that the Application of the Belgian Government is admissible; 
(2) that the Spanish State is responsible for the damage sustained by the Belgian State in the person of its nationals, shareholders in Barcelona Traction, as the result of the acts contrary to international law committed by its organs, which led to the total spoliation of the Barcelona Traction group; 
(3) that the Spanish State is under an obligation to ensure reparation of the said damage; 
(4) that this damage can be assessed at U.S. $78,000,000, representing 88 per cent. of the net value, on 12 February 1948, of the property of which the Barcelona Traction group was despoiled; 
(5) that the Spanish State is, in addition, under an obligation to pay, as an all-embracing payment to cover loss of enjoyment, compensatory interest at the rate of 6 per cent. on the said sum of U.S. $78,000,000, from 12 February 1948 to the date of judgment; 
(6) that the Spanish State must, in addition, pay a sum provisionally assessed at U.S. $3,800,000 to cover the expenses incurred by the Belgian nationals in defending their rights since 12 February 1948; 
(7) that the Spanish State is also liable in the sum of £433,821 representing the amount, in principal and interest, on 4 January 1952, of the Barcelona Traction sterling bonds held by the said nationals, as well as in the sum of U.S. $1,623,127, representing a debt owed to one of the said nationals by a subsidiary company of Barcelona Traction, this sum including lump-sum compensation for loss of profits resulting from the premature termination of a contract; 

that there will be due on those sums interest at the rate of 6 per cent. per annum, as from 4 January 1952 so far as concerns the sum of £433,821, and as from 12 February 1948 so far as concerns the sum of U.S. $1,623,127; both up to the date of judgment; 
(8) that the Spanish State is also liable to pay interest, by way of interest on a sum due and outstanding, at a rate to be determined by reference to the rates generally prevailing, on the amount of compensation awarded, from the date of the Court's decision fixing such compensation up to the date of payment; 
(9) in the alternative to submissions (4) to (6) above, that the amount of the compensation due to the Belgian State shall be established by means of an expert enquiry to be ordered by the Court; and to place on record that the Belgian Government reserves its right to submit in the course of the proceedings such observations as it may deem advisable concerning the object and methods of such measure of investigation; 
(10) and, should the Court consider that it cannot, without an expert enquiry, decide the final amount of the compensation due to the Belgian State, have regard to the considerable magnitude of the damage caused and make an immediate award of provisional compensation, on account of the compensation to be determined after receiving the expert opinion, the amount of such provisional compensation being left to the discretion of the Court." 

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

"May it please the Court 
to adjudge and declare 

I. that the Belgian claim which, throughout the diplomatic correspondence and in the first Application submitted to the Court, has always been a claim with a view to the protection of the Barcelona Traction company, has not changed its character in the second Application, whatever the apparent modifications introduced into it; 
that even if the true subject of the Belgian claim were, not the Barcelona Traction company, but those whom the Belgian Government characterizes on some occasions as 'Belgian shareholders' and on other occasions as 'Belgian interests' in that company, and the damage allegedly sustained by those 'shareholders' or 'interests', it would still remain true that the Belgian Government has not validly proved either that the shares of the company in question belonged on the material dates to 'Belgian shareholders', or, moreover, that there is in the end, in the case submitted to the Court, a preponderance of genuine 'Belgian interests'; 
that even if the Belgian claim effectively had as its beneficiaries alleged 'shareholders' of Barcelona Traction who were 'Belgian', or yet again alleged genuine 'Belgian interests' of the magnitude which is attributed to them, the general principles of international law governing this matter, confirmed by practice which knows of no exception, do not recognize that the national State of shareholders or 'interests', whatever their number or magnitude, may make a claim on their behalf in reliance on allegedly unlawful damage sustained by the company, which possesses the nationality of a third State; 
that the Belgian Government therefore lacks jus standi in the present case; 
II. that a rule of general international law, confirmed both by judicial precedents and the teachings of publicists, and reiterated in Article 3 of the Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927 between Spain and Belgium, requires that private persons
allegedly injured by a measure contrary to international law should have used and exhausted the remedies and means of redress provided by the internal legal order before diplomatic, and above all judicial, protection may be exercised on their behalf;

that the applicability of this rule to the present case has not been disputed and that the prior requirement which it lays down has not been satisfied;

III that the organic machinery for financing the Barcelona Traction undertaking, as conceived from its creation and constantly applied thereafter, placed it in a permanent state of latent bankruptcy, and that the constitutional structure of the group and the relationship between its members were used as the instrument for manifold and ceaseless operations to the detriment both of the interests of the creditors and of the economy and law of Spain, the country in which the undertaking was to carry on all its business;

that these same facts led, on the part of the undertaking, to an attitude towards the Spanish authorities which could not but provoke a fully justified refusal to give effect to the currency applications made to the Spanish Government;

that the bankruptcy declaration of 12 February 1948, the natural outcome of the conduct of the undertaking, and the bankruptcy proceedings which ensued, were in all respects in conformity with the provisions of Spanish legislation on the matter; and that moreover these provisions are comparable with those of other statutory systems, in particular Belgian legislation itself;

that the complaint of usurpation of jurisdiction is not well founded when the bankruptcy of a foreign company is connected in any way with the territorial jurisdiction of the State, that being certainly so in the present case;

that the Spanish judicial authorities cannot be accused of either one or more denials of justice in the proper sense of the term, Barcelona Traction never having been denied access to the Spanish courts and the judicial decisions on its applications and appeals never having suffered unjustified or unreasonable delays; nor is it possible to detect in the conduct of the Spanish authorities the elements of some breach of international law other than a denial of justice;

that the claim for reparation, the very principle of which is disputed by the Spanish Government, is moreover, having regard to the circumstances of the case, an abuse of the right of diplomatic protection in connection with which the Spanish Government waives none of its possible rights;

IV. that, therefore, the Belgian claim is dismissed as inadmissible or, if not, as unfounded”;

in the Rejoinder:

“May it please the Court
to adjudge and declare
that the claim of the Belgian Government is declared inadmissible or, if not, unfounded.”

In the course of the oral proceedings, the following text was presented as final submissions

on behalf of the Belgian Government,

after the hearing of 9 July 1969:

“1. Whereas the Court stated on page 9 of its Judgment of 24 July 1964 that ‘The Application of the Belgian Government of 19 June 1962 seeks reparation for damage claimed to have been caused to a number of Belgian nationals, said to be shareholders in the Barcelona Traction, Light and Power Company, Limited, a company under Canadian law, by the conduct, alleged to have been contrary to international law of various organs of the Spanish State in relation to that company and to other companies of its group’;

Whereas it was therefore manifestly wrong of the Spanish Government, in the submissions in the Counter-Memorial and in the oral arguments of its counsel, to persist in the contention that the object of the Belgian claim is to protect the Barcelona Traction company;

2. Whereas Barcelona Traction was adjudicated bankrupt in a judgment rendered by the court of Reus, in Spain, on 12 February 1948;

3. Whereas that holding company was on that date in a perfectly sound financial situation, as were its subsidiaries, Canadian or Spanish companies having their business in Spain;

4. Whereas, however, the Spanish Civil War and the Second World War had, from 1936 to 1944, prevented Barcelona Traction from being able to receive, from its subsidiaries operating in Spain, the foreign currency necessary for the service of the sterling loans issued by it for the financing of the group’s investments in Spain;

5. Whereas, in order to remedy this situation, those in control of Barcelona Traction agreed with the bondholders in 1945, despite the opposition of the March group, to a plan of compromise, which was approved by the trustee and by the competent Canadian court; and whereas its implementation was rendered impossible as a result of the opposition of the Spanish exchange authorities, even though the method of financing finally proposed no longer involved any sacrifice of foreign currency whatever for the Spanish economy;

6. Whereas, using this situation as a pretext, the March group, which in the meantime had made further considerable purchases of bonds, sought and obtained the judgment adjudicating Barcelona Traction bankrupt;

7. Whereas the bankruptcy proceedings were conducted in such a manner as to lead to the sale to the March group, which took place on 4 January 1952, of all the assets of the bankrupt company, far exceeding in value its liabilities, in consideration of the assumption by the purchaser itself of virtually the bonded debt, which, by new purchases, it had concentrated into its own hands to the extent of approximately 85 per cent., while the cash price paid to the trustees in bankruptcy, 10,000,000 pesetas—approximately $250,000,—, being insufficient to cover the bankruptcy costs, did not allow them to pass anything to the bankrupt company or its shareholders, or even to pay its unsecured creditors;

8. Whereas the accusations of fraud made by the Spanish Government against the Barcelona Traction company and the allegation that that company was in a permanent state of latent bankruptcy are devoid of all
relevance to the case and, furthermore, are entirely unfounded;

9. Whereas the acts and omissions giving rise to the responsibility of the Spanish Government are attributed by the Belgian Government to certain administrative authorities, on the one hand, and to certain judicial authorities, on the other hand;

Whereas it is apparent when those acts and omissions are examined as a whole that, apart from the defects proper to each, they converged towards one common result, namely the diversion of the bankruptcy procedure from its statutory purposes to the forced transfer, without compensation, of the undertakings of the Barcelona Traction group to the benefit of a private Spanish group, the March group;

I
ABUSE OF RIGHTS, ARBITRARY AND DISCRIMINATORY ATTITUDE OF CERTAIN ADMINISTRATIVE AUTHORITIES

Considering that the Spanish administrative authorities behaved in an improper, arbitrary and discriminatory manner towards Barcelona Traction and its shareholders, in that, with the purpose of facilitating the transfer of control over the property of the Barcelona Traction group from Belgian hands into the hands of a private Spanish group, they in particular—

(a) frustrated, in October and December 1946, the implementation of the third method for financing the plan of compromise, by refusing to authorize Ebro, a Canadian company with residence in Spain, to pay 64,000,000 pesetas in the national currency to Spanish residents on behalf of Barcelona Traction, a non-resident company, so that the latter might redeem its peseta bonds circulating in Spain, despite the fact that Ebro continued uninterruptedly to be granted periodical authorization to pay the interest on those same bonds up to the time of the bankruptcy;

(b) on the other hand, accepted that Juan March, a Spanish citizen manifestly resident in Spain, should purchase considerable quantities of Barcelona Traction sterling bonds abroad;

(c) made improper use of an international enquiry, from which the Belgian Government was excluded, by gravely distorting the purport of the conclusions of the Committee of Experts, to whom they attributed the finding of irregularities of all kinds such as to entail severe penalties for the Barcelona Traction group, which enabled the trustees in bankruptcy, at March's instigation, to bring about the premature sale at a ridiculously low price of the assets of the Barcelona Traction group and their purchase by the March group thanks to the granting of all the necessary exchange authorizations;

II
USURPATION OF JURISDICTION

Considering that the Spanish courts, in agreeing to entertain the bankruptcy of Barcelona Traction, a company under Canadian law with its registered office in Toronto, having neither registered office nor commercial establishment in Spain, nor possessing any property or carrying on any business there, usurped a power of jurisdiction which was not theirs in international law;

Considering that the territorial limits of acts of sovereignty were patently disregarded in the measures of enforcement taken in respect of property situated outside Spanish territory without the concurrence of the competent foreign authorities;

Considering that there was, namely, conferred upon the bankruptcy authorities, through the artificial device of mediate and constructive civil possession, the power to exercise in Spain the rights attaching to the shares located in Canada of several subsidiary and sub-subsidiary companies on which, with the approval of the Spanish judicial authorities, they relied for the purpose of replacing the directors of those companies, modifying their terms of association, and cancelling their regularly issued shares and replacing them with others which they had printed in Spain and delivered to Fecsa at the time of the sale of the bankrupt company's property, without there having been any effort to obtain possession of the real shares in a regular way;

Considering that that disregard is the more flagrant in that three of the subsidiaries were companies under Canadian law with their registered offices in Canada and that the bankruptcy authorities purported, with the approval of the Spanish judicial authorities, to transform two of them into Spanish companies, whereas such alteration is not permitted by the law governing the status of those companies;

III
DENIALS OF JUSTICE LATO SENSU

Considering that a large number of decisions of the Spanish courts are vitiating by gross and manifest error in the application of Spanish law, by arbitrariness or discrimination, constituting in international law denials of justice lato sensu;

Considering that in particular—

(1) The Spanish courts agreed to entertain the bankruptcy of Barcelona Traction in flagrant breach of the applicable provisions of Spanish law, which do not permit that a foreign debtor should be adjudged bankrupt if that debtor does not have his domicile, or at least an establishment, in Spanish territory;

(2) Those same courts adjudged Barcelona Traction bankrupt whereas that company was neither in a state of insolvency nor in a state of final, general and complete cessation of payments and had not ceased its payments in Spain, this being a manifest breach of the applicable statutory provisions of Spanish law, in particular Article 876 of the 1885 Commercial Code;

(3) The judgment of 12 February 1948 failed to order the publication of the bankruptcy by announcement in the place of domicile of the bankrupt, which constitutes a flagrant breach of Article 1044 (5) of the 1829 Commercial Code;

(4) The decisions failing to respect the separate estates of Barcelona Traction's subsidiaries and sub-subsidiaries, in that they extended to their property the attachment arising out of the bankruptcy of the parent
flagrant contempt of the undisputed rule of Spanish law to the effect that
acts performed and agreements concluded validly by the bankrupt before
the date of the cessation of payments as determined in the judicial decisions
shall retain their effects and their binding force in respect of the bank-
ruptcy authorities (Articles 878 et seq. of the 1885 Commercial Code);
(9) The Spanish courts decided at one and the same time to ignore
the separate legal personalities of the subsidiary and sub-subsidiary
companies (so as to justify the attachment of their property in Spain
and their inclusion in the bankrupt estate) and implicitly but indubitably to
recognize these same personalities by the conferring of fictitious possess-
on of their shares on the bankruptcy authorities, thus giving decisions
which were vitiated by an obvious self-contradiction revealing their
arbitrary and discriminatory nature;
(10) The general meeting of creditors of 19 September 1949 convened
for the purpose of appointing the trustees was, with the approval of the
Spanish judicial authorities, held in flagrant breach of Articles 300 and
1342 of the Civil Procedure Code, and 1044 (3), 1060, 1061 and 1063
of the 1829 Commercial Code, in that (a) it was not convened on cogniz-
ance of the list of creditors; (b) when that list was prepared, it was not
drawn up on the basis of particulars from the balance-sheet or the books
and documents of the bankrupt company, which books and documents
were not, as the Spanish Government itself admits, in the possession
of the commissioner on 8 October 1949, while the judicial authorities
had not at any time sent letters rogatory to Toronto, Canada, with the request
that they be put at his disposal;
(11) By authorizing the sale of the property of the bankrupt company
when the adjudication in bankruptcy had not acquired irrevocability
and while the proceedings were suspended, the Spanish courts flagrantly
violated Articles 919, 1167, 1319 and 1331 of the Civil Procedure Code
and the general principles of the right of defence;
In so far as that authorization was based on the allegedly perishable
nature of the property to be sold, it constituted a serious disregard of
Article 1035 of the 1829 Commercial Code and Article 1354 of the Civil
Procedure Code, which articles allow the sale only of movable property
which cannot be kept without deteriorating or spoiling; even supposing
that those provisions could be applied in general to the property of Bar-
celona Traction, its subsidiaries and sub-subsidiaries—quo non—, there
would still have been a gross and flagrant violation of them, inasmuch as
that property as a whole was obviously not in any imminent danger of
serious depreciation; indeed the only dangers advanced by the trustees,
namely those arising out of the threats of prosecution contained in the
Joint Statement, had not taken shape, either by the day on which autho-
rization to sell was requested or by the day of the sale, in any proceedings
or demand by the competent authorities and did not ever materialize,
except to an insignificant extent;
The only penalty which the undertakings eventually had to bear, 15
months after the sale, was that relating to the currency offence, which
had occasioned an embargo for a much higher sum as early as April 1948;
(12) The authorization to sell and the sale, in so far as they related
to the shares of the subsidiary and sub-subsidiary companies without
delivery of the certificates, constituted a flagrant violation of Articles
1461 and 1462 of the Spanish Civil Code, which require delivery of the thing sold, seeing that the certificates delivered to the successful bidder had not been properly issued and were consequently without legal value; if the authorization to sell and the sale had applied, as the respondent Government wrongly maintains, to the rights attaching to the shares and bonds or to the bankrupt company's power of domination over its subsidiaries, those rights ought to have been the subject of a joint valuation, on pain of flagrant violation of Articles 1084 to 1089 of the 1829 Commercial Code and Article 1388 of the Civil Procedure Code; in any event, it was in flagrant violation of these last-named provisions that the commissioner fixed an exaggeratedly low reserve price on the basis of a unilateral expert opinion which, through the effect of the General Conditions of Sale, allowed the March group to acquire the auctioned property at that reserve price;

(13) By approving the General Conditions of Sale on the very day on which they were submitted to them and then dismissing the proceedings instituted to contest those conditions, the judicial authorities committed a flagrant violation of numerous ordre public provisions of Spanish law; thus, in particular, the General Conditions of Sale—

(a) provided for the payment of the bondholder creditors, an operation which, under Article 1322 of the Civil Procedure Code, falls under the fourth section of the bankruptcy, whereas that section was suspended as a result of the effects attributed to the Boter motion contesting jurisdiction, no exemption from that suspension having been applied for or obtained in pursuance of the second paragraph of Article 114 of the Civil Procedure Code;

(b) prescribed for the payment of the debts owing on the bonds before they had been approved and ranked by a general meeting of the creditors on the recommendation of the trustees, contrary to Articles 1101 to 1109 of the 1829 Commercial Code and to Articles 1266 to 1274, 1286 and 1378 of the Civil Procedure Code;

(c) in disregard of Articles 1236, 1240, 1512 and 1513 of the Civil Procedure Code, did not require the price to be lodged or deposited at the Court's disposal;

(d) conferred on the trustees power to recognize, determine and declare effective the rights attaching to the bonds, in disregard, on the one hand, of Articles 1101 to 1109 of the 1829 Commercial Code and of Articles 1266 to 1274 of the Civil Procedure Code, which reserve such rights for the general meeting of creditors under the supervision of the judge, and, on the other, of Articles 1445 and 1449 of the Civil Code, which lay down that the purchase price must be a definite sum and may not be left to the arbitrary decision of one of the contracting parties;

(e) in disregard of Articles 1291 to 1294 of the Civil Procedure Code, substituted the successful bidder for the truste in respect of the payment of the debts owing on the bonds, whilst, in violation of the general principles applicable to novation, replacing the security for those debts, consisting, pursuant to the trust deeds, of shares and bonds issued by the subsidiary and sub-subsidiary companies, with the deposit of a certain sum with a bank or with a mere banker's guarantee limited to three years;

(f) delegated to a third party the function of paying certain debts, in disregard of Articles 1291 and 1292 of the Civil Procedure Code, which define the functions of the trustees in this field and do not allow of any delegation;

(g) ordered the payment of the debts owing on the bonds in sterling, whereas a forced execution may only be carried out in local currency and in the case of bankruptcy the various operations which it includes require the conversion of the debts into local currency on the day of the judgment adjudicating bankruptcy, as is to be inferred from Articles 883 and 884 of the 1885 Commercial Code;

IV

DENIALS OF JUSTICE STRICTO SENSU

Considering that in the course of the bankruptcy proceedings the rights of the defence were seriously disregarded; that in particular—

(a) the Reus court, in adjudicating Barcelona Traction bankrupt on an ex parte petition, inserted in its judgment provisions which went far beyond finding the purported insolvency of or a general cessation of payments by the bankrupt company, the only finding, in addition to one on the capacity of the petitioners, that it was open to it to make in such proceedings;

This disregard of the rights of the defence was particularly flagrant in respect of the subsidiary companies, whose property was ordered by the court to be attached without their having been summoned and without their having adjudicated bankrupt;

(b) the subsidiary companies that were thus directly affected by the judgment of 12 February 1948 nevertheless had their applications to set aside the order for attachment which concerned them rejected as inadmissible on the grounds of lack of capacity;

(c) the pursuit of those remedies and the introduction of any other such proceedings were also made impossible for the subsidiary companies by the discontinuances effected each time by the solicitors appointed to replace the original solicitors by the new boards of directors directly or indirectly involved; these changes of solicitors and discontinuances were effected by the new boards of directors by virtue of authority conferred upon them by the interim receiver simultaneously with their appointment;

(d) the proceedings for relief brought by those in control of the subsidiary companies who had been dismissed by the commissioner were likewise held inadmissible by the Reus court when they sought to avail themselves of the specific provisions of Article 1363 of the Civil Procedure Code, which provide for proceedings to reverse decisions taken by the commissioner in bankruptcy;

(e) there was discrimination on the part of the first special judge when he refused to admit as a party to the bankruptcy the Canadian National Trust Company, Limited, trustee for the bankrupt company's two sterling loans, even though it relied upon the security of the mortgage which had been given to it by Ebro, whereas at the same time he admitted to the proceedings the Bondholders' Committee
appointed by Juan March, although National Trust and the Committee derived their powers from the same trust deeds;

(f) the complaints against the General Conditions of Sale could be neither amplified nor heard because the order which had approved the General Conditions of Sale was deemed to be one of mere routine;

Considering that many years elapsed after the bankruptcy judgment and even after the ruinous sale of the property of the Barcelona Traction group without either the bankrupt company or those co-interested with it having had an opportunity to be heard on the numerous complaints put forward against the bankruptcy judgment and related decisions in the opposition of 18 June 1948 and in various other applications for relief;

Considering that those delays were caused by the motion contesting jurisdiction fraudulently lodged by a confederate of the petitioners in bankruptcy and by incidental proceedings instituted by other men of straw of the March group, which were, like the motion contesting jurisdiction, regularly admitted by the various courts;

Considering that both general international law and the Spanish-Belgian Treaty of 1927 regard such delays as equivalent to the denial of a hearing;

Considering that the manifest injustice resulting from the movement of the proceedings towards the sale, whilst the actions contesting the bankruptcy judgment and even the jurisdiction of the Spanish courts remained suspended, was brought about by two judgments delivered by the same chamber of the Barcelona court of appeal on the same day, 7 June 1949: in one of them it confirmed the admission, with two effects, of the Boter appeal from the judgment of the special judge rejecting his motion contesting jurisdiction, whereas in the other it reduced the suspensive effect granted to that same appeal by excluding from the suspensive the calling of the general meeting of creditors for the purpose of appointing the trustees in bankruptcy;

V Damage and Reparation

Considering that the acts and omissions contrary to international law attributed to the organs of the Spanish State had the effect of depriving the Barcelona Traction company of the whole of its property and of depriving it of the very objects of its activity, and thus rendered it practically defunct;

Considering that Belgian nationals, natural and juristic persons, shareholdes in Barcelona Traction, in which they occupied a majority and controlling position, and in particular the Sidro company, the owner of more than 75 per cent. of the registered capital, on this account suffered direct and immediate injury to their interests and rights, which were voided of all value and effectiveness;

Considering that the reparation due to the Belgian State from the Spanish State, as a result of the internationally unlawful acts for which the latter State is responsible, must be complete and must, so far as possible, reflect the damage suffered by its nationals whose case the Belgian State has taken up; and that, since restitutio in integrum is, in the circumstances of the case, practically and legally impossible, the reparation of the damage suffered can only take place in the form of an all-embracing pecuniary indemnity, in accordance with the provisions of the Spanish-Belgian Treaty of 1927 and with the rules of general international law;

Considering that in the instant case the amount of the indemnity must be fixed by taking as a basis the net value of the Barcelona Traction company's property at the time of its adjudication in bankruptcy, expressed in a currency which has remained stable, namely the United States dollar;

Considering that the value of that property must be determined by the replacement cost of the subsidiary and sub-subsidiary companies' plant for the production and distribution of electricity at 12 February 1948, as that cost was calculated by the Ebro company's engineers in 1946;

Considering that, according to those calculations, and after deduction for depreciation through wear and tear, the value of the plant was at that date U.S. $116,220,000; from this amount there must be deducted the principal of Barcelona Traction's bonded debt and the interest that had fallen due thereon, that is to say, U.S. $27,619,018, which leaves a net value of about U.S. $88,600,000, this result being confirmed—

(1) by the study submitted on 5 February 1949 and on behalf of Ebro to the Special Technical Office for the Regulation and Distribution of Electricity (Catalanian region) (Belgian New Document No. 50);
(2) by capitalization of the 1947 profits;
(3) by the profits made by Fecsa in 1956—the first year after 1948 in which the position of electricity companies was fully stabilized and the last year before the changes made in the undertaking by Fecsa constituted an obstacle to any useful comparison;
(4) by the reports of the experts consulted by the Belgian Government;

Considering that the compensation due to the Belgian Government must be estimated, in the first place, at the percentage of such net value corresponding to the participation of Belgian nationals in the capital of the Barcelona Traction company, namely 88 per cent.;

Considering that on the critical dates of the bankruptcy judgment and the filing of the Application, the capital of Barcelona Traction was represented by 1,798,854 shares, partly bearer and partly registered; that on 12 February 1948 Sidro owned 1,012,688 registered shares and 349,905 bearer shares; that other Belgian nationals owned 420 registered shares and at least 244,832 bearer shares; that 1,607,845 shares, constituting 89.3 per cent. of the company's capital, were thus on that date in Belgian hands; that on 14 June 1962 Sidro owned 1,334,514 registered shares and 31,288 bearer shares; that other Belgian nationals owned 2,388 registered shares and at least 200,000 bearer shares; and that 1,588,130 shares, constituting 88 per cent. of the company's capital, were thus on that date in Belgian hands;

Considering that the compensation claimed must in addition cover all incidental damage suffered by the said Belgian nationals as a result of the acts complained of, including the deprivation of enjoyment of rights, the expenses incurred in the defence of their rights and the equivalent, in capital and interest, of the amount of the Barcelona Traction bonds held by Belgian nationals, and of their other claims on the companies in the
attaching to the legal situation of shareholders as it is recognized by international law; but they thus caused serious damage which they possessed in that situation; a breach of their obligations and duties, resulting in their being deprived of the benefits which they possessed in that situation; a breach of their obligations and duties, resulting in their being deprived of the benefits which they possessed in that situation.

VII

Objection of Exclusion or Local Remedy

Considering that no real difference has emerged between the Parties as to the scope and significance of the rule of international law embodied in Article 3 of the Treaty of Union and Arbitration, for the purpose of determining the possibility of providing the Spanish courts with the necessary means of redress which are available to the Parties at reasonable cost, it must be noted that the Spanish courts refer more than 30 decisions to the point of exhaustion.

1. With Respect to the Complaints Against the Acts of the Administrative Authorities

Considering that the Spanish complaint against the decision of October and

Considering that the Spanish complaint concerning the decisions of October

Considering that the Spanish complaint concerning the decisions of October
December 1946 referred to under I (a) above is not admissible on account of Barcelona Traction's failure to exercise against them the remedies of appeal to higher authority and contentious administrative proceedings;

Considering that the remedy of appeal to higher authority was inconceivable in this case, being by definition an appeal which may be made from a decision by one administrative authority to another hierarchically superior authority namely the Minister, whereas the decisions complained of were taken with the co-operation and approval of the Minister himself, and even brought to the knowledge of those concerned by the Minister at the same time as by the competent administrative authority;

Considering that it was likewise not possible to envisage contentious administrative proceedings against a decision which patently did not fall within the ambit of Article 1 of the Act of 22 June 1894, which recognizes such a remedy only against administrative decisions emanating from administrative authorities in the exercise of their regulated powers and “infringing a right of an administrative character previously established in favour of the applicant by an Act, a regulation or some other administrative provision”, which requirements were patently not satisfied in this case;

2. With Respect to the Complaint concerning the Reus Court's Lack of Jurisdiction to Declare the Bankruptcy of Barcelona Traction

Considering that the Spanish Government is wrong in seeking to derive an argument from the fact that Barcelona Traction and its co-interested parties supposedly failed to challenge the jurisdiction of the Reus Court by means of a motion contesting its competence, and allowed the time-limit for entering opposition to expire without having challenged that jurisdiction;

Considering that in fact a motion contesting jurisdiction is not at all the same thing as a motion contesting competence ratione materiae and may properly be presented cumulatively with the case on the merits;

Considering that the bankrupt company contested jurisdiction at the head of the complaints set out in its opposition plea of 18 June 1948;

Considering that it complained again of lack of jurisdiction in its application of 5 July 1948 for a declaration of nulity and in its pleading of 3 September 1948 in which it confirmed its opposition to the bankruptcy judgment;

Considering that National Trust submitted a formal motion contesting jurisdiction in its application of 27 November 1948 for admission to the bankruptcy proceedings;

Considering that Barcelona Traction, after having as early as 23 April 1949 entered an appearance in the proceedings concerning the Boter motion contesting jurisdiction, formally declared its adherence to that motion by a procedural document of 11 April 1953;

Considering that the question of jurisdiction being a matter of ordre public, as is the question of competence ratione materiae, the complaint of belatedness could not be upheld, even in the event of the expiry of the allegedly applicable time-limit for entering a plea of opposition;

3. With Respect to the Complaints concerning the Bankruptcy Judgment and Related Decisions

Considering that the Spanish Government is wrong in contending that the said decisions were not attacked by adequate remedies pursued to the point of exhaustion or for a reasonable length of time;

Considering that in fact, as early as 16 February 1948, the bankruptcy judgment was attacked by an application for its setting aside on the part of the subsidiary companies, Ebro and Barcelona;

Considering that while those companies admittedly confined their applications for redress to the parts of the judgment which gave them grounds for complaint, the said remedies were nonetheless adequate and they were brought to nought in circumstances which are themselves the subject of a complaint which has been set out above;

Considering that, contrary to what is asserted by the Spanish Government, the bankrupt company itself entered a plea of opposition to the judgment by a procedural document of 18 June 1948, confirmed on 3 September 1948;

Considering that it is idle for the Spanish Government to criticize the summary character of this procedural document, while the suspension decreed by the special judge on account of the Boter motion contesting jurisdiction prevented the party entering opposition from filing, pursuant to Article 326 of the Civil Procedure Code, the additional pleading developing its case;

Considering that likewise there can be no question of belatedness, since only publication of the bankruptcy at the domicile of the bankrupt company could have caused the time-limit for entering opposition to begin to run, and no such publication took place;

Considering that the bankruptcy judgment and the related decisions were moreover also attacked in the incidental application for a declaration of nullity submitted by Barcelona Traction on 5 July 1948 and amplified on 31 July 1948;

4. With Respect to the Complaints concerning the Blocking of the Remedies

Considering that the various decisions which instituted and prolonged the suspension of the first section of the bankruptcy proceedings were attacked on various occasions by numerous proceedings taken by Barcelona Traction, beginning with the incidental application for a declaration of nullity which it submitted on 5 July 1948;

5. With Respect to the Complaint concerning the Dismissal of the Officers of the Subsidiary Companies by Order of the Commissioner

Considering that this measure was also attacked by applications for its setting aside on the part of the persons concerned, which were quite improperly declared inadmissible; and that the proceedings seeking redress against those decisions were adjourned until 1963;

6. With Respect to the Failure to Observe the No-Action Clause

Considering that this clause was explicitly referred to by National Trust in its application of 27 November 1948 for admission to the proceedings;

7. With Respect to the Measures Preparatory to the Sale and the Sale

Considering that the other side, while implicitly admitting that adequate proceedings were taken to attack the appointment of the trustees and the authorization to sell, is wrong in contending that this was supposedly not so in respect of—
(1) The failure to draw up a list of creditors prior to the convening of the meeting of creditors for the appointment of the trustees, whereas this defect was complained of in the procedural document attacking the appointment of the trustees and in the application that the sale be declared null and void;

(2) Certain acts and omissions on the part of the trustees, whereas they were referred to in the proceedings taken to attack the authorization to sell and the decision approving the method of unilateral valuation of the assets;

(3) The conditions of sale, whereas they were attacked by Barcelona Traction in an application to set aside and on appeal, in the application of 27 December 1951 for a declaration of nullity containing a formal prayer that the order approving the conditions of sale be declared null and void, and in an application of 28 May 1955 (New Documents submitted by the Belgian Government, 1969, No. 30); the same challenge was expressed by Sidro in its action of 7 February 1953 (New Documents submitted by the Spanish Government, 1969) and by two other Belgian shareholders of Barcelona Traction, Mrs. Mathot and Mr. Davi-vier, in their application of 26 May 1955 (New Documents submitted by the Belgian Government, 1969, No. 29);

8. With Respect to the Exceptional Remedies

Considering that the Spanish Government is wrong in raising as an objection to the Belgian claim the allegation that Barcelona Traction did not make use of certain exceptional remedies against the bankruptcy judgment, such as application for revision, action for civil liability and criminal proceedings against the judges, and application for a hearing by a party in default;

Considering that the first of these remedies could patently not be contemplated, not only on account of the nature of the bankruptcy judgment, but also because until 1963 there was an opposition outstanding against that Judgment and, superabundantly, because Barcelona Traction, its subsidiaries and co-interested parties would not have been in a position to prove the facts of subornation, violence or fraudulent machination which alone could have entitled such proceedings to be taken;

Considering that the remedies of an action for civil liability and criminal proceedings against the judges were not adequate, since they were not capable of bringing about the annulment or setting aside of the decisions constituting denials of justice;

Considering that similarly the remedy of application for a hearing accorded by Spanish law to a party in default was patently in this case neither available to Barcelona Traction nor adequate;

FOR THESE REASONS, and any others which have been adduced by the Belgian Government in the course of the proceedings,

May it please the Court, rejecting any other submissions of the Spanish State which are broader or to a contrary effect,

"To uphold the claims of the Belgian Government expressed in the submissions [in] the Reply."

The following final submissions were presented on behalf of the Spanish Government, at the hearing of 22 July 1969:

"Considering that the Belgian Government has no jus standi in the present case, either for the protection of the Canadian Barcelona Traction company or for the protection of alleged Belgian 'shareholders' of that company;

Considering that the requirements of the exhaustion of local remedies rule have not been satisfied either by the Barcelona Traction company or by its alleged 'shareholders';

Considering that as no violation of an international rule binding on Spain has been established, Spain has not incurred any responsibility vis-à-vis the applicant State on any account; and that, in particular—

(a) Spain is not responsible for any usurpation of jurisdiction on account of the action of its judicial organs;

(b) the Spanish judicial organs have not violated the rules of international law requiring that foreigners be given access to the courts, that a decision be given on their claims and that their proceedings for redress should not be subjected to unjustified delays;

(c) there have been no acts of the Spanish judiciary capable of giving rise to international responsibility on the part of Spain on account of the content of judicial decisions; and

(d) there has not been on the part of the Spanish administrative authorities any violation of an international obligation on account of abuse of rights or discriminatory acts;

Considering that for these reasons, and any others expounded in the written and oral proceedings, the Belgian claims must be deemed to be inadmissible or unfounded;

The Spanish Government presents to the Court its final submissions:

May it please the Court to adjudge and declare that the Belgian Government's claims are dismissed."

* * *

26. As has been indicated earlier, in opposition to the Belgian Application the Spanish Government advanced four objections of a preliminary nature. In its Judgment of 24 July 1964 the Court rejected the first and second of these (see paragraph 3 above), and decided to join the third and fourth to the merits. The latter were, briefly, to the effect that the Belgian Government lacked capacity to submit any claim in respect of wrongs done to a Canadian company, even if the shareholders were Belgian, and that local remedies available in Spain had not been exhausted.

27. In the subsequent written and oral proceedings the Parties supplied the Court with abundant material and information bearing both on the preliminary objections not decided in 1964 and on the merits of the case. In this connection the Court considers that reference should be made to the unusual length of the present proceedings, which has been due to the
very long time-limits requested by the Parties for the preparation of their written pleadings and in addition to their repeated requests for an extension of these limits. The Court did not find that it should refuse these requests and thus impose limitations on the Parties in the preparation and presentation of the arguments and evidence which they considered necessary. It nonetheless remains convinced of the fact that it is in the interest of the authority and proper functioning of international justice for cases to be decided without unwarranted delay.

28. For the sake of clarity, the Court will briefly recapitulate the claim and identify the entities concerned in it. The claim is presented on behalf of natural and juristic persons, alleged to be Belgian nationals and shareholders in the Barcelona Traction, Light and Power Company, Limited. The submissions of the Belgian Government make it clear that the object of its Application is reparation for damage allegedly caused to these persons by the conduct, said to be contrary to international law, of various organs of the Spanish State towards that company and various other companies in the same group.

29. In the first of its submissions, more specifically in the Counter-Memorial, the Spanish Government contends that the Belgian Application of 1962 seeks, though disguisedly, the same object as the Application of 1958, i.e., the protection of the Barcelona Traction company as such, as a separate corporate entity, and that the claim should in consequence be dismissed. However, in making its new Application, as it has chosen to frame it, the Belgian Government was only exercising the freedom of action of any State to formulate its claim in its own way. The Court is therefore bound to examine the claim in accordance with the explicit content imparted to it by the Belgian Government.

30. The States which the present case principally concerns are Belgium, the national State of the alleged shareholders, Spain, the State whose organs are alleged to have committed the unlawful acts complained of, and Canada, the State under whose laws Barcelona Traction was incorporated and in whose territory it has its registered office ("head office" in the terms of the by-laws of Barcelona Traction).

31. Thus the Court has to deal with a series of problems arising out of a triangular relationship involving the State whose nationals are shareholders in a company incorporated under the laws of another State, in whose territory it has its registered office; the State whose organs are alleged to have committed against the company unlawful acts prejudicial to both it and its shareholders; and the State under whose laws the company is incorporated, and in whose territory it has its registered office.

32. In these circumstances it is logical that the Court should first address itself to what was originally presented as the subject-matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.

35. Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions:

"The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach." (Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, pp. 181-182.)

In the present case it is therefore essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account...
of its nationals' having suffered infringement of their rights as shareholders in a company not of Belgian nationality?

36. Thus it is the existence or absence of a right, belonging to Belgium and recognized as such by international law, which is decisive for the problem of Belgium's capacity.

"This right is necessarily limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged." (Panevezyz-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76, p. 16.)

It follows that the same question is determinant in respect of Spain's responsibility towards Belgium. Responsibility is the necessary corollary of a right. In the absence of any treaty on the subject between the Parties, this essential issue has to be decided in the light of the general rules of diplomatic protection.

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37. In seeking to determine the law applicable to this case, the Court has to bear in mind the continuous evolution of international law. Diplomatic protection deals with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronts the rights of the territorial sovereign, a fact of which the general law on the subject has had to take cognizance in order to prevent abuses and friction. From its origins closely linked with international commerce, diplomatic protection has sustained a particular impact from the growth of international economic relations, and at the same time from the profound transformations which have taken place in the economic life of nations. These latter changes have given birth to municipal institutions, which have transcended frontiers and have begun to exercise considerable influence on international relations. One of these phenomena which has a particular bearing on the present case is the corporate entity.

38. In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treat-
name of the company or in its own name. If the shareholders disagree with the decisions taken on behalf of the company they may, in accordance with its articles or the relevant provisions of the law, change them or replace its officers, or take such action as is provided by law. Thus to protect the company against abuse by its management or the majority of shareholders, several municipal legal systems have vested in shareholders (sometimes a particular number is specified) the right to bring an action for the defence of the company, and conferred upon the minority of shareholders certain rights to guard against decisions affecting the rights of the company vis-à-vis its management or controlling shareholders. Nonetheless the shareholders’ rights in relation to the company and its assets remain limited, this being, moreover, a corollary of the limited nature of their liability.

43. At this point the Court would recall that in forming a company, its promoters are guided by all the various factors involved, the advantages and disadvantages of which they take into account. So equally does a shareholder, whether he is an original subscriber of capital or a subsequent purchaser of the company’s shares from another shareholder. He may be seeking safety of investment, high dividends or capital appreciation—or a combination of two or more of these. Whichever it is, it does not alter the legal status of the corporate entity or affect the rights of the shareholder. In any event he is bound to take account of the risk of reduced dividends, capital depreciation or even loss, resulting from ordinary commercial hazards or from prejudice caused to the company by illegal treatment of some kind.

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44. Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons. Creditors do not have any right to claim compensation from a person who, by wronging their debtor, causes them loss. In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder’s interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.

45. However, it has been argued in the present case that a company represents purely a means of achieving the economic purpose of its members, namely the shareholders, while they themselves constitute in fact the reality behind it. It has furthermore been repeatedly emphasized that there exists between a company and its shareholders a relationship describable as a community of destiny. The alleged acts may have been directed at the company and not the shareholders, but only in a formal sense: in reality, company and shareholders are so closely interconnected that prejudicial acts committed against the former necessarily wrong the latter; hence any acts directed against a company can be conceived as directed against its shareholders, because both can be considered in substance, i.e., from the economic viewpoint, identical. Yet even if a company is no more than a means for its shareholders to achieve their economic purpose, so long as it is in esse it enjoys an independent existence. Therefore the interests of the shareholders are both separable and indeed separated from those of the company, so that the possibility of their diverging cannot be denied.

46. It has also been contended that the measures complained of, although taken with respect to Barcelona Traction and causing it direct damage, constituted an unlawful act vis-à-vis Belgium, because they also, though indirectly, caused damage to the Belgian shareholders in Barcelona Traction. This again is merely a different way of presenting the distinction between injury in respect of a right and injury to a simple interest. But, as the Court has indicated, evidence that damage was suffered does not ipso facto justify a diplomatic claim. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected.

47. The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder’s rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company.

48. The Belgian Government claims that shareholders of Belgian nationality suffered damage in consequence of unlawful acts of the Spanish authorities and, in particular, that the Barcelona Traction shares, though they did not cease to exist, were emptied of all real economic content. It accordingly contends that the shareholders had an
independent right to redress, notwithstanding the fact that the acts complained of were directed against the company as such. Thus the legal issue is reducible to the question of whether it is legitimate to identify an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights.

49. The Court has noted from the Application, and from the reply given by Counsel on 8 July 1969, that the Belgian Government did not base its claim on an infringement of the direct rights of the shareholders. Thus it is not open to the Court to go beyond the claim as formulated by the Belgian Government and it will not pursue its examination of this point any further.

50. In turning now to the international legal aspects of the case, the Court must, as already indicated, start from the fact that the present case essentially involves factors derived from municipal law—the distinction and the community between the company and the shareholder—which the Parties, however widely their interpretations may differ, each take as the point of departure of their reasoning. If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.

51. On the international plane, the Belgian Government has advanced the proposition that it is inadmissible to deny the shareholders' national State a right of diplomatic protection merely on the ground that another State possesses a corresponding right in respect of the company itself. In strict logic and law this formulation of the Belgian claim to *jus standi* assumes the existence of the very right that requires demonstration. In fact the Belgian Government has repeatedly stressed that there exists no rule of international law which would deny the national State of the shareholders the right of diplomatic protection for the purpose of seeking redress pursuant to unlawful acts committed by another State against the company in which they hold shares. This, by emphasizing the absence of any express denial of the right, conversely implies the admission that there is no rule of international law which expressly confers such a right on the shareholders' national State.

52. International law may not, in some fields, provide specific rules in particular cases. In the concrete situation, the company against which allegedly unlawful acts were directed is expressly vested with a right, whereas no such right is specifically provided for the shareholder in respect of those acts. Thus the position of the company rests on a positive rule of both municipal and international law. As to the shareholder, while he has certain rights expressly provided for him by municipal law as referred to in paragraph 42 above, appeal can, in the circumstances of the present case, only be made to the silence of international law. Such silence scarcely admits of interpretation in favour of the shareholder.

53. It is quite true, as was recalled in the course of oral argument in the present case, that concurrent claims are not excluded in the case of a person who, having entered the service of an international organization and retained his nationality, enjoys simultaneously the right to be protected by his national State and the right to be protected by the organization to which he belongs. This however is a case of one person in possession of two separate bases of protection, each of which is valid (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 185*). There is no analogy between such a situation and that of foreign shareholders in a company which has been the victim of a violation of international law which has caused them damage.

54. Part of the Belgian argument is founded on an attempt to assimilate interests to rights, relying on the use in many treaties and other instruments of such expressions as property, rights and interests. This is not, however, conclusive. Property is normally protected by law. Rights are *ex hypothesi* protected by law, otherwise they would not be rights. According to the Belgian Government, interests, although distinct from rights, are also protected by the aforementioned conventional rules. The Court is of the opinion that, for the purpose of interpreting the general rule of international law concerning diplomatic protection, which is its task, it has no need to determine the meaning of the term interests in the conventional rules, in other words to determine whether by this term the conventional rules refer to rights rather than simple interests.

55. The Court will now examine other grounds on which it is conceivable that the submission by the Belgian Government of a claim on behalf of shareholders in Barcelona Traction may be justified.

56. For the same reasons as before, the Court must here refer to municipal law. Forms of incorporation and their legal personality have
sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of “lifting the corporate veil” or “disregarding the legal entity” has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.

57. Hence the lifting of the veil is more frequently employed from without, in the interest of those dealing with the corporate entity. However, it has also been operated from within, in the interest of—among others—the shareholders, but only in exceptional circumstances.

58. In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.

* *

59. Before proceeding, however, to consider whether such circumstances exist in the present case, it will be advisable to refer to two specific cases involving encroachment upon the legal entity, instances of which have been cited by the Parties. These are: first, the treatment of enemy and allied property, during and after the First and Second World Wars, in peace treaties and other international instruments; secondly, the treatment of foreign property consequent upon the nationalizations carried out in recent years by many States.

60. With regard to the first, enemy-property legislation was an instrument of economic warfare, aimed at denying the enemy the advantages to be derived from the anonymity and separate personality of corporations. Hence the lifting of the veil was regarded as justified ex necessitate and was extended to all entities which were tainted with enemy character, even the nationals of the State enacting the legislation. The provisions of the peace treaties had a very specific function: to protect allied property, and to seize and pool enemy property with a view to covering reparation claims. Such provisions are basically different in their rationale from those normally applicable.

61. Also distinct are the various arrangements made in respect of compensation for the nationalization of foreign property. Their rationale too, derived as it is from structural changes in a State’s economy, differs from that of any normally applicable provisions. Specific agreements have been reached to meet specific situations, and the terms have varied from case to case. Far from evidencing any norm as to the classes of beneficiaries of compensation, such arrangements are sui generis and provide no guide in the present case.

62. Nevertheless, during the course of the proceedings both Parties relied on international instruments and judgments of international tribunals concerning these two specific areas. It should be clear that the developments in question have to be viewed as distinctive processes, arising out of circumstances peculiar to the respective situations. To seek to draw from them analogies or conclusions held to be valid in other fields is to ignore their specific character as lex specialis and hence to court error.

63. The Parties have also relied on the general arbitral jurisprudence which has accumulated in the last half-century. However, in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case. Other decisions, allowing or disallowing claims by way of exception, are not, in view of the particular facts concerned, directly relevant to the present case.

* *

64. The Court will now consider whether there might not be, in the present case, other special circumstances for which the general rule might not take effect. In this connection two particular situations must be studied: the case of the company having ceased to exist and the case of the company’s national State lacking capacity to take action on its behalf.

65. As regards the first of these possibilities the Court observes that the Parties have put forward conflicting interpretations of the present situation of Barcelona Traction. There can, however, be no question but that Barcelona Traction has lost all its assets in Spain, and was placed in receivership in Canada, a receiver and manager having been appointed. It is common ground that from the economic viewpoint the company has been entirely paralyzed. It has been deprived of all its Spanish sources of income, and the Belgian Government has asserted that the company
could no longer find the funds for its legal defence, so that these had to be supplied by the shareholders.

66. It cannot however, be contended that the corporate entity of the company has ceased to exist, or that it has lost its capacity to take corporate action. It was free to exercise such capacity in the Spanish courts and did in fact do so. It has not become incapable in law of defending its own rights and the interests of the shareholders. In particular, a precarious financial situation cannot be equated with the demise of the corporate entity, which is the hypothesis under consideration: the company’s status in law is alone relevant, and not its economic condition, nor even the possibility of its being “practically defunct”—a description on which argument has been based but which lacks all legal precision. Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their government could arise.

67. In the present case, Barcelona Traction is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist. Moreover, it is a matter of public record that the company’s shares were quoted on the stock-market at a recent date.

68. The reason for the appointment in Canada not only of a receiver but also of a manager was explained as follows:

“In the Barcelona Traction case it was obvious, in view of the Spanish bankruptcy order of 12 February 1948, that the appointment of only a receiver would be useless, as positive steps would have to be taken if any assets seized in the bankruptcy in Spain were to be recovered.” (Hearing of 2 July 1969.)

In brief, a manager was appointed in order to safeguard the company’s rights; he has been in a position directly or indirectly to uphold them. Thus, even if the company is limited in its activity after being placed in receivership, there can be no doubt that it has retained its legal capacity and that the power to exercise it is vested in the manager appointed by the Canadian courts. The Court is thus not confronted with the first hypothesis contemplated in paragraph 64, and need not pronounce upon it.

69. The Court will now turn to the second possibility, that of the lack of capacity of the company’s national State to act on its behalf. The first question which must be asked here is whether Canada—the third apex of the triangular relationship—is, in law, the national State of Barcelona Traction.

70. In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist. Indeed, it has been the practice of some States to give a company incorporated under their law diplomatic protection solely when it has its seat (siège social) or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned. Only then, it has been held, does there exist between the corporation and the State in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the “genuine connection” has found general acceptance. Such tests as have been applied are of a relative nature, and sometimes links with one State have had to be weighed against those with another. In this connection reference has been made to the Nettebohm case. In fact the Parties made frequent reference to it in the course of the proceedings. However, given both the legal and factual aspects of protection in the present case the Court is of the opinion that there can be no analogy with the issues raised or the decision given in that case.

71. In the present case, it is not disputed that the company was incorporated in Canada and has its registered office in that country. The incorporation of the company under the law of Canada was an act of free choice. Not only did the founders of the company seek its incorporation under Canadian law but it has remained under that law for a period of over 50 years. It has maintained in Canada its registered office, its accounts and its share registers. Board meetings were held there for many years; it has been listed in the records of the Canadian tax authorities. Thus a close and permanent connection has been established, fortified by the passage of over half a century. This connection is in no way weakened by the fact that the company engaged from the very outset in commercial activities outside Canada, for that was its declared object. Barcelona Traction’s links with Canada are thus manifold.

72. Furthermore, the Canadian nationality of the company has received general recognition. Prior to the institution of proceedings before the Court, three other governments apart from that of Canada (those of the United Kingdom, the United States and Belgium) made representa-
tions concerning the treatment accorded to Barcelona Traction by the Spanish authorities. The United Kingdom Government intervened on behalf of bondholders and of shareholders. Several representations were also made by the United States Government, but not on behalf of the Barcelona Traction company as such.

73. Both Governments acted at certain stages in close co-operation with the Canadian Government. An agreement was reached in 1950 on the setting-up of an independent committee of experts. While the Belgian and Canadian Governments contemplated a committee composed of Belgian, Canadian and Spanish members, the Spanish Government suggested a committee composed of British, Canadian and Spanish members. This was agreed to by the Canadian and United Kingdom Governments, and the task of the committee was, in particular, to establish the monies imported into Spain by Barcelona Traction or any of its subsidiaries, to determine and appraise the materials and services brought into the country, to determine and appraise the amounts withdrawn from Spain by Barcelona Traction or any of its subsidiaries, and to compute the profits earned in Spain by Barcelona Traction or any of its subsidiaries and the amounts susceptible of being withdrawn from the country at 31 December 1949.

74. As to the Belgian Government, its earlier action was also undertaken in close co-operation with the Canadian Government. The Belgian Government admitted the Canadian character of the company in the course of the present proceedings. It explicitly stated that Barcelona Traction was a company of neither Spanish nor Belgian nationality but a Canadian company incorporated in Canada. The Belgian Government has even conceded that it was not concerned with the injury suffered by Barcelona Traction itself, since that was Canada’s affair.

75. The Canadian Government itself, which never appears to have doubted its right to intervene on the company’s behalf, exercised the protection of Barcelona Traction by diplomatic representation for a number of years, in particular by its note of 27 March 1948, in which it alleged that a denial of justice had been committed in respect of the Barcelona Traction, Ebro and National Trust companies, and requested that the bankruptcy judgment be cancelled. It later invoked the Anglo-Spanish treaty of 1922 and the agreement of 1924, which applied to Canada. Further Canadian notes were addressed to the Spanish Government in 1950, 1951 and 1952. Further approaches were made in 1954, and in 1955 the Canadian Government renewed the expression of its deep interest in the affair of Barcelona Traction and its Canadian subsidiaries.

76. In sum, the record shows that from 1948 onwards the Canadian Government made to the Spanish Government numerous representations which cannot be viewed otherwise than as the exercise of diplomatic protection in respect of the Barcelona Traction company. Therefore this was not a case where diplomatic protection was refused or remained in the sphere of fiction. It is also clear that over the whole period of its diplomatic activity the Canadian Government proceeded in full knowledge of the Belgian attitude and activity.

77. It is true that at a certain point the Canadian Government ceased to act on behalf of Barcelona Traction, for reasons which have not been fully revealed, though a statement made in a letter of 19 July 1955 by the Canadian Secretary of State for External Affairs suggests that it felt the matter should be settled by means of private negotiations. The Canadian Government has nonetheless retained its capacity to exercise diplomatic protection; no legal impediment has prevented it from doing so: no fact has arisen to render this protection impossible. It has discontinued its action of its own free will.

78. The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally.

79. The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that.

80. This cannot be regarded as amounting to a situation where a violation of law remains without remedy: in short, a legal vacuum.
There is no obligation upon the possessors of rights to exercise them. Sometimes no remedy is sought, though rights are infringed. To equate this with the creation of a vacuum would be to equate a right with an obligation.

81. The cessation by the Canadian Government of the diplomatic protection of Barcelona Traction cannot, then, be interpreted to mean that there is no remedy against the Spanish Government for the damage done by the allegedly unlawful acts of the Spanish authorities. It is not a hypothetical right which was vested in Canada, for there is no legal impediment preventing the Canadian Government from protecting Barcelona Traction. Therefore there is no substance in the argument that for the Belgian Government to bring a claim before the Court represented the only possibility of obtaining redress for the damage suffered by Barcelona Traction and, through it, by its shareholders.

82. Nor can the Court agree with the view that the Canadian Government had of necessity to interrupt the protection it was giving to Barcelona Traction, and to refrain from pursuing it by means of other procedures, solely because there existed no link of compulsory jurisdiction between Spain and Canada. International judicial proceedings are but one of the means available to States in pursuit of their right to exercise diplomatic protection (Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 178). The lack of a jurisdictional link cannot be regarded either in this or in other fields of international law as entailing the non-existence of a right.

83. The Canadian Government's right of protection in respect of the Barcelona Traction company remains unaffected by the present proceedings. The Spanish Government has never challenged the Canadian nationality of the company, either in the diplomatic correspondence with the Canadian Government or before the Court. Moreover it has unreservedly recognized Canada as the national State of Barcelona Traction in both written pleadings and oral statements made in the course of the present proceedings. Consequently, the Court considers that the Spanish Government has not questioned Canada's right to protect the company.

84. Though, having regard to the character of the case, the question of Canada's right has not been before it, the Court has considered it necessary to clarify this issue.

85. The Court will now examine the Belgian claim from a different point of view, disregarding municipal law and relying on the rule that in inter-State relations, whether claims are made on behalf of a State's national or on behalf of the State itself, they are always the claims of the State. As the Permanent Court said,

"The question, therefore, whether the . . . dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint." (Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 12. See also Nottebohm, Second Phase, Judgment, I.C.J. Reports 1953, p. 24.)

86. Hence the Belgian Government would be entitled to bring a claim if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty or a general rule of law. The opinion has been expressed that a claim can accordingly be made when investments by a State's nationals abroad are thus prejudicially affected, and that since such investments are part of a State's national economic resources, any prejudice to them directly involves the economic interest of the State.

87. Governments have been known to intervene in such circumstances not only when their interests were affected, but also when they were threatened. However, it must be stressed that this type of action is quite different from and outside the field of diplomatic protection. When a State admits into its territory foreign investments or foreign nationals it is, as indicated in paragraph 33, bound to extend to them the protection of the law. However, it does not thereby become an insurer of that part of another State's wealth which these investments represent. Every investment of this kind carries certain risks. The real question is whether a right has been violated, which right could only be the right of the State to have its nationals enjoy a certain treatment guaranteed by general international law, in the absence of a treaty applicable to the particular case. On the other hand it has been stressed that it must be proved that the investment effectively belongs to a particular economy. This is, as it is admitted, sometimes very difficult, in particular where complex undertakings are involved. Thus the existing concrete test would be replaced by one which might lead to a situation in which no diplomatic protection could be exercised, with the consequence that an unlawful act by another State would remain without remedy.

88. It follows from what has already been stated above that, where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim.

89. Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are
often multinational, and considering the way in which the economic interests of States have proffered, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject.

90. Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures. No such instrument is in force between the Parties to the present case.

91. With regard more particularly to human rights, to which reference has already been made in paragraph 34 of this Judgment, it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe, of which Spain is not a member, the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim.

92. Since the general rule on the subject does not entitle the Belgian Government to put forward a claim in this case, the question remains to be considered whether nonetheless, as the Belgian Government has contended during the proceedings, considerations of equity do not require that it be held to possess a right of protection. It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction.

93. On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State. This hypothesis does not correspond to the circumstances of the present case.

94. In view, however, of the discretionary nature of diplomatic protection, considerations of equity cannot require more than the possibility for some protector State to intervene, whether it be the national State of the company, by virtue of the general rule mentioned above, or, in a secondary capacity, the national State of the shareholders who claim protection. In this connection, account should also be taken of the practical effects of deducing from considerations of equity any broader right of protection for the national State of the shareholders. It must first of all be observed that it would be difficult on an equitable basis to make distinctions according to any quantitative test: it would seem that the owner of 1 per cent. and the owner of 99 per cent. of the share-capital should have the same possibility of enjoying the benefit of diplomatic protection. The protector State may, of course, be disinclined to take up the case of the single small shareholder, but it could scarcely be denied the right to do so in the name of equitable considerations. In that field, protection by the national State of the shareholders can hardly be graduated according to the absolute or relative size of the shareholding involved.

95. The Belgian Government, it is true, has also contended that as high a proportion as 88 per cent. of the shares in Barcelona Traction belonged to natural or juristic persons of Belgian nationality, and it has used this as an argument for the purpose not only of determining the amount of the damages which it claims, but also of establishing its right of action on behalf of the Belgian shareholders. Nevertheless, this does
not alter the Belgian Government’s position, as expounded in the course of the proceedings, which implies, in the last analysis, that it might be sufficient for one single share to belong to a national of a given State for the latter to be entitled to exercise its diplomatic protection.

96. The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands. It might perhaps be claimed that, if the right of protection belonging to the national States of the shareholders were considered as only secondary to that of the national State of the company, there would be less danger of difficulties of the kind contemplated. However, the Court must state that the essence of a secondary right is that it only comes into existence at the time when the original right ceases to exist. As the right of protection vested in the national State of the company cannot be regarded as extinguished because it is not exercised, it is not possible to accept the proposition that in case of its non-exercise the national States of the shareholders have a right of protection secondary to that of the national State of the company. Furthermore, study of factual situations in which this theory might possibly be applied gives rise to the following observations.

97. The situations in which foreign shareholders in a company wish to have recourse to diplomatic protection by their own national State may vary. It may happen that the national State of the company simply refuses to grant it its diplomatic protection, or that it begins to exercise it (as in the present case) but does not pursue its action to the end. It may also happen that the national State of the company and the State which has committed a violation of international law with regard to the company arrive at a settlement of the matter, by agreeing on compensation for the company, but that the foreign shareholders find the compensation insufficient. Now, as a matter of principle, it would be difficult to draw a distinction between these three cases so far as the protection of foreign shareholders by their national State is concerned, since in each case they may have suffered real damage. Furthermore, the national State of the company is perfectly free to decide how far it is appropriate for it to protect the company, and is not bound to make public the reasons for its decision. To reconcile this discretionary power of the company’s national State with a right of protection falling to the shareholders’ national State would be particularly difficult when the former State has concluded, with the State which has contravened international law with regard to the company, an agreement granting the company compensation which the foreign shareholders find inadequate. If, after such a settlement, the national State of the foreign shareholders could in its turn put forward a claim based on the same facts, this would be likely to introduce into the negotiation of this kind of agreement a lack of security which would be contrary to the stability which it is the object of international law to establish in international relations.

98. It is quite true, as recalled in paragraph 53, that international law recognizes parallel rights of protection in the case of a person in the service of an international organization. Nor is the possibility excluded of concurrent claims being made on behalf of persons having dual nationality, although in that case lack of a genuine link with one of the two States may be set up against the exercise by that State of the right of protection. It must be observed, however, that in these two types of situation the number of possible protectors is necessarily very small, and their identity normally not difficult to determine. In this respect such cases of dual protection are markedly different from the claims to which recognition of a general right of protection of foreign shareholders by their various national States might give rise.

99. It should also be observed that the promoters of a company whose operations will be international must take into account the fact that States have, with regard to their nationals, a discretionary power to grant diplomatic protection or to refuse it. When establishing a company in a foreign country, its promoters are normally impelled by particular considerations; it is often a question of tax or other advantages offered by the host State. It does not seem to be in any way inequitable that the advantages thus obtained should be balanced by the risks arising from the fact that the protection of the company and hence of its shareholders is thus entrusted to a State other than the national State of the shareholders.

100. In the present case, it is clear from what has been said above that Barcelona Traction was never reduced to a position of impotence such that it could not have approached its national State, Canada, to ask for its diplomatic protection, and that, as far as appeared to the Court, there was nothing to prevent Canada from continuing to grant its diplomatic protection to Barcelona Traction if it had considered that it should do so.

101. For the above reasons, the Court is not of the opinion that, in the particular circumstances of the present case, * jus standi * is conferred on the Belgian Government by considerations of equity.

* 

102. In the course of the proceedings, the Parties have submitted a great amount of documentary and other evidence intended to substantiate
their respective submissions. Of this evidence the Court has taken cognizance. It has been argued on one side that unlawful acts had been committed by the Spanish judicial and administrative authorities, and that as a result of those acts Spain has incurred international responsibility. On the other side it has been argued that the activities of Barcelona Traction and its subsidiaries were conducted in violation of Spanish law and caused damage to the Spanish economy. If both contentions were substantiated, the truth of the latter would in no way provide justification in respect of the former. The Court fully appreciates the importance of the legal problems raised by the allegation, which is at the root of the Belgian claim for reparation, concerning the denial of justice allegedly committed by organs of the Spanish State. However, the possession by the Belgian Government of a right of protection is a prerequisite for the examination of these problems. Since no *jus* *stani* before the Court has been established, it is not for the Court in its Judgment to pronounce upon any other aspect of the case, on which it should take a decision only if the Belgian Government had a right of protection in respect of its nationals, shareholders in Barcelona Traction.

* * * * *

103. Accordingly,

The Court

rejects the Belgian Government’s claim by fifteen votes to one, twelve votes of the majority being based on the reasons set out in the present Judgment.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fifth day of February, one thousand nine hundred and seventy, 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 to the Government of the Spanish State, respectively.

*(Signed)* J. L. **BUSTAMANTE Y RIVERO,**
President.

*(Signed)* S. **AQUARONE,**
Registrar.

Judge **PETRÉN** and Judge **ONYEAMA** make the following Joint Declaration:

We agree with the operative provision and the reasoning of the Judgment subject to the following declaration:

With regard to the nationality of Barcelona Traction, the Judgment refers to the existence of opinions to the effect that the absence of a genuine connection between a company and the State claiming the right of diplomatic protection of the company might be set up against the exercise of such a right. In this context the Judgment also mentions the decision in the *Notteboom* case to the effect that the absence of a genuine connecting link between a State and a natural person who has acquired its nationality may be set up against the exercise by that State of diplomatic protection of the person concerned. The present Judgment then concludes that given the legal and factual aspects of protection in the present case there can be no analogy with the issues raised or the decision given in the *Notteboom* case.

Now in the present case the Spanish Government has asserted and the Belgian Government has not disputed that, Barcelona Traction having been incorporated under Canadian law and having its registered office in Toronto, it is of Canadian nationality and Canada is qualified to protect it.

Canada’s right of protection being thus recognized by both Parties to the proceedings, the first question which the Court has to answer within the framework of the third preliminary objection is simply whether, alongside the right of protection pertaining to the national State of a company, another State may have a right of protection of the shareholders of the company who are its nationals. This being so, the Court has not in this case to consider the question whether the genuine connection principle is applicable to the diplomatic protection of juristic persons, and, still less, to speculate whether, if it is, valid objections could have been raised against the exercise by Canada of diplomatic protection of Barcelona Traction.

Judge **LACHS** makes the following Declaration:

I am in full agreement with the reasoning and conclusions of the Judgment, but would wish to add the following observation:

The Court has found, in the light of the relevant elements of law and of fact, that the Applicant, the Belgian Government, has no capacity in the present case. At the same time it has stated that the Canadian Government’s right of protection in respect of the Barcelona Traction company has remained unaffected by the proceedings now closed.
BARCELONA TRACTION (DECL. LACHS)

I consider that the existence of this right is an essential premise of the Court's reasoning, and that its importance is emphasized by the seriousness of the claim and the particular nature of the unlawful acts with which it charges certain authorities of the respondent State.

President Bustamante y Rivero, Judges Sir Gerald Fitzmaurice, Tanaka, Jessup, Morelli, Padilla Nervo, Gros and Ammoun append Separate Opinions to the Judgment of the Court.

Judge ad hoc Ripphagen appends a Dissenting Opinion to the Judgment of the Court.

(Initialed) J. L. B.-R.
(Initialed) S. A.
International Court of Justice

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)
Preliminary Objections, Judgment

_I.C.J. Reports 2007_
COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE

AHMADOU SADIO DIALLO

(RÉPUBLIQUE DE GUINÉE c. RÉPUBLIQUE DÉMOCRATIQUE
DU CONGO)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 24 MAI 2007

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING

AHMADOU SADIO DIALLO

(REPUBLIC OF GUINEA v. DEMOCRATIC REPUBLIC
OF THE CONGO)

PRELIMINARY OBJECTIONS

JUDGMENT OF 24 MAY 2007

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AHMADOU SADIO DIALLO
(REPUBLIC OF GUINEA v. DEMOCRATIC REPUBLIC OF THE CONGO)

EXCEPTIONS PRÉLIMINAIRES

AHMADOU SADIO DIALLO
(REPUBLIC OF GUINEA v. DEMOCRATIC REPUBLIC OF THE CONGO)

PRELIMINARY OBJECTIONS

Facts underlying the case — Disputes between Africom-Zaire and Africon-tainers-Zaire, two sociétés privées à responsabilité limitée (SPRLs) incorporated under Zairean law, on the one hand, and the Zairean State and other business partners on the other — Arrest, detention and expulsion of Mr. Diallo, a Guinean citizen, associé and gérant of the companies, on the ground that his presence and conduct breached public order in Zaire — Disagreement between the Parties on the circumstances of Mr. Diallo’s arrest, detention and expulsion.

* *

Object of the Application — Diplomatic protection on behalf of Mr. Diallo for the violation of three categories of rights — Mr. Diallo’s individual personal rights — Mr. Diallo’s direct rights as associé in Africom-Zaire and Africon-tainers-Zaire — Rights of the companies.

* *

Basis of the Court’s jurisdiction — Declarations made by the Parties under Article 36, paragraph 2, of the Statute.

* *

Preliminary objections raised by the DRC to the admissibility of the Application — Guinea’s standing — Non-exhaustion of local remedies — Examination by the Court in respect of each of the three different categories of rights alleged by Guinea to have been violated.
Mr. Diallo's individual personal rights.

DRC's contention that Guinea's Application is inadmissible on the ground that local remedies have not been exhausted — Scope ratiome materiae of diplomatic protection — Conditions of exercise — Mr. Diallo's Guinean nationality — Burden of proof as regards local remedies — Guinea required to prove exhaustion by Mr. Diallo of local remedies available in the DRC or the existence of exceptional circumstances justifying the failure to exhaust them — DRC required to prove existence and non-exhaustion of available and effective local remedies — Examination by the Court confined to the question of local remedies in respect of Mr. Diallo's expulsion — Expulsion characterized as "refoulement" when carried out — Refusals of entry not appealable under Congolese law — DRC cannot rely on error in designation — Request for reconsideration by the administrative authority having taken the decision not a local remedy to be exhausted — Objection based on failure to exhaust local remedies rejected.

Protection of Mr. Diallo's direct rights as associé in Africom-Zaïre and Africontainers-Zaïre.

DRC's contention that Guinea's Application is inadmissible for lack of standing, Mr. Diallo's expulsion not having injured his direct rights as associé — Guinea's contention that the effect of and motive for Mr. Diallo's expulsion was to prevent him from exercising his direct rights as associé in Africom-Zaïre and Africontainers-Zaïre and his rights as their gérant — Legal nature of the companies governed by Congolese law — Independent legal personality of SPRLs distinct from that of their associés — National State of associés entitled to exercise diplomatic protection in respect of infringements of their direct rights — Definition of rights appertaining to the status of associé and to the position of gérant of an SPRL under Congolese law and assessment of the effects on these rights of the actions taken against Mr. Diallo, being substantive matters — Objection based on Guinea's lack of standing rejected.

DRC's contention that Guinea's Application is inadmissible for failure to exhaust local remedies — Alleged violations of Mr. Diallo's direct rights as associé described by Guinea as a direct consequence of his expulsion — Court having found that the DRC has not proved the existence under Congolese law of effective remedies against Mr. Diallo's expulsion — DRC not having shown the existence of distinct remedies against the alleged violations of Mr. Diallo's direct rights as associé — Objection as to inadmissibility based on failure to exhaust local remedies rejected.

Diplomatic protection with respect to Mr. Diallo "by substitution" for Africom-Zaïre and Africontainers-Zaïre.

DRC's contention that Guinea's Application is inadmissible for lack of standing — Guinea's argument that customary international law of diplomatic protection by a company by its State of nationality is subject to an exception allowing for diplomatic protection of shareholders by their national State "by substitution" for the company when the State whose responsibility is at issue is the national State of the company — Exception not, at present, established in customary international law — Question whether customary international law contains a more limited rule of protection "by substitution", such as that proposed by the International Law Commission (ILC) in Article 11 (b) of its draft Articles on Diplomatic Protection — Does not arise for decision on present facts — Diplomatic protection of Africom-Zaïre and Africontainers-Zaïre governed by the normal rule of the nationality of the claims — Congolese nationality of the companies — Objection based on Guinea's lack of standing upheld.

DRC's objection based on failure to exhaust local remedies without object.

Application admissible in so far as it concerns protection of Mr. Diallo's rights as an individual and his direct rights as associé in Africom-Zaïre and Africontainers-Zaïre.

JUDGMENT

In the case concerning Ahmadou Sadio Diallo,

between

the Republic of Guinea,

represented by

Mr. Mohamed Camara, Chargé d'affaires a.i. at the Embassy of the Republic of Guinea, Brussels,

as Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission of the United Nations,

as Deputy Agent, Counsel and Advocate;

Mr. Mathias Forteau, Professor at the University of Lille 2,

Mr. Jean-Marc Thouvenin, Professor at the University of Paris X-Nanterre, member of the Paris Bar, Cabinet Sygna Partners,

Mr. Samuel Wordsworth, member of the English Bar, Essex Court Chambers,

as Counsel and Advocates;
Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris X-Nanterre, Mr. Luke Vidal, member of the Paris Bar, Cabinet Sygna Partners, as Advisers,

and

the Democratic Republic of the Congo, represented by

H.E. Mr. Pierre Ilunga M’Bundu wa Biloba, Minister of Justice and Keeper of the Seals, Democratic Republic of the Congo, as Head of Delegation;

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

Maître Tshibangu Kalala, Deputy, Congolese Parliament, member of the Kinshasa and Brussels Bars, Cabinet Tshibangu et Associés, as Co-Agent, Counsel and Advocate;

Mr. André Mazayambo Makengo Kisala, Professor of International Law, University of Kinshasa, as Counsel and Advocate;

Mr. Yenyi Olungu, Principal Advocate-General of the Republic, Directeur de cabinet of the Minister of Justice and Keeper of the Seals, Mr. Victor Musompo Kasongo, Private Secretary to the Minister of Justice and Keeper of the Seals, Mr. Nsingi-zi-Mayemba, Minister-Counsellor, Embassy of the Democratic Republic of the Congo in the Netherlands, Mr. Bamana Kalonji Jerry, Second Counsellor, Embassy of the Democratic Republic of the Congo in the Netherlands, Maître Kikangala Ngoie, member of the Brussels Bar, as Advisers;

Maître Kadima Mukadi, member of the Kinshasa Bar, Cabinet Tshibangu et Associés, Maître Lufulwabo Tshipangila, member of the Brussels Bar, Maître Tshibwabwa Mbuyi, member of the Brussels Bar, as Research Assistants;

Ms Ngoya Tshibangu, as Assistant,

THE COURT, composed as above, after deliberation, delivers the following Judgment:

1. On 28 December 1998, the Government of the Republic of Guinea (hereinafter “Guinea”) filed in the Registry of the Court an Application instituting proceedings against the Democratic Republic of the Congo (hereinafter the “DRC”) in respect of a dispute concerning “serious violations of international law” allegedly committed “upon the person of a Guinean national”. The Application consisted of two parts, each signed by Guinea’s Minister for Foreign Affairs. The first part, entitled “Application” (hereinafter the “Application (Part One)”), contained a succinct statement of the subject of the dispute, the basis of the Court’s jurisdiction and the legal grounds relied on. The second part, entitled “Memorial of the Republic of Guinea” (hereinafter the “Application (Part Two)”), set out the facts underlying the dispute, expanded on the legal grounds put forward by Guinea and stated Guinea’s claims. In the Application (Part One) Guinea maintained:

“Mr. Ahmadou Sadio Diallo, a businessman of Guinean nationality, was unjustly imprisoned by the authorities of the Democratic Republic of the Congo, after being resident in that State for thirty-two (32) years, despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled.”

Guinea added:

“[T]his expulsion came at a time when Mr. Ahmadou Sadio Diallo was pursuing recovery of substantial debts owed to his businesses by the State and by oil companies established in its territory and of which the State is a shareholder”.

Mr. Diallo’s arrest, detention and expulsion are alleged to constitute, inter alia, violations of

“the principle that aliens should be treated in accordance with ‘a minimum standard of civilization’, [of] the obligation to respect the freedom and property of aliens, [and of] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court”.

To found the jurisdiction of the Court, Guinea invoked in the Application (Part One) the declarations whereby the two States have recognized the compulsory jurisdiction of the Court 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 the DRC 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. By an Order of 25 November 1999, the Court fixed 11 September 2000 as the time-limit for the filing of a Memorial by Guinea and 11 September 2001 as the time-limit for the filing of a Counter-Memorial by the DRC. By an Order of 8 September 2000, the President of the Court, at Guinea’s request, extended the time-limit for the filing of the Memorial to 23 March 2001; in the same Order the time-limit for the filing of the Counter-Memorial was extended to 4 October 2002. Guinea duly filed its Memorial within the time-limit as thus extended.

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each of them availed itself of its right under Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case, Guinea chose Mr. Mohammed Bedjaoui and the DRC Mr. Auguste Mampuya Kanunk’a-Tshiabo. Following Mr. Bedjaoui’s resignation on 10 September 2002, Guinea chose Mr. Ahmed Mahiou.
5. On 3 October 2002, within the time-limit set in Article 79, paragraph 1, of the Rules of Court as adopted on 14 April 1978, the DRC raised preliminary objections in respect of the admissibility of Guinea's Application. In accordance with Article 79, paragraph 3, of the Rules of Court, such a statement within the time-limit fixed and the case thus became ready for hearing on the preliminary objections.

6. Pursuant to 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 documents annexed would be made accessible to the public on the opening of the oral proceedings.

7. Public sittings were held from 27 November 2006 to 1 December 2006, at which the Court heard the oral arguments and replies of:

For the DRC:
- H.E. Mr. Jacques Masangu-a-Mwanza
- Maître Tshibangu Kalala
- Mr. André Mazyambo Makengo Kisala

For Guinea:
- Mr. Mohamed Camara
- Mr. Mathias Forteau
- Mr. Samuel Wordsworth
- Mr. Alain Pellet
- Mr. Jean-Marc Thouvenin

8. A Member of the Court put a question at the hearing on 28 November 2006, which the Parties answered orally, in accordance with Article 61, paragraph 4, of the Rules of Court.

9. By a letter dated 1 December 2006, the Court, acting pursuant to Article 62, paragraph 1, of the Rules of Court, asked the DRC to furnish it with certain additional documents.

10. In the Application (Part Two), the following requests were made by Guinea:

As to the form:
- To authorize the DRC to make an official public apology to the Republic of Guinea for the numerous wrongs done to it in the person of its national Ahmadou Sadio Diallo;
- To find that the sums claimed are certain, liquidated and legally due;
- To order the DRC to pay to the Republic of Guinea on behalf of its national Ahmadou Sadio Diallo the sums of US $31,334,685,888.45 and Z 14,207,082,872.7 in respect of the financial loss suffered by him; and
- To order the DRC to return to the Republic of Guinea all the unvalued assets set out in the list of miscellaneous claims;
- To order the DRC to submit within one month an acceptable schedule for the repayment of the above sums;
- To order the Court to order the DRC to submit within one month a statement of the financial loss suffered by the Republic of Guinea as a result of the aforementioned acts.

As to the merits:
- In the event that the Court finds that the DRC is liable for the losses sustained by the Republic of Guinea, it must order the DRC to compensate the Republic of Guinea for the aforementioned damages, and in any event for the amounts corresponding to the principal award, that is to say US $31,334,685,888.45 and Z 14,207,082,872.7 in respect of the financial loss suffered by Ahmadou Sadio Diallo.

The Republic of Guinea asks that, in the event that the Court finds that the DRC is liable for the losses sustained by the Republic of Guinea, it may order the DRC to compensate the Republic of Guinea for the aforementioned damages, and in any event for the amounts corresponding to the principal award, that is to say US $31,334,685,888.45 and Z 14,207,082,872.7 in respect of the financial loss suffered by Ahmadou Sadio Diallo; and that the Court may order the DRC to return all the unvalued assets set out in the list of miscellaneous claims.
**On behalf of the Government of the DRC.**

in the preliminary objections:

“The Democratic Republic of the Congo respectfully requests the Court to adjudge and declare that the Application of the Republic of Guinea is inadmissible,

(1) on the ground that the Republic of Guinea lacks standing to exercise diplomatic protection in the present proceedings, since its Application seeks essentially to secure reparation for injury suffered on account of the alleged violation of rights of companies not possessing its nationality;

(2) on the ground that, in any event, neither the companies in question nor Mr. Diallo have exhausted the available and effective local remedies existing in Zaire, and subsequently in the Democratic Republic of the Congo.”

**On behalf of the Government of Guinea,**

in the written statement containing its observations and submissions on the preliminary objections raised by the DRC:

“For the reasons set out above, the Republic of Guinea kindly requests the Court to:

1. Reject the preliminary objections raised by the Democratic Republic of the Congo, and

2. Declare the Application of the Republic of Guinea admissible.”

12. At the oral proceedings, the following submissions were presented by the Parties:

**On behalf of the Government of the DRC,**

at the hearing of 29 November 2006:

“The Democratic Republic of the Congo respectfully requests the Court to adjudge and declare that the Application of the Republic of Guinea is inadmissible,

(1) on the ground that the Republic of Guinea lacks standing to exercise diplomatic protection in the present proceedings, since its Application seeks essentially to secure reparation for injury suffered on account of the violation of rights of companies not possessing its nationality;

(2) on the ground that, in any event, neither the companies in question nor Mr. Diallo have exhausted the available and effective local remedies existing in the Democratic Republic of the Congo.”

**On behalf of the Government of Guinea,**

at the hearing of 1 December 2006:

“For the reasons set out in its Observations of 7 July 2003 and in oral argument, the Republic of Guinea kindly requests the International Court of Justice:

(1) to reject the preliminary objections raised by the Democratic Republic of the Congo;

(2) to declare the Application of the Republic of Guinea admissible; and

(3) to fix time-limits for the further proceedings.”

* * *

13. The Court will begin with a brief description of the factual background to the present case.

14. As set out in their written pleadings, the Parties are in agreement as to the following facts. Mr. Ahmadou Sadio Diallo, a Guinean citizen, settled in the DRC (called “Congo” between 1960 and 1971 and “Zaire” between 1971 and 1997) in 1964. There, in 1974, he founded an import-export company, Africom-Zaire, a société privée à responsabilité limitée (private limited liability company, hereinafter “SPRL”) incorporated under Zairean law and entered in the Trade Register of the city of Kinshasa, and he became its gérant (manager). In 1979 Mr. Diallo expanded his activities, taking part, as gérant of Africom-Zaire and with backing from two private partners, in the founding of another Zairean SPRL, specializing in the containerized transport of goods. The capital in the new company, Africontrans-Zaire, was held as follows: 40 per cent by Mr. Zala, a Zairean national; 30 per cent by Ms Dewast, a French national; and 30 per cent by Africom-Zaire. It too was entered in the Trade Register of the city of Kinshasa. In 1980 Africom-Zaire’s two partners in Africontrans-Zaire withdrew. The parts sociales (see paragraph 25 hereunder) in Africontrans-Zaire were then held as follows: 60 per cent by Africom-Zaire and 40 per cent by Mr. Diallo. At the same time Mr. Diallo became the gérant of Africontrans-Zaire. Towards the end of the 1980s, Africom-Zaire’s and Africontrans-Zaire’s relationships with their business partners started to deteriorate. The two companies, acting through their gérant, Mr. Diallo, then initiated various steps, including judicial ones, in an attempt to recover alleged debts. The various disputes between Africom-Zaire or Africontrans-Zaire, on the one hand, and their business partners, on the other, continued throughout the 1990s and for the most part remain unresolved today. Thus, Africom-Zaire claims payment from the DRC of a debt (acknowledged by the DRC) resulting from default in payment for deliveries of listing paper to the Zairean State between 1983 and 1986. Africom-Zaire is involved in another dispute, concerning arrears or overpayments of rent, with plantation Lever au Zaire (“PLZ”). Africontrans-Zaire is in dispute with the companies Zaire Fina, Zaire Shell and Zaire Mobil Oil, as well as with the Office National des Transports (“ONATRA”) and Générale des Carrières et des Mines (“Gécamines”). For the most part these differences concern alleged violations of contractual exclusivity clauses and the lay-up, improper use or destruction or loss of containers.

15. The Court considers the following facts also to be established. On 31 October 1995, the Prime Minister of Zaire issued an expulsion Order against Mr. Diallo. The Order gave the following reason for the expul-
Mr. Diallo’s “presence and conduct have breached public order in Zaire, especially in the economic, financial and monetary areas, and continue to do so”. On 31 January 1996, Mr. Diallo, already under arrest, was deported from Zaire and returned to Guinea by air. The removal from Zaire was formalized and served on Mr. Diallo in the shape of a notice of refusal of entry (refoulement) on account of “illegal residence” (séjour irrégulier) that had been drawn up at the Kinshasa airport on the same day.

16. Throughout the proceedings Guinea and the DRC have continued to differ on a number of other facts.

17. In respect of the specific circumstances of Mr. Diallo’s arrest, detention and expulsion, Guinea maintains that Mr. Diallo was “secretly placed in detention, without any form of judicial process or even examination” on 5 November 1995. He allegedly remained imprisoned first for two months, before being released on 10 January 1996, “further to intervention by the [Zairean] President himself”, only then to be “immediately rearrested and imprisoned for two [more] weeks” before being expelled. Mr. Diallo is thus said to have been detained for 75 days in all. Guinea adds that he was mistreated while in prison and was “deprived of the benefit of the 1963 Vienna Convention on Consular Relations”. According to Guinea, Mr. Diallo has been without means of support since his expulsion and he has been unable to fulfil his functions as executive officer (dirigeant) of, or exercise his rights as shareholder in, Africom-Zaire and Africontainers-Zaire.

18. Guinea further maintains that Mr. Diallo’s arrest, detention and expulsion were the culmination of a DRC policy to prevent him from recovering the debts owed to his companies, including judgment debts. Guinea claims that, before arresting Mr. Diallo and expelling him in January 1996, the Congolese authorities repeatedly interfered in the affairs of his companies. Guinea contends that Mr. Diallo had already suffered one year of imprisonment, in 1988, after trying to recover debts owed to Africom-Zaire by the Zairean State. Guinea also cites certain steps taken by the DRC in the course of 1995 “arbitrarily to stay the domestic proceedings for the enforcement of decisions handed down in favour of Mr. Diallo’s companies”. It thus explains:

“Enforcement of the judgment [by the Kinshasa Tribunal de grande instance] in the Africontainers-Zaire v. Zaire Shell case was stayed, on 13 September [1995], by order of the [Zairean Vice-] Minister of Justice, without any legal basis.”

After the stay was lifted, property belonging to Zaire Shell was attached but “the attachments were once again revoked on 13 October [1995], this time permanently, on ‘oral instructions’ from the Minister of Justice and outside the law”. Guinea adds that Mr. Diallo’s arrest, detention and expulsion took place just as Zaire Shell, for its part, and Zaire Fina and Zaire Mobil Oil, for theirs, approached Zaire’s Minister of Justice, by letters dated 29 August 1995 and 15 November 1995, respectively, “seeking the intervention of the Government to warn the courts and tribunals about Mr. Ahmadou Sadio Diallo’s conduct in his campaign to destabilize commercial companies”.

19. The DRC rejects these allegations by Guinea and argues that the duration and conditions of Mr. Diallo’s detention during the expulsion process were in conformity with Zairean law. In particular, it contends that the statutory maximum of eight days’ detention was not exceeded. The DRC adds that the decision expelling Mr. Diallo was justified by his “manifestly groundless” and increasingly exaggerated financial claims against Zairean public undertakings and private companies operating in Zaire and by the disinformation campaign he had launched there “aimed at the highest levels of the Zairean State, as well as very prominent figures abroad”. The DRC notes that “the total sum claimed by Mr. Diallo as owed to the companies run by him came to over 36 billion United States dollars . . . , which represents nearly three times the [DRC’s] total foreign debt”.

It adds: “the Zairean authorities also discovered that Mr. Diallo had been involved in currency trafficking and that he was moreover guilty of a number of attempts at bribery”. Mr. Diallo’s actions thus allegedly threatened seriously to compromise not only the operation of the undertakings concerned but also public order in Zaire.

20. The DRC further claims not to have interfered in the affairs of Africom-Zaire and Africontainers-Zaire or to have expelled Mr. Diallo with a view to preventing the companies from completing the legal proceedings they had brought to recover monies owed them. The DRC does not deny that in September 1995 the Minister of Justice ordered a stay of execution of the judgment rendered by the Kinshasa Tribunal de grande instance in the Africontainers-Zaire v. Zaire Shell case. It nevertheless explains that, “when the enforcement of a judicial decision is liable to . . . lead to serious public disorder”, Zairean law allows the Minister of Justice to “stay its execution and request the Inspectorat général des services judiciaires (Inspectorate-General of Courts) to review it for legality”. It adds that procedures of this type, “found . . . in a number of African States”, are “in no way contrary to the principle of separation of powers, as it is understood in that part of the world”. The DRC points out that the stay of execution of the judgment in question “was of very short
23. While admitting that Congolese legislation does not allow for the incorporation of an SPRL by one person, Guinea, in answering the question put by Judge Benomou (see paragraphs 8 and 21 above), rejected the question put by his colleague, the Minister of Justice, stating that the fact of the company’s being unipersonal was a case not falling within the law. It maintained that Mr. Diallo could not be the sole shareholder in the company, in that there was no “manifest error” as he had indeed been the sole shareholder in the company, as established in the trade register. The DRC also stressed that Mr. Diallo should not be confused with Africom-Zaire and that his expulsion, to pursue any and all legal proceedings they had begun and did in fact do so. According to the DRC, the DRC made reference to various problems said to exist in connection with Africom-Zaire.

24. Guinea further stated that the document referred to by the DRC at the hearing did not provide the Court with any reference to “Africom-Zaire” law or the legal status of the companies. The DRC, on the contrary, argued that the existence of the two companies had been confirmed by the public prosecutor before the Court, and that many official documents issued by Zairean authorities recognized Mr. Diallo’s status as an “associé” of Africom-Zaire. Finally, Guinea maintained that the DRC had acknowledged not only the existence of the two companies but also the fact that Mr. Diallo had become the sole executive office of these two companies under the laws of Zaire.

25. The Court notes at the outset that Africom-Zaire and Africoinvesters-Zaire are SPRLs incorporated under Congolese law, i.e. companies “which are formed by persons whose liability is limited to their capital contributions and that are not publicly held companies; and in which the shares are not freely transferable” (Articles 43, 44, 45 of the Decree of 27 February 1887). In light of the foregoing, the Court finds that the concept of “associé” in Geneva’s Article 134 and the concept of “gérant” in Zairean law refer to the same legal status. Under Congolese law, holders of shares are not permitted to transfer their shares without the consent of all other shareholders. Under Zairean law, the Court notes that the shares of Africom-Zaire are not freely transferable and that the documents referred to by the DRC at the hearing did not provide any reference to the existence of these companies or to the fact that they had been incorporated under the laws of Zaire. The DRC, in its written pleadings and at the hearings, has often referred to Mr. Diallo’s status as an “associé” of Africom-Zaire, which is not permissible under Congolese law, as “associés” are not allowed to be the sole shareholders of a company. In light of the foregoing, the Court finds that the DRC has not demonstrated that Mr. Diallo had the status of an “associé” under Congolese law in Africom-Zaire.
"associé" will be the term primarily used by the Court in the present Judgment, except where it is referring to the Parties' arguments and when they themselves used the generic term “shareholder”.

26. The Court observes that the dispute between Guinea and the DRC comprises many aspects and that the Parties have focused on the one or the other of these at different stages in the proceedings.

27. Thus, the greater part of Guinea's Application concerns the disputes between Africom-Zaire and Africontainers-Zaire, on the one hand, and their public and private business partners, on the other. Specifically, Guinea devotes a lengthy part of its Application to describing the debts allegedly owed to the companies and Mr. Diallo, as well as to expounding the legal grounds on which the DRC is alleged to be liable for all these debts. The claims put forward by Guinea in its Application (Part Two) are also aimed for the most part at obtaining payment of the debts (see paragraph 10 above).

28. Guinea nevertheless also states in its Application that it seeks to exercise its diplomatic protection on behalf of Mr. Diallo “with a view to obtaining [from the Court] a finding that the [DRC] is guilty of serious violations of international law committed upon [his] person”. It asserts that the DRC has violated

“the principle that aliens should be treated in accordance with ‘a minimum standard of civilization’, the obligation to respect the freedom and property of aliens, [and] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court”.

In support of these claims, Guinea cites “numerous international agreements concerning the treatment of aliens and the free movement of goods and persons”, including in particular the Universal Declaration of Human Rights of 10 December 1948 and the International Covenant on Civil and Political Rights of 19 December 1966. It states that “these various violations of human rights must be construed as breaches of norms of jure cogens”.

29. In its Memorial on the merits, Guinea continues to devote considerable attention to the issue of the debts allegedly owed to Africom-Zaire and Africontainers-Zaire and to Mr. Diallo. But Guinea also places renewed emphasis on the exercise of its diplomatic protection on behalf of Mr. Diallo and states that it

“is taking up the cause of one of its nationals, and is acting to enforce his direct rights as an individual and as shareholder and executive officer of companies which he founded . . . and of which he is the sole or principal owner, to the exclusion of distinct rights which these companies may have against the DRC”.

It divides Mr. Diallo’s rights which it seeks to protect into two separate categories, according to their nature. In the first, it places Mr. Diallo’s rights as an individual, including, in addition to those referred to in the Application, Mr. Diallo’s right not to be subjected to inhuman and degrading treatment and his right to the benefit of the provisions of the 1963 Vienna Convention on Consular Relations, both of which rights were allegedly violated at the time of his arrest, detention and expulsion. In the second category of rights which Guinea seeks to protect it places the “direct rights” allegedly enjoyed by Mr. Diallo as a shareholder (rights also sometimes called by Guinea “shareholder’s rights”) in Africom-Zaire and Africontainers-Zaire, specifically his right to oversee, control and manage the companies.

30. Guinea further states in its Application that it is seeking to protect, in addition to Mr. Diallo, “the companies which he founded and owns”. In its Memorial on the merits, it makes clear that it seeks to exercise its diplomatic protection on behalf of Mr. Diallo by “substitution” for Africom-Zaire and Africontainers-Zaire. Guinea explains that by “substitution” or “protection by substitution” it means the right of a State to exercise its diplomatic protection on behalf of nationals who are shareholders in a foreign company whenever the company has been a victim of wrongful acts committed by the State under whose law it has been incorporated. Thus Guinea does not confine itself to exercising protection of Mr. Diallo in respect of the violations of his direct rights as shareholder in Africom-Zaire and Africontainers-Zaire but seeks to protect him “in respect of the injuries suffered by [these] companies [themselves]”.

31. In sum, Guinea seeks through its action to exercise its diplomatic protection on behalf of Mr. Diallo for the violation, alleged to have occurred at the time of his arrest, detention and expulsion, or to have derived therefrom, of three categories of rights: his individual personal rights, his direct rights as associé in Africom-Zaire and Africontainers-Zaire and the rights of those companies, by “substitution”.

32. To establish the jurisdiction of the Court, Guinea relies on the declarations made by the Parties under Article 36, paragraph 2, of the Statute. The DRC acknowledges that the declarations are sufficient to found the jurisdiction of the Court in the present case. The DRC nevertheless challenges the admissibility of Guinea’s Application and raises two preliminary objections in doing so. First of all, according to the DRC, Guinea lacks standing to act in the current proceedings since the rights which it seeks to protect belong to Africom-Zaire and Africontainers-Zaire, Congolese companies, not to Mr. Diallo. Guinea, it is argued, is further precluded from exercising its diplomatic protection on the ground that neither Mr. Diallo nor the companies have exhausted the remedies
available in the Congolese legal system to obtain reparation for the injuries claimed by Guinea before the Court.

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33. The Court will now examine the preliminary objections to admissibility raised by the DRC, in respect of each of the various categories of rights alleged by Guinea to have been violated in the present case.

* * *

34. The Court will first address the question of the admissibility of Guinea’s Application in so far as it concerns protection of Mr. Diallo’s rights as an individual.

35. According to the DRC, Guinea’s claims in respect of Mr. Diallo’s rights as an individual are inadmissible because he “[has not] exhausted the available and effective local remedies existing in Zaire, and subsequently in the Democratic Republic of the Congo”. While this objection, presented by the DRC in its written pleadings and at the hearings, is very broadly worded, in the course of the present proceedings the DRC elaborated on only a single aspect of it: that concerning his expulsion from Congolese territory.

36. On this subject the DRC maintains that its domestic legal system provided for available, effective remedies which Mr. Diallo should have exhausted before his cause could be espoused by Guinea. It first observes that, contrary to Guinea’s contention, Mr. Diallo’s expulsion from the territory was lawful. The DRC acknowledges that the notice signed by the immigration officer “inadvertently” refers to “refusal of entry” (refoulement) instead of “expulsion”. Further, it does not challenge Guinea’s assertion that Congolese law provides that refusals of entry are not appealable. The DRC nevertheless maintains that “despite this error, it is indisputable . . . that this was indeed an expulsion and not a refusal of entry”. According to the DRC, calling the action a refusal of entry was therefore not intended to deprive Mr. Diallo of a remedy; on the contrary, “if Mr. Diallo had appealed to the Congolese authorities for permission to return to the DRC, that appeal would have had some prospect of success”. The DRC cites the general principle of Congolese law that reconsideration of a decision can in all cases be requested from the authority having taken it and, if necessary, from that authority’s superior. It maintains that Mr. Diallo never asked the competent authorities to reconsider their position and to allow him to return to the DRC. According to the DRC, such a request would have had a good chance of success, especially after the change in régime in the country in 1997. The effectiveness of requests for redress in respect of expulsion decisions in the DRC is alleged to be confirmed moreover by a substantial practice, the DRC citing in this regard two applications made by foreign nationals appealing their removal from Zairean territory, each of which led to withdrawal of the removal Order.

37. Guinea responds that “[a]fter eight years of proceedings the DRC has shown itself to be incapable of invoking so much as a single real remedy that would have been available to Mr. Diallo” in respect of the violation of his rights as an individual. On the subject of Mr. Diallo’s expulsion from the Congolese territory, Guinea states that there were no effective remedies first in Zaire, nor in the later DRC, against this measure, recalling in this regard that the expulsion Order against Mr. Diallo was carried out by way of an action denominated “refusal of entry” and that, “under Article 13 of the Legislative Order of 12 September 1983 concerning immigration control [in Zaire]: ‘[a] measure refusing entry shall not be subject to appeal’”. Guinea adds that the possibility Mr. Diallo had to approach the Zairean authority having issued the expulsion Order “is not, in any event, a remedy within the meaning of the local remedies rule”. It asserts that, on the contrary, this is merely an “extra-legal procedure that may be characterized as an appeal to the indifference of the governmental authorities”. And, according to Guinea, “[a]dministrative or other remedies which are neither judicial nor quasi-judicial and are discretionary in nature are not . . . taken into account by the local remedies rule”. Guinea observes moreover that the two instances of remedies against expulsion cited by the DRC in support of its position are not germane since one case involved expulsion on grounds of illegal immigration, in respect of which a remedy of grace (recours gracieux) is available, and the other involved a “decision on grounds of undesirability” the reason for which is not specified in the Order revoking the decision.

38. Guinea further contends that, even though some remedies may in theory have been available to Mr. Diallo in the Congolese legal system, they would in any event have offered him no reasonable possibility of protection at the time. Guinea thus notes that the objective in expelling Mr. Diallo was precisely to prevent him from pursuing legal proceedings and argues that

“if a State deliberately chooses to remove an alien from its territory . . . because that alien is seeking local redress, that State can no longer reasonably demand that the alien seek redress only through legal avenues available in its territory”.

Lastly, it notes that any action taken by Mr. Diallo would have been doomed to fail owing to the personal animosity towards him harboured by certain members of the Congolese Government.

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39. The Court will recall that under customary international law, as reflected in Article 1 of the draft Articles on Diplomatic Protection of the International Law Commission (hereinafter the “ILC”),

“diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility” (Article 1 of the draft Articles on Diplomatic Protection adopted by the ILC at its Fifty-eighth Session (2006), ILC Report, doc. A/61/10, p. 24).

Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope ratione materiae of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights.

40. In the present case Guinea seeks to exercise its diplomatic protection on behalf of Mr. Diallo in respect of the DRC’s alleged violation of his rights as a result of his arrest, detention and expulsion, that violation allegedly constituting an internationally wrongful act by the DRC giving rise to its responsibility. It therefore falls to the Court to ascertain whether the Applicant has met the requirements for the exercise of diplomatic protection, that is to say whether Mr. Diallo is a national of Guinea and whether he has exhausted the local remedies available in the DRC.

41. To begin with, the Court observes that it is not disputed by the DRC in respect of the DRC’s alleged violation of his rights as a result of his arrest, detention and expulsion, that violation allegedly constituting an internationally wrongful act by the DRC giving rise to its responsibility. It therefore falls to the Court to ascertain whether the Applicant has met the requirements for the exercise of diplomatic protection, that is to say whether Mr. Diallo is a national of Guinea and whether he has exhausted the local remedies available in the DRC.

42. As the Court stated in the Interhandel (Switzerland v. United States of America) case,

“[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.” (I.C.J. Reports 1959, p. 27.)

43. The Parties do not question the local remedies rule; they do however differ as to whether the Congolese legal system actually offered local remedies which Mr. Diallo should have exhausted before his cause could be espoused by Guinea before the Court.

44. In matters of diplomatic protection, it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies (see Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), I.C.J. Reports 1989, pp. 43-44, para. 53). It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted (see ibid., p. 46, para. 59).

Thus, in the present case, Guinea must establish that Mr. Diallo exhausted any available local remedies or, if not, must show that exceptional circumstances justified the fact that he did not do so; it is, on the other hand, for the DRC to prove that there were available and effective remedies in its domestic legal system against the decision to remove Mr. Diallo from the territory and that he did not exhaust them.

45. The Court will recall at this stage that, in its Memorial on the merits, Guinea described in detail the violations of international law allegedly committed by the DRC against Mr. Diallo. Among those cited is the claim that Mr. Diallo was arbitrarily arrested and detained on two occasions, first in 1988 and then in 1995. It states that he suffered inhuman and degrading treatment during those periods in detention and adds that his rights under the 1963 Vienna Convention on Consular Relations were not respected. The Court observes however that Guinea has not, in any way, developed the question of the admissibility of the claims concerning this inhuman and degrading treatment or relating to the 1963 Vienna Convention on Consular Relations. As the Court has already noted (see paragraph 36), the DRC has for its part endeavoured in the present proceedings to show that remedies to challenge the decision to remove Mr. Diallo from Zaire are institutionally provided for in its domestic legal system. By contrast, the DRC did not address the issue of exhaustion of local remedies in respect of Mr. Diallo’s arrest, his detention or the alleged violations of his other rights, as an individual, said to have resulted from those measures, and from his expulsion, or to have accompanied them. In view of the above, the Court will address the question of local remedies solely in respect of Mr. Diallo’s expulsion.

46. The Court notes that the expulsion was characterized as a “refusal of entry” when it was carried out, as both Parties have acknowledged and as is confirmed by the notice drawn up on 31 January 1996 by the national immigration service of Zaire. It is apparent that refusals of entry
are not appealable under Congolese law. Article 13 of Legislative Order No. 83-033 of 12 September 1983, concerning immigration control, expressly states that the “measure [refusing entry] shall not be subject to appeal”. The Court considers that the DRC cannot now rely on an error allegedly made by its administrative agencies at the time Mr. Diallo was “refused entry” to claim that he should have treated the measure as an expulsion. Mr. Diallo, as the subject of the refusal of entry, was justified in relying on the consequences of the legal characterization thus given by the Zairean authorities, including for purposes of the local remedies rule.

47. The Court further observes that, even if this was a case of expulsion and not refusal of entry, as the DRC maintains, the DRC has also failed to show that means of redress against expulsion decisions are available under its domestic law. The DRC did, it is true, cite the possibility of requesting reconsideration by the competent administrative authority (see paragraph 36 above). The Court nevertheless recalls that, while the local remedies that must be exhausted include all remedies of a legal nature, judicial redress as well as redress before administrative bodies, administrative remedies can only be taken into consideration for purposes of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Thus, the possibility open to Mr. Diallo of submitting a request for reconsideration of the expulsion decision to the administrative authority having taken it, that is to say the Prime Minister, in the hope that he would retract his decision as a matter of grace cannot be deemed a local remedy to be exhausted.

48. Having established that the DRC has not proved the existence in its domestic legal system of available and effective remedies allowing Mr. Diallo to challenge his expulsion, the Court concludes that the DRC’s objection to admissibility based on the failure to exhaust local remedies cannot be upheld in respect of that expulsion.

* * *

49. The Court now turns to the question of the admissibility of Guinea’s Application in so far as it concerns protection of Mr. Diallo’s rights as associés of the two companies Africom-Zaire and Africontainers-Zaire. The DRC raises two objections to admissibility regarding this aspect of the Application: it contests Guinea’s standing, and it suggests that Mr. Diallo has not exhausted the local remedies that were available to him in the DRC to assert his rights. The Court will deal with these objections in turn, beginning with that relating to Guinea’s standing.

50. The DRC accepts that under international law the State of nationality has the right to exercise its diplomatic protection in favour of associés or shareholders when there is an injury to their direct rights as such. It nonetheless contends that “international law allows for [this] protection . . . only under very limited conditions which are not fulfilled in the present case”.

51. The DRC maintains first of all that Guinea is not seeking, in this case, to protect the direct rights of Mr. Diallo as associé. It takes the view that Guinea “identifies an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights” or, more specifically, that it identifies a violation of the rights of Africom-Zaire and Africontainers-Zaire with a violation of the rights of Mr. Diallo. The DRC states as proof that “in several passages in its written pleadings, Guinea considers claims held by Africom-Zaire and Africontainers-Zaire to be claims held by Mr. Diallo”. Such confusion between the rights of the companies and the rights of the shareholders is described by the DRC not only as “contrary to positive international law” but also as “contrary to the logic itself of the institution of diplomatic protection”; it is said to have been expressly “rejected by the Court in the Barcelona Traction case”.

52. The DRC further asserts that, in any event, action to protect the direct rights of shareholders as such applies to only very limited cases. Since shareholders “can claim to derive their shareholders rights [only from the company]”, “by definition, what is envisaged here can only be the rights of shareholders in their relations with the company”. According to the DRC:

“[t]his interpretation is confirmed by the list of examples provided by the Court [in the Barcelona Traction case]: the right to dividends, the right to attend and vote at general meetings, and the right to share in the residual assets of the company on liquidation are rights which by definition the shareholder can invoke only against the company, subject to certain conditions and in accordance with certain procedures laid down in the company’s articles and in the commercial law of the legal order concerned”.

The only acts capable of violating the direct rights of shareholders would consequently be “acts of interference in relations between the company and its shareholders”. For the DRC, therefore, the arrest, detention and expulsion of Mr. Diallo could not constitute acts of interference on its part in relations between the associé Mr. Diallo and the companies Africom-Zaire and Africontainers-Zaire. As a result, they could not injure Mr. Diallo’s direct rights.
53. The DRC agrees, as suggested by Guinea, that

“the rights listed in the 1970 Judgment [in the Barcelona Traction case] are no more than examples, and that the rights in question must be sought in the domestic legislation of the States concerned”.

The DRC also agrees with Guinea on the fact that, in terms of Congolese law, the direct rights of associés are determined by the Decree of the Independent State of Congo of 27 February 1887 on commercial corporations. The rights of Mr. Diallo as associé of the companies Africom-Zaire and Africontainers-Zaire are therefore theoretically as follows: “the right to dividends and to the proceeds of liquidation”, “the right to be appointed manager (gérant)”, “the right of the associé manager (gérant) not to be removed without cause”, “the right of the manager to represent the company”, “the right of oversight [of the management]” and “the right to participate in general meetings”. However, the DRC notes that in practice, Mr. Diallo “was unable to exercise . . . the right of oversight of the two companies” since “the statutory oversight is oversight of the management (gérance)” and “such oversight cannot be entrusted to an individual who is already manager (gérant)”. The DRC further maintains that, contrary to what is claimed by Guinea, none of the other rights accorded to Mr. Diallo could have been affected by his expulsion. Hence it points out that the right of “being paid dividends and liquidation bonuses does not require as a condition of its enjoyment that the holder live in the Congo”. Likewise, “the functional rights [of the associé] . . . are not such as to be essentially affected by the physical absence of the holder from the headquarters of the company”. Mr. Diallo could very well have exercised them from foreign territory. He would have had every opportunity of “delegating executive tasks to local administrators, including through the appointment of a new manager”. The DRC also notes on this subject

“that Mr. Diallo himself continued to run Africontainers-Zaire and pursued recovery of the debts owed to that company well after his expulsion . . . [by appointing] representatives and lawyers to act on his behalf and on his instructions”.

54. In support of its diplomatic protection claim on behalf of Mr. Diallo as associé, Guinea refers to the Judgment in the Barcelona Traction case, where, having ruled that “an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected” (I.C.J. Reports 1970, p. 36, para. 46), the Court added that “[t]he situation is different if the act complained of is aimed at the direct rights of the shareholder as such” (ibid., p. 36, para. 47). Guinea further claims that this position of the Court was taken up in Article 12 of the ILC’s draft Articles on Diplomatic Protection, which provides that:

“To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.”

55. According to Guinea, the direct rights of Mr. Diallo as a shareholder of Africom-Zaire and Africontainers-Zaire are essentially determined by the Decree of 27 February 1887 on commercial corporations. This text is said to confer on him firstly a series of “property rights”, including the right to dividends from these companies, and secondly a series of “functional rights”, including the right to control, supervise and manage the companies. Guinea claims that the Congolese investment code also affords Mr. Diallo certain additional rights as shareholder, for example “the right to a share of the profits of his companies” and “a right of ownership in his companies, in particular in respect of his shares”. Guinea thus takes the view that it is confining itself, in its claim, to the violation of the rights enjoyed by Mr. Diallo in respect of the companies, including his rights of supervision, control and management, and that it is therefore not confusing his rights with those of the company.

56. Guinea also points out that, in SPRLs, the parts sociales “are not freely transferable”, which “considerably accentuates the intuitu personae character of these companies, very different in this respect from public limited companies”. It argues that this character is seen as even more marked in the case of Africom-Zaire and Africontainers-Zaire, since Mr. Diallo was their “sole manager (gérant) and sole associé (directly or indirectly)”. According to Guinea, “in fact and in law it was virtually impossible to distinguish Mr. Diallo from his companies”.

57. Guinea considers that the arrest, detention and expulsion of Mr. Diallo not only had the effect “of preventing him from continuing to administer, manage and control any of the operations of the companies Africom-Zaire and Africontainers-Zaire”, but were specifically motivated by the intent to prevent him from exercising these rights, from pursuing the legal proceedings brought on behalf of the companies, and thereby from recovering their debts. Such intent is said to emerge from the text of the Order of 31 October 1995, which refers to “[Mr. Diallo,] whose presence and conduct have breached Zairean law and order, especially in the economic, financial and monetary areas, and continue to do so”. These measures, moreover, are said to have followed on from moves by the Zairean authorities seeking a stay of execution on a judgment of the Tribunal de Grande Instance of Kinshasa ordering Zaire Shell to pay compensation to Africontainers-Zaire.

58. Finally, Guinea maintains that, contrary to what is claimed by the DRC, Mr. Diallo could not validly exercise his direct rights as shareholder from his country of origin. Consequently,
“[e]ven if he had been in a position to appoint a new ‘gérant’ and a ‘commissaire’ — and he was not, given his lack of funds — he was still being deprived of the right to appoint the management of his choice in violation of . . . the 1887 Decree, and he could not be expected to confer or abandon the management to some third party”.

Guinea adds that it is unrealistic to claim, as the DRC does, that Mr. Diallo could have exercised, from abroad, his rights of supervision and control, or indeed convoked, taken part in and voted at the general meetings.

59. The Court begins by noting the existence of a disagreement between the Parties on the circumstances surrounding the establishment of Africom-Zaire and the conduct of its activities, on the continuation of those activities after the 1980s, and on the consequences these questions may have under Congolese law. It nonetheless takes the view that this disagreement essentially relates to the merits and that it has no bearing on the question of the admissibility of Guinea’s Application as challenged in the Congo’s objections.

60. The Court notes that the Parties have referred frequently to the case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain). This involved a public limited company whose capital was represented by shares. The present case concerns SPRLs whose capital is composed of parts sociales (see paragraph 25 above).

61. As the Court recalled in the Barcelona Traction case, “[t]here is . . . no need to investigate the many different forms of legal entity provided for by the municipal laws of States” (I.C.J. Reports 1970, p. 34, para. 40). What matters, from the point of view of international law, is to determine whether or not these have a legal personality independent of their members. Conferring independent corporate personality on a company implies granting it rights over its own property, rights which it alone is capable of protecting. As a result, only the State of nationality may exercise diplomatic protection on behalf of the company when its rights are injured by a wrongful act of another State. In determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law.

62. The Court, in order to establish the precise legal nature of Africom-Zaire and Africontainers-Zaire, must refer to the domestic law of the DRC and, in particular, to the Decree of 27 February 1887 on commercial corporations. This text states, in Article 1, that “commercial corporations recognized by law in accordance with this Decree shall constitute legal persons having a personality distinct from that of their members”.

63. Congolese law accords an SPRL independent legal personality distinct from that of its associés, particularly in that the property of the associés is completely separate from that of the company, and in that the associés are responsible for the debts of the company only to the extent of the resources they have subscribed. Consequently, the company’s debts receivable from and owing to third parties relate to its respective rights and obligations. As the Court pointed out in the Barcelona Traction case: “So long as the company is in existence the shareholder has no right to the corporate assets.” (I.C.J. Reports 1970, p. 34, para. 41.) This remains the fundamental rule in this respect, whether for a SPRL or for a public limited company.

64. The exercise by a State of diplomatic protection on behalf of a natural or legal person, who is associé or shareholder, having its nationality, seeks to engage the responsibility of another State for an injury caused to that person by an internationally wrongful act committed by that State. Ultimately, this is no more than the diplomatic protection of a natural or legal person as defined by Article 1 of the ILC draft Articles; what amounts to the internationally wrongful act, in the case of associés or shareholders, is the violation by the respondent State of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of that State, as accepted by both Parties, moreover. On this basis, diplomatic protection of the direct rights of associés of a SPRL or shareholders of a public limited company is not to be regarded as an exception to the general legal régime of diplomatic protection for natural or legal persons, as derived from customary international law.

65. Having considered all of the arguments advanced by the Parties, the Court finds that Guinea does indeed have standing in this case insofar as its action involves a person of its nationality, Mr. Diallo, and is directed against the allegedly unlawful acts of the DRC which are said to have infringed his rights, particularly his direct rights as associé of the two companies Africom-Zaire and Africontainers-Zaire.

66. The Court notes that Mr. Diallo, who was associé in Africom-Zaire and Africontainers-Zaire, also held the position of gérant in each of them. An associé of an SPRL holds parts sociales in its capital, while the gérant is an organ of the company acting on its behalf. It is not for the Court to determine, at this stage in the proceedings, which specific rights appertain to the status of associé and which to the position of gérant of an SPRL under Congolese law. It is at the merits stage, as appropriate, that the Court will have to define the precise nature, content and limits of these rights. It is also at that stage of the proceedings that it will be for the Court, if need be, to assess the effects on these various rights of the action against Mr. Diallo. There is no need for the Court to rule on these substantive matters in order to be able to dispose of the preliminary objections raised by the Respondent.
67. In view of the foregoing, the Court concludes that the objection of inadmissibility raised by the DRC due to Guinea’s lack of standing to protect Mr. Diallo cannot be upheld in so far as it concerns his direct rights as associé of Africom-Zaire and Africontainers-Zaire.

68. The DRC further claims that Guinea cannot exercise its diplomatic protection for the violation of Mr. Diallo’s direct rights as associé of Africom-Zaire and Africontainers-Zaire in so far as he has not attempted to exhaust the local remedies available in Congolese law for the alleged breach of those specific rights.

69. The DRC points out that Guinea “does not dispute . . . that there are procedures and machinery for redress, judicial or otherwise, within the legal system of the DRC which would have enabled the companies in question or Mr. Diallo himself to safeguard their rights”.

It adds that “[i]n the circumstances of the present case, however, there is nothing . . . to warrant the conclusion that it was impossible for Mr. Diallo to avail himself of the machinery and procedures offered by Congolese law which would have enabled him to safeguard his rights”.

70. The DRC thus submits first that “Mr. Diallo’s absence from Congolese territory was not an obstacle [in Congolese law] to the proceedings already initiated when Mr. Diallo was still in the Congo” or for him to bring other proceedings. Mr. Diallo could also have “given one or more representatives power of attorney to act in legal proceedings instituted” or to “institute fresh proceedings in other disputes”. In that connection, the DRC observes that in reality the proceedings already set in motion by Mr. Diallo on behalf of the companies of which he was managing director were not interrupted because of his removal from the national territory”.

It also notes that “the alleged ‘extreme poverty’ of Mr. Diallo and his finding it ‘materially impossible to initiate further . . . proceedings’ [as claimed by Guinea] . . . are affirmations lacking in credibility and quite without evidential value”.

In any event, poverty does not constitute “a new exception to the fundamental principle of the prior exhaustion of local remedies”.

71. The DRC also asserts that the existing remedies available in the Congolese legal system are effective. It emphasizes in that respect the fact that “the ‘effectiveness’ of a remedy in no way implies that the plaintiff wins the case”, adding that “there can clearly be no question of contesting the effectiveness of local remedies simply because Mr. Diallo’s initial claims were not upheld in full or were subsequently rejected”.

It also points out that in fact “the local remedies available within the Congolese legal system have been shown to be effective with respect to the disputes submitted to the ordinary Congolese courts by the companies Africontainers-Zaire and Africom-Zaire” in which those companies obtained rulings in their favour. Moreover, the DRC considers that, given “the particular situation in which the Democratic Republic of the Congo . . . found itself for some years”, it does not appear that the duration of proceedings before its domestic courts was unreasonable.

72. For its part, Guinea alleges that “the Congolese State deliberately chose to deny access to its territory to Mr. Diallo because of the legal proceedings that he had initiated on behalf of his companies”. It maintains that “[i]n these circumstances, to accuse Mr. Diallo of not having exhausted the remedies would not only be manifestly ‘unreasonable’ and ‘unfair’, but also an abuse of the rule regarding the exhaustion of local remedies”.

Guinea adds that the circumstances of Mr. Diallo’s expulsion also precluded him from pursuing local remedies on his own behalf or on that of his companies. It recalls that Mr. Diallo was first arrested and imprisoned in 1988, then in 1995 and finally expelled from the territory of the Congo for having “ventured . . . to bring administrative and legal claims”. The threat weighing on Mr. Diallo and his exclusion from Congolese territory constituted, according to Guinea, “a factual denial of access to local remedies”. The expulsion of Mr. Diallo from Congolese territory is also said to have put him in a financial position in which it was “materially impossible for him to pursue any remedy whatsoever in Zaire”. As for the possibility referred to by the DRC of appointing another gérant or giving someone else power of attorney to pursue the proceedings already initiated or institute fresh proceedings, Guinea points out that, in the circumstances of the case, “no one could be called upon to take over so dangerous a managerial post” and that “[t]he possible successor . . . would have had good reason to think that he was manifestly precluded from pursuing local remedies”.

73. Guinea further emphasizes that the existing remedies in the Con-
The Court concludes from the foregoing that the allegations of political motivation advanced by the DRC with respect to Mr. Diallo’s expulsion are unfounded and do not, therefore, prejudice the admissibility of Mr. Diallo’s Application. The Court will now address the question of the admissibility of Guinea’s Application in respect of the exercise of diplomatic protection as it relates to the case of Mr. Diallo by substitution in favour of the companies Africom-Zaire and Africontainers-Zaire. The Court notes that the alleged violation of Mr. Diallo’s direct rights as associé was dealt with by Guinea as a direct consequence of his expulsion, given the circumstances in which that expulsion occurred. The Court has already found above (see paragraph 48) that the DRC’s alleged failure to exhaust the local remedies open to Africom-Zaire and Africontainers-Zaire, derived from the admissibility of Mr. Diallo’s Application and the failure to exhaust the local remedies, is inadmissible in respect of Mr. Diallo’s direct rights as associé. The Court will therefore address this question in turn, beginning with Guinea’s standing.

The Court notes that the alleged violation of Mr. Diallo’s direct rights as associé was dealt with by Guinea as a direct consequence of his expulsion, given the circumstances in which that expulsion occurred. The Court has already found above (see paragraph 48) that the DRC’s alleged failure to exhaust the local remedies open to Africom-Zaire and Africontainers-Zaire, derived from the admissibility of Mr. Diallo’s Application and the failure to exhaust the local remedies, is inadmissible in respect of Mr. Diallo’s direct rights as associé. The Court will therefore address this question in turn, beginning with Guinea’s standing.

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77. The Court concludes from the foregoing that the objection as to admissibility raised by the DRC on the ground of the failure to exhaust the local remedies against the alleged violations of Mr. Diallo’s direct rights as associé of the two companies Africom-Zaire and Africontainers-Zaire cannot be upheld.

78. The DRC contends that Guinea cannot invoke, as it does in the present case, "considerations of equity" in order to justify, the right to exercise its diplomatic protection in favour of Mr. Diallo by substitution for Africom-Zaire and Africontainers-Zaire independently of the violation of the direct rights of Mr. Diallo. The Court notes that the alleged violation of Mr. Diallo’s direct rights as associé was dealt with by Guinea as a direct consequence of his expulsion, given the circumstances in which that expulsion occurred. The Court has already found above (see paragraph 48) that the DRC’s alleged failure to exhaust the local remedies open to Africom-Zaire and Africontainers-Zaire, derived from the admissibility of Mr. Diallo’s Application and the failure to exhaust the local remedies, is inadmissible in respect of Mr. Diallo’s direct rights as associé. The Court will therefore address this question in turn, beginning with Guinea’s standing.

79. The DRC adds that, contrary to what Guinea says, neither the Court’s jurisprudence nor State practice recognizes the possibility of diplomatic protection "by substitution" proposed by Guinea. The DRC contends that the possibility of diplomatic protection "by substitution" proposed by Guinea is thus said to go "far beyond what positive international law provides". The Court notes that the alleged violation of Mr. Diallo’s direct rights as associé was dealt with by Guinea as a direct consequence of his expulsion, given the circumstances in which that expulsion occurred. The Court has already found above (see paragraph 48) that the DRC’s alleged failure to exhaust the local remedies open to Africom-Zaire and Africontainers-Zaire, derived from the admissibility of Mr. Diallo’s Application and the failure to exhaust the local remedies, is inadmissible in respect of Mr. Diallo’s direct rights as associé. The Court will therefore address this question in turn, beginning with Guinea’s standing.

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awards; decisions of the European Commission of Human Rights; the requirements of Article 25 of the Washington Convention; ICSID jurisprudence; and bilateral treaties for the promotion and protection of investments.”

According to the DRC, the arbitral awards to which Guinea refers are of no relevance, on the one hand, because of their age and, on the other, because, in each of the cases concerned, the issue of the right to claim on behalf of the shareholders had been settled in a convention enabling the arbiters to adjudicate without limiting themselves to the application of general international law and which also contained a waiver by the respondent State of any right to raise an objection preventing the tribunal from ruling on the merits. The decisions of the European Commission of Human Rights, “given within a quite specific institutional and conventional framework, applicable at regional level, [are said to be no more] . . . relevant to the circumstances of the present case”. As for the ICSID Convention, bilateral and multilateral treaties for the promotion and protection of investments and, ICSID decisions, they are also said to lack relevance, as they “do not constitute the direct application of the principles and rules governing diplomatic protection”.

79. According to the DRC, Guinea is in reality asking the Court to authorize it to exercise its diplomatic protection in a manner contrary to international law. In this connection, the DRC referred to the Judgment delivered by a Chamber of the Court in the case concerning Frontier Dispute (Burkina Faso/Republic of Mali), and observed that, since the Parties had not, in the present case, requested a decision ex aequo et bono under Article 38, paragraph 2, of the Statute, the Court must “also dismiss any possibility of resorting to equity contra legem” (I.C.J. Reports 1986, p. 567, para. 28). The DRC adds that none of the particular circumstances of the case warrants calling that conclusion into question.

80. The DRC further contends that, even supposing that the Court agreed to take account of the considerations of equity relied on by Guinea, Guinea has not demonstrated that protection of the shareholder “in substitution” for the company which possesses the nationality of the respondent State would be justified in the present case. In this connection, the DRC contends first that it has not been established that the solution advocated by Guinea is equitable in principle. On the contrary, the DRC suggests that such protection by substitution would in fact lead to a discriminatory régime of protection, resulting as it would in the unequal treatment of the shareholders. Some shareholders, such as Mr. Diallo in this case, might enjoy the protection of their national State by virtue of their alien status and of the good relations which they enjoy with their national authorities, whereas the other shareholders, either because they have the same nationality as the companies, or because their country of origin does not wish to exercise diplomatic protection in respect of them, could have recourse only to domestic law and domestic courts to assert their rights. According to the DRC, such a difference in treatment lacks any objective and reasonable basis and thus constitutes true discrimination.

81. Lastly, the DRC maintains that “even assuming that ‘protection by substitution’ were accepted as justified, application of this principle to the case of Mr. Diallo would prove fundamentally inequitable”. According to the DRC, “Mr. Diallo’s personality and the conduct adopted by him since the start of this case are far from irreproachable”. Moreover, the DRC alleges that it was those “activities [of Mr. Diallo], fraudulent and detrimental to public order, which motivated his removal from Zairean territory”. It adds that Mr. Diallo’s refusal to exhaust the available local remedies would also render diplomatic protection by substitution inequitable in this case.

82. For its part, Guinea observes that it is not asking the Court to resort to equity contra legem to decide the present case when invoking Mr. Diallo’s protection by substitution for Africom-Zaïre and Africon-tainers-Zaïre. Rather, Guinea contends that, in the Barcelona Traction case, the Court referred, in a dictum, to the possibility of an exception, founded on reasons of equity, to the general rule of the protection of a company by its national State, “when the State whose responsibility is invoked is the national State of the company”. In this connection, it quotes the following passage from the Judgment, which it considers apposite:

“On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State.” (I.C.J. Reports 1970, p. 48, para. 93.)

According to Guinea, the equity concerned in this case is equity infra legem. The alleged purpose of such recourse is to permit “a reasonable application” . . . of the rules relating to diplomatic protection”, in order “not to deprive foreign shareholders in a company having the nationality of the State responsible for the internationally wrongful act of all possibility of protection”. Guinea recognizes that the Court did not definitively settle the question of the existence of diplomatic protection by substitution in the Barcelona Traction case. It nevertheless considers that the text of the Judgment, read in the light of the opinions of the Members of the Court appended to it, leads one “to believe that a majority of the Judges regarded the exception as established in law”.

83. Guinea contends that the existence of the rule of protection by substitution and its customary nature are confirmed by numerous arbitral awards establishing
“that the shareholders of a company can enjoy the diplomatic protection of their own national State as regards the national State of the company when that State is responsible for an internationally wrongful act against it”.

Further, according to Guinea, “[s]ubsequent practice [following Barcelona Traction], conventional or jurisprudential . . . has dispelled any uncertainty . . . on the positive nature of the ‘exception’”. Guinea thus refers to certain decisions of the European Commission of Human Rights, to the Washington Convention establishing the ICSID, to the latter’s jurisprudence and to the jurisprudence of the Iran-United States Claims Tribunal.

84. In Guinea’s view, the application of protection by substitution is particularly appropriate in this case. Guinea again emphasizes that Afri-com-Zaire and Africontainers-Zaire are SPRLs, which have a marked intuïtu personæ character and which, moreover, are statutorily controlled and managed by one and the same person. Further, it especially points out that Mr. Diallo was bound, under Zairean legislation, and in particular Article 1 of the Legislative Order of 7 June 1966 concerning the registered office and the administrative seat of companies “whose main centre of operations is situated in the Congo”, to incorporate the companies in Zaire. In this regard, Guinea refers to Article 11, paragraph (b), of the draft Articles on Diplomatic Protection adopted in 2006 by the ILC, providing that the rule of protection by substitution applies specifically in situations where the shareholders in a company have been required to form the company in the State having committed the alleged violation of international law. Under Article 11, paragraph (b):

“A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

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(b) the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.”

85. Guinea also submits that the accusations made by the DRC against Mr. Diallo are not supported by any facts. On the contrary, it describes Mr. Diallo as “a shrewd and serious investor and businessman”, who has never been accused of not honouring his own commitments to the Zairean State and private companies, and who has rendered great services to the economic development of Zaire by making substantial investments there. Lastly, Guinea rejects as not only inaccurate but also irrelevant in the present context the allegation that Mr. Diallo refused to exhaust all the remedies available in the DRC, this being a claim concerning a condition for admissibility different from that which is here examined.

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86. The Court recalls that, as regards diplomatic protection, the principle as emphasized in the Barcelona Traction case, is that:

“Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected.” (I.C.J. Reports 1970, p. 36, para. 46.)

87. Since its dictum in the Barcelona Traction case (ibid., p. 48, para. 93) (see paragraph 82 above), the Court has not had occasion to rule on whether, in international law, there is indeed an exception to the general rule “that the right of diplomatic protection of a company belongs to its national State” (ibid., p. 48, para. 93), which allows for protection of the shareholders by their own national State “by substitution”, and on the reach of any such exception. It is true that in the case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), the Chamber of the Court allowed a claim by the United States of America on behalf of two United States corporations (who held 100 per cent of the shares in an Italian company), in relation to alleged acts by the Italian authorities injuring the rights of the latter company. However, in doing so, the Chamber based itself not on customary international law but on a Treaty of Friendship, Commerce and Navigation between the two countries directly granting to their nationals, corporations and associations certain rights in relation to their participation in corporations and associations having the nationality of the other State. The Court will now examine whether the exception invoked by Guinea is part of customary international law, as claimed by the latter.

88. The Court is bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative. It is in this particular and relatively limited context that the question of protection by
substitution might be raised. The theory of protection by substitution seeks indeed to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international treaty and to whom no other remedy is available, the allegedly unlawful acts having been committed against the company by the State of its nationality. Protection by “substitution” would therefore appear to constitute the very last resort for the protection of foreign investments.

89. The Court, having carefully examined State practice and decisions of international courts and tribunals in respect of diplomatic protection of associés and shareholders, is of the opinion that these do not reveal — at least at the present time — an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea.

90. The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary. The arbitrations relied on by Guinea are also special cases, whether based on specific international agreements between two or more States, including the one responsible for the allegedly unlawful acts regarding the companies concerned (see, for example, the special agreement concluded between the American, British and Portuguese Governments in the Delagoa case or the one concluded between El Salvador and the United States of America in the Salvador Commercial Company case) or based on agreements concluded directly between a company and the State allegedly responsible for the prejudice to it (see the Biloune v. Ghana Investments Centre case).

91. It is a separate question whether customary international law contains a more limited rule of protection by substitution, such as that set out by the ILC in its draft Articles on Diplomatic Protection, which would apply only where a company’s incorporation in the State having committed the alleged violation of international law “was required by it as a precondition for doing business there” (Art. 11, para. (b)).

92. However, this very special case does not seem to correspond to the one the Court is dealing with here. It is a fact that Mr. Diallo, a Guinean citizen, settled in Zaire in 1964, when he was 17 years of age, and that he did not set up his first company, Africom-Zaire, until ten years later, in 1974. In addition, when, in 1979, Mr. Diallo took part in the creation of Africontainers-Zaire, it was in fact only as manager (gérant) of Africom-Zaire, a company under Congolese law. When Africontainers-Zaire was set up, 70 per cent of its capital was held by associés of Congolese nationality, and only in 1980, one year later, did Mr. Diallo become an associé in his own name of that company, holding 40 per cent of the capital, following the withdrawal of the other two associés, the company Africom-Zaire holding the remaining parts sociales. It appears natural, against this background, that Africom-Zaire and Africontainers-Zaire were created in Zaire and entered in the Trade Register of the city of Kinshasa by Mr. Diallo, who was already engaged in commercial activities. Furthermore, and above all it has not satisfactorily been established before the Court that their incorporation in that country, as legal entities of Congolese nationality, would have been required of their founders to enable the founders to operate in the economic sectors concerned.

93. The Court concludes on the facts before it that the companies, Africom-Zaire and Africontainers-Zaire, were not incorporated in such a way that they would fall within the scope of protection by substitution in the sense of Article 11, paragraph (b), of the ILC draft Articles on Diplomatic Protection referred to by Guinea. Therefore, the question of whether or not this paragraph of Article 11 reflects customary international law does not arise in this case.

94. In view of the foregoing, the Court cannot accept Guinea’s claim to exercise diplomatic protection by substitution. It is therefore the normal rule of the nationality of the claims that applies. The right to establish the companies Africom-Zaire and Africontainers-Zaire is consequently well founded and must be upheld.

95. Having concluded that Guinea is without standing to offer Mr. Diallo diplomatic protection as regards the alleged unlawful acts of the DRC against the rights of the companies Africom-Zaire and Africontainers-Zaire, the Court need not further consider the DRC’s objection based on the non-exhaustion of local remedies.

96. In view of all the foregoing, the Court concludes that Guinea’s Application is admissible in so far as it concerns protection of Mr. Diallo’s rights as an individual and his direct rights as associé in Africom-Zaire and Africontainers-Zaire.
97. In accordance with Article 79, paragraph 7, of the Rules of Court as adopted on 14 April 1978, time-limits for the further proceedings shall subsequently be fixed by Order of the Court.

* * *

98. For these reasons,

THE COURT,

(1) As regards the preliminary objection to admissibility raised by the Democratic Republic of the Congo for lack of standing by the Republic of Guinea to exercise diplomatic protection in the present case:

(a) unanimously,

Rejects the objection in so far as it concerns protection of Mr. Diallo’s direct rights as associé in Africom-Zaire and Africontainers-Zaire;

(b) by fourteen votes to one,

Upholds the objection in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mampuya;

AGAINST: Judge ad hoc Mahiou;

(2) As regards the preliminary objection to admissibility raised by the Democratic Republic of the Congo on account of non-exhaustion by Mr. Diallo of local remedies:

(a) unanimously,

Rejects the objection in so far as it concerns protection of Mr. Diallo’s rights as an individual;

(b) by fourteen votes to one,

Rejects the objection in so far as it concerns protection of Mr. Diallo’s direct rights as associé in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mampuya;

AGAINST: Judge ad hoc Mahiou;

(3) In consequence:

(a) unanimously,

Declares the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo’s rights as an individual;

(b) by fourteen votes to one,

Declares the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo’s direct rights as associé in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mampuya;

AGAINST: Judge ad hoc Mahiou;

(c) by fourteen votes to one,

Declares the Application of the Republic of Guinea to be inadmissible in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire.

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mampuya;

AGAINST: Judge ad hoc Mahiou.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-fourth day of May, two thousand and seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Guinea and the Government of the Democratic Republic of the Congo, respectively.

(Signed) Rosalyn Higgins,
President.

(Signed) Philippe Couvreur,
Registrar.

Judge ad hoc Mahiou appends a declaration to the Judgment of the Court; Judge ad hoc Mampuya appends a separate opinion to the Judgment of the Court.

(Initialled) R.H.
(Initialled) Ph.C.
Constitutional Court of South Africa

Kaunda and Others v. President of the Republic of South Africa and Others, 4 August 2004

(CCT 23/04) [2004] ZACC 5
CHASKALSON CJ

The applicants in this matter are 69 South African citizens presently held in Zimbabwe on a variety of charges. The first six respondents are the President of the Republic of South Africa and various Cabinet Ministers who are cited as representatives of the South African government (the government). The National Director of Public Prosecutions is cited as the seventh respondent.

The applicants were arrested in Zimbabwe on 7 March 2004. On 9 March 2004, a group of 15 men were arrested in Malabo, the capital of Equatorial Guinea, and accused of being mercenaries and plotting a coup against the President of Equatorial Guinea. The majority of the detainees are South African nationals. The applicants fear that they may be extradited from Zimbabwe to Equatorial Guinea and put on trial with those who have been arrested there. They contend that if this happens they will not get a fair trial and, if convicted, that they stand the risk of being sentenced to death.

The applicants initially approached the High Court in Pretoria (the High Court) seeking orders aimed at compelling the government to make certain representations on their behalf to the governments of Zimbabwe and Equatorial Guinea, and to take steps to ensure that their rights to dignity, freedom and security of the person and fair
conditions of detention and trial are at all times respected and protected in Zimbabwe and Equatorial Guinea.

[4] The substantive relief claimed was in the following terms:

"2. Directing and ordering the Government of the Republic of South Africa (the Government) to take all reasonable and necessary steps as a matter of extreme urgency, to seek the release and/or extradition of the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.

3. Declaring that the Government is, as a matter of law, entitled to request the release and/or extradition of the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.

4. Directing and ordering the Government to seek an assurance as a matter of extreme urgency from the Zimbabwean Government that the applicants will not be released or extradited to Equatorial Guinea.

5. Directing and ordering the Government to seek assurance as a matter of extreme urgency from the Zimbabwean and Equatorial Guinean Governments, as the case may be, to not impose the death penalty on the applicants.

6. Directing and ordering the Government to ensure as far as is reasonably possible, that the dignity of the applicants as guaranteed in section 9 of the Constitution of South Africa (the Constitution) are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

7. Directing and ordering the Government to ensure as far as is reasonably possible, that the applicants’ right to freedom and security of person including the rights not to be subjected to torture, or cruel, inhuman or degrading treatment or punishment, as guaranteed in section 12 of the Constitution, are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

8. Directing and ordering the Government to ensure as far as is reasonably possible, that the rights of the applicants to fair detention and fair trial as guaranteed in section 35 of the Constitution are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.

9. Directing and ordering the Government to, through the office of the second respondent, report in writing to the Registrar of this Honourable Court on a weekly basis as to the issues set out above where applicable."

[5] The application which was heard in the High Court by Ngoepe JP was dismissed. The Judge President delivered his judgment on 9 June 2004. On 21 June 2004 the applicants lodged an urgent application with the registrar of this Court for leave to appeal directly to it against the decision of the High Court. On 29 June the government lodged an affidavit opposing the application. This Court was then in recess and not due to convene again until 15 August. Because of the seriousness of the allegations made it was decided to convene the Court during the recess. On 30 June directions were given that the application for leave to appeal would be heard on 19 and 20 July 2004. The parties were put on terms to lodge their arguments expeditiously and to deal with the merits of the application to ensure that if leave to appeal was granted the matter could be disposed of without hearing further argument.

[6] The Society for the Abolition of the Death Penalty in South Africa was admitted as an amicus curiae in the High Court proceedings and provided argument supporting the applicants’ application. It has sought leave to participate as an amicus in the application for leave to appeal. That was granted and we have had the benefit of written and oral argument from the amicus as well as the applicants and the government.

The application to the High Court
The proceedings against the government were commenced in the High Court over two months ago as a matter of urgency. The application was foreshadowed by a newspaper report published on 5 May 2004 saying that the applicants were expected to lodge an application in the High Court to force the government to step in. The report which is attached to the applicants’ founding affidavit is based largely on statements attributed to the applicants’ attorney and counsel in this matter. No demand was, however, made on the government at that time. Some twelve days later, on 17 May 2004, the government was given twenty four hours’ notice to comply with the demands made in a letter from the applicants’ attorney. The demands made were those which are now the claims referred to above. Their application to the High Court for this relief was lodged the following day with an affidavit of over 100 pages signed by the applicants’ attorney, to which were attached 34 annexures running to over 200 pages.

There is no justification for the peremptory manner in which the proceedings were commenced, nor satisfactory explanation for the failure to make the demand at the time the media was informed that court proceedings were to be launched. It must have been obvious to the applicants’ attorneys that the demands could not reasonably have been responded to within twenty four hours. Not surprisingly there was no response and the following day the application was lodged requiring the government to respond within a week. The answering affidavits draw attention to the short time within which the government has had to deal with the allegations made in the founding affidavit. They place most of the material allegations in issue but do so at times baldly, and without providing an account of all that they intend to do in the circumstances of the case. A consequence of the way that the papers have been drafted by the applicants and the respondents is that some of the issues that have been the subject of argument were not clearly formulated in the founding affidavit or the government’s answer. The picture which emerges from the record and on which the application must be decided is dealt with more fully when the various claims are addressed. The background is as follows.

The arrest of the applicants in Zimbabwe

The applicants say that they were employed to act as security guards in the Democratic Republic of the Congo (DRC) for a company which conducts mining operations there. Their services were required because mines in the DRC are subject to attacks by rebel armies and need protection. The rebel armies are equipped with modern weapons and the security guards need weapons suitable to enable them to resist such attacks. The applicants allege that a company known as Military Technical Services (MTS), which is a licensed arms dealer in South Africa, entered into an agreement earlier this year with a state owned company in Zimbabwe called Zimbabwe Defence Industries (ZDI) to supply the arms that would be required for this purpose.

On 7 March 2004 the applicants boarded a plane at Wonderboom Airport in South Africa from where they allege they were to commence their journey to the DRC to fulfil their contract to act as security guards. The plane took off and landed at the
Polokwane International Airport where the applicants’ papers were cleared. The plane took off again and finally landed at Harare International Airport. According to the applicants, they were to refuel at Harare, pick up cargo there and then fly to Burundi, with their final destination being the DRC. They were arrested at Harare airport before the cargo had been loaded.

According to the charges they face in Harare the cargo was to consist of

- 61 AK rifles – 150 offensive hand grenades
- 45,000 AK ammunition
- 20 PKM Light machine guns
- 30,000 PKM ammunition
- 100 RPG 7 anti tank launchers
- 2 X 60mm mortar tubes
- 5080 X 60mm mortar bombs
- 150 offensive hand grenades
- 20 icarus flairs
- 500 boxes 7.62 X 54mm ammunition
- 1,000 boxes 7.62 X 39mm ammunition
- 1,000 rounds RPG anti tank H.E ammunition
- 50 PRM machine guns.

After the applicants had been arrested they were moved to Chikurubi Maximum Security Prison (Chikurubi Prison). They make serious allegations concerning the conditions in which they have been held since then and the difficulties they have had in instructing their attorneys and preparing for their trial in Zimbabwe. These allegations will be dealt with more fully later. For the moment it is sufficient to say that they face the following charges in Zimbabwe:

- Contravening section 13(1) of the Public Order and Security Act – Count 1 – Conspiracy to possess dangerous weapons; Count 2 – Attempt to possess dangerous weapons.
- Contravening section 4(2)(b) of the Firearms Act – Count 1 – Conspiracy to purchase firearms without a firearms certificate;
- Contravening section 4(4)(a) of the Firearms Act – Count 2 – Conspiracy to purchase ammunition without a firearms certificate.
- Contravening section 36(1)(a)(i) and section 36(1)(c) or alternatively section 36(1)(e) of the Immigration Act – enter or assist any person to enter, remain or depart from Zimbabwe and making a false statement.
- Contravening section 89(2)(b) of Statutory Instrument 79/88 of Aviation (air navigation) Regulations – make a false statement or declaration to an official of the Civil Aviation Authority of Zimbabwe.

The applicants’ trial in Zimbabwe was due to commence on the first day of the hearing of this application. It was, however, postponed for two days to enable the counsel and attorneys who represent them in this application to appear on their behalf in Zimbabwe.

The allegations made by the applicants in the High Court proceedings

The founding affidavit on which the application is based was made by the applicants’ attorney, Mr Griebenow (Griebenow). He explains in great detail the difficulty he has experienced in consulting with the applicants in Chikurubi Prison and the practical difficulty he would have had in attempting to get them to make the affidavit. The government disputed various allegations made by Griebenow, but did
not make an issue of the fact that there were no affidavits from the applicants confirming what he said. The High Court accepted Griebenow’s explanation for making the founding affidavit himself. I will therefore deal with the matter as if the applicants had confirmed the allegations made by Griebenow.

[14] The applicants have nine separate claims that are set out in their notice of motion. These are claims of extraordinary breadth. I will deal with each of the claims in turn. But before doing so it is necessary to deal with two procedural issues raised during argument.

**Is the application urgent and are the applicants entitled to appeal directly to this Court?**

[15] The procedural issues are related and can be dealt with together. They are whether the application for leave to appeal is sufficiently urgent to warrant the failure to comply with the normal rules of procedure and to entitle the applicants to bypass the Supreme Court of Appeal or the Full Bench of the High Court, and appeal directly to this Court.

[16] This Court has held on various occasions that the granting of leave to appeal directly to it depends on various factors:

> Relevant factors to be considered in such cases will, on one hand, be the importance of the constitutional issues, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matters in issue and the prospects of success, and, on the other hand, the disadvantages to the management of the Court’s roll and to the ultimate decision of the case if the SCA is bypassed.**2**

[17] The applicants primarily aim to avoid being extradited to Equatorial Guinea and being tried in Zimbabwe or Equatorial Guinea. To that end their first claim is to require the South African government to take steps to have them extradited to South Africa so that any trial they may have to face can be conducted here. The other claims are directed to their conditions of detention, and to trial procedures should they be put on trial in Zimbabwe or Equatorial Guinea.

[18] If the applicants are extradited to Equatorial Guinea or put on trial in Zimbabwe, the relief claimed by them seeking to prevent this will become academic. The claims relating to their conditions of detention are immediate and if they are entitled to the relief claimed, are pressing. It is desirable that finality be reached on these issues without delay.

[19] The constitutional issues raise the question whether the Constitution binds the state to take steps to protect the applicants in relation to the complaints they have concerning their conditions of detention in Zimbabwe and the prosecution they face there, as well as the possibility of their being extradited to Equatorial Guinea to face charges which could result, if they were to be convicted, in their being sentenced to death. These issues involve the reach of the Constitution, and the relationship

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2 Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.
between the judiciary and the executive and the separation of powers between them. They are issues of great moment, and if their claims have substance, of great importance to the applicants.

[20] The merits of the constitutional claim are relevant to the application for leave to appeal directly to this Court and the alleged urgency of the matter. The procedure followed by this Court in setting the application down for hearing and requiring the parties to deal with the merits enables the Court to consider the merits of the claim and, if so advised, to bring this dispute to finality. It also avoids a situation in which delays may result in the relief claimed becoming academic.

[21] A theme that runs through all the claims is a demand that the government should seek assurances from foreign governments concerning prosecutions or contemplated prosecutions in those countries. The applicants assert that they have rights under the Constitution entitling them to make such demands, that the government has failed to comply with their demands and that in failing to do so it has breached their constitutional rights. The relief they claim is in effect a mandamus ordering the government to take action at a diplomatic level to ensure that the rights they claim to have under the South African Constitution are respected by the two foreign governments.

[22] The issues raised by the applicants and the amicus curiae involve, on the one hand, the relationship at an international level between South Africa and foreign states, in this case Zimbabwe and Equatorial Guinea, and on the other, the nature and extent of its obligations to citizens beyond its borders. To answer the questions raised it is necessary to deal both with international law and domestic law. As the setting is international, I begin with international law.

**International law**

[23] Section 232 of the Constitution provides that:

"Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

Traditionally, international law has acknowledged that states have the right to protect their nationals beyond their borders but are under no obligation to do so. Counsel for the government, citing the *Barcelona Traction* case, relied on this principle to support the government's contention that the applicants' claims are misconceived. They referred to the following passages from the judgment of the International Court of Justice (ICJ) in that case:

"The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress..."

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3 *Barcelona Traction Light and Power Company Limited* 1970 ICJ Reports 3; 46 ILR 178.
The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that.\(^4\)

Their argument comes down to this. The applicants’ remedy is to approach the government for assistance and not the courts. If this is done the government will consider their requests. It is, however, the sole judge of what should be done in any given case and when and in what manner assistance that is given should be provided.

The term diplomatic protection is not a precise term of art. It is defined in the Special Rapporteur’s report as

“action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State.”\(^6\)

It appears from the ILC report, however, that there are differences on this and that some commentators take the view that diplomatic protection applies only to actions taken to secure redress for injuries actually caused.\(^8\)

According to the Special Rapporteur’s report, diplomatic protection includes, in a broad sense, “consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, [and] economic pressures”.\(^9\) Some authorities distinguish between diplomatic action taken by a state to secure redress for an injury to a national, and judicial proceedings taken to that end. The distinction is not relevant for the purposes of this case.

\(^4\) Id at paras 78-9.


\(^6\) Special Rapporteur’s report above n 5 at 11.

\(^7\) Dunn The Protection of Nationals: A Study in the Application of International Law (Johns Hopkins Press, Baltimore 1932) at 18.

\(^8\) ILC report above n 5 at 146.

\(^9\) Special Rapporteur’s report above n 5 at 15.
[28] It had been suggested that the traditional approach to diplomatic protection, such as that set out in the *Barcelona Traction* case,\(^{10}\) should be developed to recognise that in certain circumstances where injury is the result of a grave breach of a jus cogens norm, the state whose national has been injured, should have a legal duty to exercise diplomatic protection on behalf of the injured person. As a corollary to that, states would be obliged to make provision in their municipal law for the enforcement of this right before a competent court or other independent national authority.

[29] It appears from the ILC report that although there was some support for this development, and some recent national constitutions made provision for such an obligation, presently this is not the general practice of states. Currently the prevailing view is that diplomatic protection is not recognised by international law as a human right and cannot be enforced as such. To do so may give rise to more problems than it would solve. Diplomatic protection remains the prerogative of the state to be exercised at its discretion. It must be accepted, therefore, that the applicants cannot base their claims on customary international law. No contention to the contrary was addressed to us in argument.

*South African law*

[30] Against this background of international law and practice I turn to consider the question whether according to our municipal law the applicants have a right to diplomatic protection from the state, and can require it to come to their assistance in Zimbabwe or Equatorial Guinea if they are extradited to that country.

[31] Counsel for the applicants contended that the applicants’ rights to dignity, life, freedom and security of the person, including the right not to be treated or punished in a cruel, inhuman or degrading way, and also the right to a fair trial entrenched in sections 10, 11, 12 and 35 of the Constitution, are being infringed in Zimbabwe and are likely to be infringed if they are extradited to Equatorial Guinea. Relying on section 7(2) of the Constitution, which requires the state to “respect, protect, promote and fulfil the rights in the Bill of Rights”, he contended that the state is obliged to protect these rights of the applicants, and the only way it can do so in the circumstances of this case is to provide them with diplomatic protection. Counsel for the amicus adopted a similar but more nuanced approach directing himself to the issue of capital punishment and the state’s duties to its citizens if that risk arises in a foreign country.

[32] The argument based on section 7(2) is built on the proposition that the state has a positive obligation to comply with its provisions.\(^{11}\) I accept that this is so. But that does not mean that the rights nationals have under our Constitution attach to them

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10 Above n 3.

11 See Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening) 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 44; Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another intervening) 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 37; Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 20; S v Baloyi (Minister of Justice and Another intervening) 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) at para 11.
when they are outside of South Africa,\textsuperscript{12} or that the state has an obligation under section 7(2) to “respect, protect, promote, and fulfil” the rights in the Bill of Rights which extends beyond its borders. Those are different issues which depend, in the first instance, on whether the Constitution can be construed as having extraterritorial effect.

Section 233 of the Constitution provides:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

This must apply equally to the provisions of the Bill of Rights and the Constitution as a whole. Consistently with this, section 39(1)(b) of the Constitution requires courts, when interpreting the Bill of Rights, to consider international law.

A right to diplomatic protection is not referred to in the Universal Declaration of Human Rights, nor is it a right contained in any international agreement of which I am aware, including the international human rights’ treaties to which South Africa is a party, such as the African Charter on Human and Peoples’ Rights\textsuperscript{13} or the International Covenant on Civil and Political Rights.\textsuperscript{14} Our Constitution shows respect for international law, and although it includes rights which go beyond those recognised by international law and major human rights instruments, when it does so, it spells out the rights expressly.

As Ackermann J pointed out in Bernstein and Others v Bester and Others NNQ,\textsuperscript{15} “[t]he internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights”.\textsuperscript{16} The Bill of Rights is extensive and covers conventional and less conventional rights in detail. A right to diplomatic protection is a most unusual right, which one would expect to be spelt out expressly rather than being left to implication.\textsuperscript{17}

\textit{Extraterritoriality: the constitutional text}

The starting point of the enquiry into extraterritoriality is to determine the ambit of the rights that are the subject matter of section 7(2). To begin with two observations are called for. First, the Constitution provides the framework for the governance of South Africa. In that respect it is territorially bound and has no application beyond our borders. Secondly, the rights in the Bill of Rights on which

\begin{itemize}
\item \textsuperscript{12}See para 44 below.
\item \textsuperscript{14}International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by the General Assembly of the United Nations, resolution 2200 (XXI) of 16 December 1966. Entry into force: 23 March 1976.
\item \textsuperscript{15}1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC).
\item \textsuperscript{16}Id at para 106.
\item \textsuperscript{17}Cf Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 45.
\end{itemize}

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reliance is placed for this part of the argument are rights that vest in everyone. Foreigners are entitled to require the South African state to respect, protect and promote their rights to life and dignity and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa. Clearly, they lose the benefit of that protection when they move beyond our borders. Does section 7(2) contemplate that the state’s obligation to South Africans under that section is more extensive than its obligation to foreigners, and attaches to them when they are in foreign countries?

[37] Section 7(1) refers to the Bill of Rights as the

“cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

The bearers of the rights are people in South Africa. Nothing suggests that it is to have general application, beyond our borders.

Extraterritoriality: international law

[38] It is a general rule of international law that the laws of a state ordinarily apply only within its own territory. It is recognised, however, that a state is also entitled, in certain circumstances, to make laws binding on nationals wherever they may be. This can give rise to a tension if laws binding on nationals conflict with laws of a foreign sovereign state in which the national is. As Dugard points out, sovereignty empowers a state to exercise the functions of a state within a particular territory to the exclusion of all other states. In most instances, the exercise of jurisdiction beyond a state’s territorial limits would under international law constitute an interference with the exclusive territorial jurisdiction of another state. In The Case of the S.S. Lotus, the Permanent Court of International Justice described this principle as follows:

“Now the 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 territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention . . . all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.”

[39] As Brownlie and Shaw point out, the passage of which this forms a part has been criticised by a substantial number of authorities. The criticism emanates from a reading of the passage which appears to regard states as possessing very wide powers of jurisdiction which could only be restricted by proof of a rule of international law

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prohibiting the action concerned. As Shaw notes, however, two later judgments of the ICJ indicate that “the emphasis lies the other way around.”

[40] It is not necessary to enter this controversy. What seems to be clear is that when the application of a national law would infringe the sovereignty of another state, that would ordinarily be inconsistent with and not sanctioned by international law.

[41] In the case of R v Cook, the majority of the Supreme Court of Canada endorsed this understanding of the international law position holding that “the principle of the sovereign equality of states generally prohibits extraterritorial application of domestic law”. In dealing with the application of the Charter beyond the borders of Canada, they said

“on the jurisdictional basis of nationality, the Charter applies to the actions of Canadian law enforcement authorities on foreign territory (which satisfies s. 32(1)), provided that the application of Charter standards would not interfere with the sovereign authority of the foreign state.”

[42] I agree with this approach which, on issues relevant to the application of the Bill of Rights to foreign states and their functionaries, does not seem to me to be inconsistent with the views of the other judges in that case. L’Heureux-Dube and McLachlin JJ expressed themselves as follows:

“[F]or the protection of the Charter to apply, the action alleged to have violated the claimant’s Charter rights must have been carried out by one of the governmental actors enumerated in s. 32. Under no circumstances can the actions of officials of another jurisdiction, acting outside Canada, be considered to violate the Charter. Officials of other jurisdictions will not be considered agents of Canadian authorities. This emerges from the need to respect the sovereignty and laws of countries where Canadian officials work, by not expecting foreign officials to comply with Canadian law or modify their procedures to respect Canadian law.”

[43] Bastarache and Gonthier JJ said:

“By its terms, s. 32(1) dictates that the Charter applies to the Canadian police by virtue of their identity as part of the Canadian government. By those same terms, however, the Charter may not be applied to a person who is neither within the authority of the various Canadian legislatures, nor a Canadian official.”

[44] There may be special circumstances where the laws of a state are applicable to nationals beyond the state’s borders, but only if the application of the law does not interfere with the sovereignty of other states. For South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign state and its officials meet not only the

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29 Id at para 91.
30 Id at para 124.
31 Where there are formal agreements or informal acts of cooperation between states which sanction the one state’s exercise of jurisdiction in the territory of the other, questions of sovereignty do not arise and thus nationals affected by their state’s action in a foreign territory may conceivably invoke the protection of their Constitution – See in this regard the case of Reid v Covert 354 US 1 (1957).
requirements of the foreign state’s own laws, but also the rights that our nationals have under our Constitution, would be inconsistent with the principle of state sovereignty. Section 7(2) should not be construed as imposing a positive obligation on government to do this.

[45] During argument hypothetical questions were raised relating to South African officials abroad, to South African companies doing business beyond our borders, to the government itself engaging in commercial ventures through state owned companies with bases in foreign countries, and to what the state’s obligations might be in such circumstances. There is a difference between an extraterritorial infringement of a constitutional right by an organ of state bound under section 8(1) of the Constitution, or by persons bound under section 8(2) of the Constitution, in circumstances which do not infringe the sovereignty of a foreign state, and an obligation on our government to take action in a foreign state that interferes directly or indirectly with the sovereignty of that state. Claims that fall in the former category raise problems with which it is not necessary to deal now. They may, however, be justiciable in our courts, and nothing in this judgment should be construed as excluding that possibility.

The decision in Mohamed and Another v President of the Republic of South Africa and Others

[32] The difficulties are illustrated by decisions in a number of Canadian cases in which different approaches have been adopted by the judges dealing with them. See for instance, R v Cook above n 26 and the cases there referred to.

[46] The applicants contend that because the state provided intelligence to Zimbabwe and Equatorial Guinea which was the cause of their being arrested in Zimbabwe, where they face the possibility of being extradited to Equatorial Guinea, the state has a particular duty to protect them in the situation in which they now find themselves. In support of this submission they placed considerable reliance on the decision of this Court in Mohamed and Another v President of the Republic of South Africa and Others.

[47] Mohamed’s case dealt with an entirely different situation to that which exists in the present case. In that case certain state functionaries had colluded with the FBI to secure the removal of Mohamed from South Africa to the USA. In doing so they had acted illegally and in breach of Mohamed’s rights under the Constitution. The Court held that in doing so

“they infringed Mohamed’s rights under the Constitution and acted contrary to their obligations to uphold and promote the rights entrenched in the Bill of Rights.”

[48] It was this that led this Court to say:

“It would not necessarily be futile for this Court to pronounce on the illegality of the governmental conduct in issue in this case”

and that it would not

33 Mohamed above n 11.
34 Id at para 60.
35 Id at para 70.
“be out of place for there to be an appropriate order on the relevant organs of State in South Africa to do whatever may be within their power to remedy the wrong done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him.”

On the facts of the case, however, and despite the fact that it made a declaration that the government had acted unlawfully in handing Mohamed over to the FBI, it declined to make an order requiring the government to take positive action to ameliorate the prejudice resulting from the unlawful act.

[49] O'Regan J refers to the fact that Mohamed was in the USA at the time. But the relevant events in that case all took place in South Africa. His rights were infringed in South Africa by government officials and not in the USA where he found himself as a result of their having violated his rights. This Court therefore had no difficulty in finding that his constitutional rights had been breached. The state argued that Mohamed had consented to being taken to the USA and had accordingly waived his rights under the Bill of Rights. That was denied by Mohamed. In dealing with the question of waiver this Court held:

“We did not have the benefit of full argument on this issue and it would accordingly be unwise to express a view on it. We will, without deciding, assume in favour of the respondents, that a proper consent of such a nature would be enforceable against Mohamed. To be enforceable, however, it would have to be a fully informed consent and one clearly showing that the applicant was aware of the exact nature and extent of the rights being waived in consequence of such consent.”

[50] The facts of the present case are entirely different. The applicants were not removed from South Africa by the government, or with the government’s assistance. They left South Africa voluntarily and now find themselves in difficulty in Zimbabwe and at risk of being extradited to Equatorial Guinea. Their arrest in Zimbabwe, the criminal charges brought against them there, and the possibility of their being extradited from Zimbabwe to Equatorial Guinea are not the result of any unlawful conduct on the part of the government or of the breach of any duty it owed to them.

[51] Police who receive information that a bank robbery is being planned do not commit a wrong by failing to advise the would-be robbers of the information that they have, nor do they act illegally by lying in wait at the site of the proposed robbery in order to apprehend the robbers when they arrive at the scene. For a court to hold otherwise would undermine legitimate methods of policing and law enforcement.

36 Id at para 71 (footnote omitted).
37 Id at para 62.
38 Id at para 67.
[52] The applicants characterise what happened as a trap. But this too is wrong. There is nothing to suggest that the South African authorities encouraged the applicants in any way to embark upon the venture in which they were engaged or induced them to do so. At best for the applicants the South African authorities failed to warn them of the intelligence that they had received or of the fact that it would be passed on to Zimbabwe and Equatorial Guinea. But that was not a breach of any duty owed by the South African government to the applicants. On the contrary, a failure to pass on the intelligence to the authorities in Zimbabwe and Equatorial Guinea would have been a breach of the duties that South Africa owed to those countries.

[53] Even if the intelligence passed on by South Africa to Zimbabwe and Equatorial Guinea led to the arrests in Zimbabwe, the passing on of the intelligence was not a wrongful act. In the times in which we live it is essential that this be done, and comity between nations would be harmed by a failure to do so. No wrong has been done to the applicants by the South African government that has to be remedied, nor is there a consequence of unlawful conduct that has to be ameliorated.

[54] The Bill of Rights binds the South African government, but does not bind other governments. As the Canadian Supreme Court has said with regard to the application of its own constitution in respect of appeals by Canadian nationals to be protected against the application of inconsistent foreign law, “individuals who choose to leave Canada leave behind Canadian law and procedures and must generally accept the local law, procedure and punishments which the foreign state applies to its own residents.”

[55] There too, a distinction is drawn between extradition proceedings in Canada, which are subject to constitutional scrutiny, and the non-retention of constitutional rights if extradition takes place, or if the national is out of the country. The same rule is applicable in the United States.

[56] Subject to an important qualification that I raise later in this judgment concerning law, procedure and punishment inconsistent with international human rights norms, I would adopt that principle for the purpose of South African law.

[57] In the present case the actors responsible for the action against which the applicants demand protection from the South African government are all actors in the employ of sovereign states over whom our government has no control. The laws to which objection is taken are the laws of foreign states who are entitled to demand that they be respected by everyone within their territorial jurisdiction, and also by other states. The applicants have no right to demand that the government take action to

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39 See para 90 below.


41 “There can be no doubt that the actions undertaken by the Government of Canada in extradition as in other matters are subject to scrutiny under the Charter (s. 32). Equally, though, there cannot be any doubt that the Charter does not govern the actions of a foreign country; see, for example, Spencer v The Queen [1985] 2 SCR 278. In particular the Charter cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted.” – Canada v Schmidt [1987] 1 SCR 500 at 518.

42 “When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.” – Neely v Henkel (No. 1) 180 US 109 (1901) at 123 cited with approval in Canada v Schmidt above n 41 at 525.
prevent those laws being applied to them. *Mohamed’s case is not authority for the contrary submission advanced by the applicants.

*Section 3 of the Constitution*

[58] This does not mean that our Constitution is silent on this issue. Section 3 of the Constitution provides:

“(1) There is a common South African citizenship.

(2) All citizens are —

(a) equally entitled to the rights, privileges and benefits of citizenship; and

(b) equally subject to the duties and responsibilities of citizenship.

(3) National legislation must provide for the acquisition, loss and restoration of citizenship.”

[59] The relevance of these provisions to diplomatic protection is discussed by Erasmus and Davidson in an article in the South African Yearbook of International Law.43 Although I take a somewhat different view as to the content to be given to the benefits and privileges of citizens guaranteed by section 3, I agree with much of what they say, and to a large extent with the conclusions that they reach.

[60] As a nation we have committed ourselves to uphold and protect fundamental rights which are the cornerstone of our democracy. We recognise a common citizenship and that all citizens are equally entitled to the rights, privileges and benefits of citizenship. Whilst I have held that there is no enforceable right to diplomatic protection, South African citizens are entitled to request South Africa for protection under international law against wrongful acts of a foreign state.

[61] They are not in a position to invoke international law themselves and are obliged to seek protection through the state of which they are nationals. Whilst the state is entitled but not obliged under international law to take such action, it invariably acts only if requested by the national to do so.44

[62] South African citizenship requirements45 are such that citizens invariably, if not always, will be nationals of South Africa. They are entitled, as such, to request the protection of South Africa in a foreign country in case of need.

[63] Nationality is an incident of their citizenship which entitles them to the privilege or benefit of making such a request. Should there ever be an exceptional case where the citizen’s connection with South Africa is too remote to justify a claim of nationality, it would be a legitimate response to such a request to say that South Africa is not entitled to demand diplomatic protection for that person.46 But apart from that, the citizen is entitled to have the request considered and responded to appropriately.

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44 Id at 116 where the authors refer to a decision of a mixed claims commission between the United States and Germany where it was pointed out that there would be no action unless the injured national requests the state to act on its behalf – *Administrative Decision No 5 (United States v Germany)* (1924) 7 RIAA 119 as cited by Harris *Cases and Materials on International Law* 5 ed (Sweet & Maxwell, London 1998) at 521.


46 *Nottebohm Case (Liechtenstein v Guatemala)* 22 ILR 349 at 360.
When the request is directed to a material infringement of a human right that forms part of customary international law, one would not expect our government to be passive. Whatever theoretical disputes may still exist about the basis for diplomatic protection, it cannot be doubted that in substance the true beneficiary of the right that is asserted is the individual.

The founding values of our Constitution include human dignity, equality and the advancement of human rights and freedoms. Equality is reflected in the principle of equal citizenship demanded by section 3.

The advancement of human rights and freedoms is central to the Constitution itself. It is a thread that runs throughout the Constitution and informs the manner in which government is required to exercise its powers. To this extent, the provisions of section 7(2) are relevant, not as giving our Constitution extraterritorial effect, but as showing that our Constitution contemplates that government will act positively to protect its citizens against human rights abuses.

The entitlement to request diplomatic protection which is part of the constitutional guarantee given by section 3 has certain consequences. If, as I have held, citizens have a right to request government to provide them with diplomatic protection, then government must have a corresponding obligation to consider the request and deal with it consistently with the Constitution. I mention later that there may even be a duty in extreme cases for the government to act on its own initiative. This, however, is a terrain in which courts must exercise discretion and recognise that government is better placed than they are to deal with such matters.

According to the government’s answering affidavit its policy in regard to such matters was correctly stated by Deputy Minister of Foreign Affairs Mr Aziz Pahad in an interview with the media, a transcript of which was annexed by the applicants to their founding affidavit. The transcript is in the following terms:

“[A]s their government, we have to ensure that all South African citizens, whatever offence they have carried out or are charged with, must receive a fair trial, they must have access to their lawyers, they must be tried within the framework of the Geneva Convention, they must be held in prison within the framework of the Geneva Convention and International law and we will always, it is our constitutional duty to ensure that this is getting out within the framework of the Geneva Convention and that there is a fair trial.”

There may thus be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of

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47 The Special Rapporteur’s report (above n 5 at 12-13) highlights the controversy regarding the question of whose rights are asserted when a state exercises diplomatic protection on behalf of its national. Erasmus & Davidson also discuss this issue in their article (above n 43 at 116-7). In recent proceedings before the ICJ, South Africa adopted the attitude that the true beneficiary of the right asserted is the individual. In its written submissions to the Court, South Africa outlined its position as follows: “the locus of [international] human rights vests in the individual and not the Government” and the individual is “the beneficiary of at least a core of human rights and the protection so afforded”. See page 22 of the written submissions submitted by the Government of the Republic of South Africa on 30 January 2004 to the ICJ in the matter of the request by the United Nations General Assembly for an Advisory Opinion on the legal consequences of the wall being built by Israel.

48 Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 56.

49 See para 70 below.
international human rights norms. A request to the government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable, and a court could order the government to take appropriate action.

[70] There may even be a duty on government in extreme cases to provide assistance to its nationals against egregious breaches of international human rights which come to its knowledge. The victims of such breaches may not be in a position to ask for assistance, and in such circumstances, on becoming aware of the breaches, the government may well be obliged to take an initiative itself.

[71] The difficulty of dealing with legal claims for diplomatic protection is exemplified by the approach of courts confronted with such claims. The Special Rapporteur draws attention to cases in British, Dutch, Spanish, Austrian, Belgian, and French courts in which claims by individuals against their governments for diplomatic protection were dismissed. He refers to these cases as demonstrating an expectation that courts should come to the assistance of nationals injured by foreign states. The fact that the claims were dismissed shows, however, how difficult it is to do so.

[72] Even in those countries where the constitution recognises that the state has an obligation to afford such protection, the ILC report suggests that there is some doubt as to whether that obligation is justiciable under municipal law.51

[73] A court cannot tell the government how to make diplomatic interventions for the protection of its nationals. Germany, which has a long tradition of recognising a state obligation to provide diplomatic assistance to nationals injured by foreign states recognises this, and leaves much to the discretion of the government.52

[74] Although the exercise of the discretion can be tested for compliance with the constitution,

“[r]e the scope of discretion in the foreign policy sphere is based on the fact that the shape of foreign relations and the course of their development are not determined solely by the wishes of the Federal Republic of Germany and are much more dependent upon circumstances beyond its control. In order to enable current political objectives of the Federal Republic of Germany to be achieved within the framework of what is permissible under international and constitutional law, the Federal Basic Law grants the organs of foreign affairs wide room for manoeuvre in the assessment of foreign policy issues as well as the consideration of the necessity for possible courses of action.”53

50 Special Rapporteur’s report above n 5 at 32.

51 ILC report above n 5 at 156.

52 Hess decision BVerfGE 55, 349; 90 ILR 386 where the Federal Constitutional Court held that “the Federal Government enjoys wide discretion in deciding the question of whether and in what manner to grant protection against foreign States” – at 395.

53 Id at 396.
[75] The Court of Appeal in England recently had occasion to consider in the *Abbasi* case whether claims for diplomatic protection are justiciable. After a careful review of the relevant authorities it came to the conclusion that although there is no enforceable duty under English law to protect citizens injured by breaches of their fundamental rights, the discretion that the Foreign Office has to provide such protection is not beyond a court’s powers of review if it can be shown that the decision was irrational or contrary to legitimate expectation. According to this judgment:

“It is highly likely that any decision of the Foreign and Commonwealth Office, as to whether to make representations on a diplomatic level, will be intimately connected with decisions relating to this country’s foreign policy, but an obligation to consider the position of a particular British citizen and consider the extent to which some action might be taken on his behalf, would seem unlikely itself to impinge on any forbidden area.

The extent to which it may be possible to require more than that the Foreign Secretary give due consideration to a request for assistance will depend on the facts of the particular case.”

[76] We were not referred to decisions of other national courts which suggest a higher intensity of review than that evinced by the German and English decisions. None are referred to by the Special Rapporteur, and I am not aware of any other decisions that may be relevant to evaluating international practice.

[77] A decision as to whether, and if so, what protection should be given, is an aspect of foreign policy which is essentially the function of the executive. The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which could be harmed by court proceedings and the attendant publicity.

[78] This does not mean that South African courts have no jurisdiction to deal with issues concerned with diplomatic protection. The exercise of all public power is subject to constitutional control. Thus even decisions by the President to grant a pardon or to appoint a commission of inquiry are justiciable. This also applies to an allegation that government has failed to respond appropriately to a request for diplomatic protection.

[79] For instance if the decision were to be irrational, a court could intervene. This does not mean that courts would substitute their opinion for that of the government or order the government to provide a particular form of diplomatic protection.

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54 *Abbasi v Secretary of State for Foreign and Commonwealth Affairs and Another* [2002] EWCA Civ 1598.

55 *Id* at para 106 iv-v.

56 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 13.

57 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 38.
“Rationality . . . is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary’s decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.”

[80] If government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly. Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review a decision. There may possibly be other grounds as well and these illustrations should not be understood as a closed list.

[81] What needs to be stressed, however, in the light of some of the submissions made to us in this case, is that government has a broad discretion in such matters which must be respected by our courts. With this in mind, I proceed now to deal with the specific claims made by the applicants. I will deal with each of the claims in turn, though not in the same order as they appear in the notice of motion.

The claim to be extradited from Zimbabwe to South Africa

[82] The relief claimed by the applicants in this regard is as follows:

58 Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 90.

“Directing and ordering the government . . . to take all reasonable and necessary steps as a matter of extreme urgency, to seek the release and/or extradition of the applicants from the governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.”

[83] In terms of the Constitution the prosecuting authority, headed by the National Director of Public Prosecutions, has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to the instituting of criminal proceedings.59 This would include applying for extradition where this is necessary. The powers of the prosecuting authority, for which the Minister of Justice and Constitutional Affairs assumes final responsibility, 60 must be exercised by the prosecuting authority without fear, favour, or prejudice.61 Decisions to institute prosecutions may raise policy issues which are far from easy to determine where, as in the present case, the events are already the subject matter of criminal proceedings in another country.

[84] In terms of the Promotion of Administrative Justice Act62 a decision to institute a prosecution is not subject to review.63 The Act does not, however, deal specifically with a decision not to prosecute. I am prepared to assume in favour of the applicants that different considerations apply to such decisions, and that there may possibly be

59 Section 179(1)(a) read with section 179(2) of the Constitution.
60 Section 179(6) of the Constitution.
61 Section 179(4) of the Constitution.
63 Id section 1(b)(I).
circumstances in which a decision not to prosecute could be reviewed by a court. But even if this assumption is made in favour of the applicants, they have failed to establish that this is a case in which such a power should be exercised.

[85] It is not disputed that the prosecuting authority in South Africa opened an investigation into the possibility of charging the applicants under the Regulation of Foreign Military Assistance Act with being party to a planned coup in Equatorial Guinea. Section 3(b) of this Act makes it an offence to

“render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless such assistance is rendered in accordance with an agreement approved in section 5.”

Foreign military assistance includes

“any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state.”

It is not suggested that the applicants had approval under section 5 to provide “foreign military assistance”.

[86] If there is substance in the suggestion that a coup was being planned, there would be a basis for the South African government to put the applicants on trial here and to apply for their extradition for that purpose. To do so, however, they would have to meet the requirements of the Zimbabwean law regulating extradition from that country to South Africa. The relevant law is the Revised Edition of the Extradition Act of 1996 (the Zimbabwe Extradition Act). South Africa is a designated country in terms of that Act.

[87] Section 16 of the Zimbabwe Extradition Act requires requests for extradition by a designated country to be accompanied by a warrant of arrest giving particulars of the offence in respect of which the extradition is sought and such evidence as would establish a prima facie case in a court of law in Zimbabwe that the person concerned has committed the offence concerned in the designated country.

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64 As to the position prior to the Promotion of Administrative Justice Act, see: Gillingham v Attorney-General and Others 1909 TS 572; Wronsky en 'n Ander v Prokureur-Generaal 1971 (3) SA 292 (SWA); Highstead Entertainment (Pty) Ltd v Minister of Law and Order 1994 (1) SA 387 (C) at 394H where it is said that courts would be slow to interfere with such decisions. This is similar to the approach taken in the United Kingdom where courts have held that there is a power to review a decision not to prosecute, but it is a power that has to be “sparingly exercised” - R v Director of Public Prosecutions, ex parte C [1995] 1 Cr. App. R. 136 at 140.


66 Id. As defined in paragraph (c) of the definition of foreign military assistance in section 1.
Mr J P Pretorius (Pretorius), the Deputy Director of Public Prosecutions in the Priority Crimes Litigation Unit of the prosecuting authority is in charge of the investigations against the applicants. An affidavit by him forms part of the record in the High Court proceedings. It says:

“At present there is not sufficient evidence to make a decision whether to institute a prosecution against the persons concerned in connection with this matter. This situation may change in the near future.”

Griebenow says that he was told on 17 May by Pretorius that he would be drawing up an indictment that evening. Pretorius denies this and says that he told Griebenow that he would start working on the indictment on the 17th. He goes on to say that the docket is not complete and further investigations are necessary. The allegation by Pretorius that there was insufficient evidence to make a decision about a prosecution is not denied. Counsel for the applicants conceded that he could not dispute this allegation. He suggested that a charge could be framed on the basis of the applicants’ own evidence that they were going to the DRC to provide security services. This he says is covered by the definition of foreign military assistance which includes:

“[S]ecurity services for the protection of individuals involved in armed conflict or their property.”

But even if this be so, there is a vast difference between defending a mine owner against unlawful assaults on its property, and planning a coup against the head of a state with which South Africa enjoys diplomatic relations. South Africa and Equatorial Guinea have also entered into a joint security agreement entitled “Agreement between the Government of the Republic of South Africa and the Government of the Republic of Equatorial Guinea Concerning Cooperation on Defence and Security”. Article 3 of the Agreement provides the functions of the South Africa–Equatorial Guinea Joint Commission on Defence and Security. These include: promoting cooperation at all levels in the fields of defence and security; exchanging security information on the activities and movement of elements threatening the security and stability of the two countries; establishing effective channels of communication between the defence and security forces of the two countries; dealing with matters of cross-border crimes and illegal immigration; briefing members on the security situation prevailing in each country generally and exchanging ideas and acting jointly on how the attendant problems may be addressed; and dealing with any other matters which in the opinion of the parties will enhance better mutual understanding and strengthen relations of solidarity between the two countries.

An application for extradition must provide particulars of the offence and prima facie evidence to support the charge. If the prosecuting authority’s investigations are directed to the possibility of putting the applicants on trial for planning a coup in Equatorial Guinea it must have evidence to support that allegation. Secondly, the
offence for which the extradition is sought must be an offence for which the accused person could have been charged and prosecuted in Zimbabwe if the offence had been committed there. Neither of these propositions has been established by the applicants. Zimbabwe does not have legislation comparable to the Regulation of Foreign Military Assistance Act.

The applicants seek to overcome this difficulty by saying that they will consent to being extradited to South Africa should such an application be made. But that is no answer. If the government lacks evidence to establish a prima facie case against the applicants it is not entitled to put them on trial. Nor would a Zimbabwean court be entitled to order that they be extradited to South Africa rather than Equatorial Guinea. An extradition by consent in such circumstances would be no more than a device to remove the applicants from Zimbabwe and bring them back to South Africa, where they would then have to be put on trial for a lesser offence than participating in plans for a coup, or be released because of the lack of evidence of their having committed any crime. To pursue a request for extradition in such circumstances would be contrary to South African law and Zimbabwean law and inconsistent with the government’s duty to conduct its foreign relations in good faith.

Section 14 of the Zimbabwe Extradition Act provides:

“(1) Subject to this Act, a person may be arrested, detained and extradited from Zimbabwe to a designated country in the manner provided for in this Part, for an offence in respect of which in the designated country he is accused or has been convicted and is required to be sentenced or to undergo punishment, whether the offence was committed before or after the declaration of the country concerned as a designated country.

(2) This Part shall apply to any offence which-

(a) is punishable in the law of the designated country concerned by imprisonment for a period of twelve months or by any more severe punishment; and

(b) would constitute an offence punishable in Zimbabwe if the act or omission constituting the offence took place in Zimbabwe or, in the case of an extra-territorial offence, in corresponding circumstances outside Zimbabwe.”

The government says that the prosecuting authority’s investigations have not been completed and there is not yet sufficient evidence to take a decision to institute a prosecution. This is not denied by the applicants, who themselves deny that they were party to plans to stage a coup. That being so, it must be accepted that when these proceedings were initiated the government lacked the evidence necessary to apply for the extradition of the applicants. On that ground alone the first claim must fail. Counsel for the applicants was constrained to concede that this was so and did not persist in the claim.

In the circumstances it is not necessary to deal with the question whether, if there were a legitimate basis for seeking the extradition of the applicants, this Court would have had the power in the circumstances of this case to order the government to do so.

The claim that steps be taken to secure the release of the applicants from custody in Zimbabwe

There is no evidence to suggest that the charges that the applicants face in Zimbabwe are not offences according to Zimbabwean law, or that there is no evidence to justify the bringing of such charges against them. That being so, there is no basis on which South Africa would be entitled to exert diplomatic pressure on Zimbabwe for them to be released, let alone for a court to order that this be done.
The risk of capital punishment

[96] The claim is formulated as follows:

“Directing and ordering the Government to seek assurance as a matter of extreme urgency from the Zimbabwean and Equatorial Guinean Governments not to impose the death penalty on the applicants.”

[97] There is nothing to suggest that the applicants are at risk of being charged with an offence in Zimbabwe for which capital punishment would be a competent sentence. That possibility need not, therefore, be considered. There is, however, evidence to suggest that the applicants may possibly be charged with capital offences in Equatorial Guinea.

[98] There can be no doubt that capital punishment is inconsistent with the provisions of our Bill of Rights. But the question whether South African citizens can require our government to take action to protect them against conduct in a foreign country, which would be lawful there, but would infringe their rights if committed in South Africa, raises entirely different issues. Although the abolitionist movement is growing stronger at an international level, capital punishment is not prohibited by the African Charter on Human and Peoples’ Rights or the International Covenant on Civil and Political Rights, and is still not impermissible under international law. The execution of the sentence, if imposed, would be by the state of Equatorial Guinea, which means that attempts to mitigate the sentence would necessarily engage the foreign relations between the two countries.

[99] The government’s policy on this issue is that it makes representations concerning the imposition of such punishment only if and when such punishment is imposed on a South African citizen. The government’s answering affidavit goes on to say:

“It is a concern of the South African government that there are South Africans who are indicted or incarcerated in foreign countries where the death sentence is a competent sentence. It is a continuing effort where appropriate to make representations regarding the death sentence as a form of punishment.”

The applicants are entitled to the benefit of this policy, and if capital punishment were to be imposed on them, then consistently with its policy, government would have to make representations on their behalf. There is no evidence to suggest that this would not happen.

[100] Counsel for the amicus curiae submitted that it is cruel treatment to put a person on trial in a foreign country to face a possible death sentence if convicted. However, as long as the proceedings and prescribed punishments are consistent with international law, South Africans who commit offences in foreign countries are liable to be dealt with in accordance with the laws of those countries, and not the

70 See the discussion of this in Mohamed above n 11 at para 39 and Burns above n 40 at paras 85-92.
requirements of our Constitution, and are subject to the penalties prescribed by such laws.72

[101] The question whether representations should be made now or later is a matter of judgment and a question of timing. There may in fact prove to be no need for representations to be made at all. The applicants may not be convicted, or if convicted, may not be sentenced to death. Counsel for the applicants submitted that if a death sentence were to result, there might be insufficient time between sentence and execution for representations to be made. There is, however, nothing to show that if the applicants were to be convicted and sentenced to death in Equatorial Guinea, there would not be sufficient time to make effective representations.

[102] Bearing in mind the deference to which the government is entitled in such matters it cannot be said that its response to the applicants’ demand that it make the representations now, is inconsistent with the Constitution. The claim that the government be directed as a matter of extreme urgency to seek an assurance that the death penalty will not be imposed must therefore be dismissed.

Extradition to Equatorial Guinea

[103] According to Griebenow, Equatorial Guinea has made a request to Zimbabwe for the extradition of the applicants. He bases this averment on submissions made to the court in Zimbabwe by a representative of the Attorney-General in opposing an application by the applicants to be released from custody. He also refers to the fact that the applicants’ legal representatives in Zimbabwe were told by the Attorney-General’s representative in Zimbabwe that a request for extradition had been made by Equatorial Guinea, and were shown pages from a document from the Zimbabwean Ministry of Foreign Affairs directed to the Attorney-General of Zimbabwe in which it is recommended that the application for extradition be considered favourably. Reference is also made to the fact that several people, including a number of South African citizens, have already been arrested in Equatorial Guinea in connection with the alleged coup.

[104] On 28 April 2004, the Government of Zimbabwe passed a statutory instrument in terms of which Equatorial Guinea was added to the list of countries to which Zimbabwe may extradite persons. The applicants also refer to news reports in Zimbabwe that President Nguema of Equatorial Guinea recently visited Zimbabwe for Independence-day celebrations, and on that occasion had a five hour meeting with President Mugabe of Zimbabwe at which the subject of the extradition of the applicants to Equatorial Guinea was discussed. This was referred to in comments made by the President of Equatorial Guinea after the meeting. The respondents offered no evidence to counter these allegations. I am satisfied that in the circumstances the applicants have established that there is a real risk that they are likely to be faced with proceedings in Zimbabwe for their extradition to Equatorial Guinea.

72 See above para 57.
This does not mean, however, that they will in fact be extradited. The applicants deny the allegation that they were party to a plan to stage a coup in Equatorial Guinea. There is no reference to the precise nature of the charge on which the request for extradition is said to have been made, nor to the evidence that Equatorial Guinea has to support a claim for extradition under the Zimbabwe Extradition Act. In terms of the Zimbabwe Extradition Act an enquiry has to be conducted by a magistrate to establish whether or not there are grounds on which an extradition order can legitimately be made. The applicants will be entitled to resist such an order at the hearing. If the evidence against them is insufficient to justify extradition, the magistrate will not be entitled to grant an order. If an order is made, it would be subject to appeal.

The applicants argue that there is a risk that Zimbabwe will act illegally and hand them over to Equatorial Guinea without an order being made for their extradition. They have, however, produced no evidence to support this allegation. The applicants have been in custody for over three months during which the court proceedings against them have been pending. If the Zimbabwean authorities contemplate handing them over to Equatorial Guinea without an extradition order sanctioning such a procedure, it is unlikely that they would not have done so immediately after their arrest, or as soon as they received the request for extradition.

The applicants rely on media reports that the President of Zimbabwe had entered into an agreement with the President of Equatorial Guinea to extradite the applicants to Equatorial Guinea in exchange for the supply of oil. No attempt has been made to verify the accuracy of these reports. Apart from the reference to the media report, all that is said in support of the allegation is that there have been instances in the past in which the Zimbabwean government has ignored orders of court, and that the Zimbabwean authorities have in fact failed to comply with certain orders relating to the conditions in which they are kept in custody. But this does not mean that Zimbabwe is likely to act illegally, in breach of the duty that it owes to South Africa under international law, and hand South African citizens over to Equatorial Guinea contrary to orders made by courts dealing with the extradition application. The South African government cannot reasonably be expected to conduct its diplomatic relations with Zimbabwe on the assumption that this might happen, and to make demands on the Zimbabwean government on the assumption that they will act illegally and contrary to South Africa’s rights under international law.

The question of extradition to Equatorial Guinea has, however, been debated in the High Court and this Court and no purpose would be served by declining to deal with that question on the grounds that the demand is premature.

The claim relating to the risk of extradition to Equatorial Guinea was originally formulated in general terms but during argument counsel for the applicants limited the claim and formulated it as follows:

"Directing and ordering the Government to seek an assurance as a matter of extreme urgency from the Zimbabwean Government that the applicants will not be released or
extradited to Equatorial Guinea without a prior assurance being obtained from Equatorial Guinea to the effect that the death sentence will not be imposed, and if imposed, will not be carried out.”

[110] There were two strands to the applicants’ argument. The first was based on the decision in Mohamed’s case.73 I have already dealt with that argument.74 It has no substance and must be rejected. The second relates to an allegation still to be considered, and that is that if extradited the applicants will be subjected to a trial that is not fair. I deal later with this aspect of their claim.

[111] The claim for extradition has not yet been lodged in the Magistrates’ Court and although there may be reasonable grounds to anticipate what the charges may be, the details of the evidence and the charges are unknown. Without that information it is not possible to say whether or not there is a real risk that the applicants will be extradited to Equatorial Guinea to face a capital charge.

[112] No request was made for this relief prior to the institution of these proceedings. Moreover, according to the ILC report there is general agreement that diplomatic protection “is concerned with injury under international law, and not injury under domestic law.”75 Capital punishment is permissible both in Zimbabwe and Equatorial Guinea. Capital punishment is also not impermissible under international law. If the applicants are extradited lawfully from Zimbabwe to Equatorial Guinea they cannot complain that they have suffered an injury according to international law solely on the grounds that they will face a capital charge in Zimbabwe. In the light of government’s stated policy concerning capital punishment in foreign countries, its response in its answering affidavit that it would seek an assurance only if capital punishment is imposed, is not a response with which a court can interfere.

[113] The claim as formulated in the prayer and as amended by counsel must therefore be dismissed.

Fair detention and trial

[114] The claim concerning fair detention and fair trial is formulated as follows:

“Directing and ordering the Government to ensure as far as is reasonably possible, that the rights of the applicants to fair detention and fair trial as guaranteed in section 35 of the Constitution are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.”

[115] As far as the fair trial claim is concerned, the prayer that is directed to section 35 of our Constitution is misconceived. For reasons that I have already given the claim as formulated cannot succeed.

[116] Serious allegations have, however, been made about the criminal justice system in Equatorial Guinea. The applicants allege that if they are put on trial there and charged with being party to the alleged coup, they will be exposed to the risk of being convicted and put to death as a result of an unfair trial. That is a grave allegation

73 Above n 11.
74 See above paras 46-57.
75 Above n 5 at 147.
which calls for close scrutiny and careful consideration by this Court. The incorrect formulation of the applicants’ claim should not stand in the way of this being done.


[118] The Special Rapporteur reported in January 1999. His report refers to lawlessness, torture, the beating of prisoners, overcrowded prison conditions with a complete lack of hygiene and inadequate food, impunity enjoyed by agents of the state, and the lack of due process within the justice system.

[119] Amnesty International sent a mission to observe a trial of 144 persons alleged to have infringed state security between 23 May and 9 June 2002. The observer concluded that the trial was characterised by serious human rights violations and countless procedural irregularities. Despite overt evidence of broken limbs and obvious injuries, complaints of torture were not investigated. Defence lawyers were allowed only one day to consult with their clients before the trial started. The trial was also condemned by the European Parliament which called for the guilty verdict to be annulled and the release of the convicted persons. In its report, Amnesty International mentions that it has on numerous occasions submitted its concerns about human rights violations to the Equatorial Guinean authorities and has urged them to approve and implement safeguards to prevent arbitrary detention, torture, ill-treatment and trials which do not comply with due process of law. These are requirements of the African Charter on Human and Peoples’ Rights and the International Covenant on Civil and Political Rights, which were ratified by the government of Equatorial Guinea in 1986 and 1987 respectively.

[120] In March 2004 Amnesty International issued a press release drawing attention to the torture of foreign nationals then in custody and alleged to be mercenaries, and the deplorable conditions in which they were being detained. It questioned whether they would receive a fair trial.

[121] In July 2003 the International Bar Association sent a fact finding mission to Equatorial Guinea. The mission conducted wide ranging interviews with government ministers, politicians, judges, and the legal profession. In a lengthy report, including recommendations as to what needs to be done to secure compliance with the rule of law and an independent judiciary, the findings and conclusions of the mission included the following:

- The executive exercises considerable control over both the legislature and the judiciary.
- There is no separation of powers and very little or no respect for the rule of law. Torture, failure to guarantee the right to a fair trial, lack of freedom of expression and association, poor prison conditions and the failure of the...
judiciary to act independently are some of the examples of human rights abuses that occur with impunity.

- The lack of independence of the judiciary, the expectation that judges will be loyal to the government, and the use of military judges in civilian courts are cause for concern.

[122] The South African government says that it is not its policy to comment on the justice systems of foreign countries and it has declined to do so. It takes the attitude that the reports are not admissible in evidence and that the court cannot make a finding on the efficacy and fairness of the legal and judicial systems of Equatorial Guinea without the benefit of expert evidence.

[123] Its attitude, as expressed in the answering affidavit, is that a decision as to whether or not to intervene is one that will be taken by a responsible authority in South Africa should the applicants be extradited to Equatorial Guinea. Whilst this Court cannot and should not make a finding as to the present position in Equatorial Guinea on the basis only of these reports, it cannot ignore the seriousness of the allegations that have been made. They are reports of investigations conducted by reputable international organisations and a Special Rapporteur appointed by the United Nations Human Rights Committee. The fact that such investigations were made and reports given is itself relevant in the circumstances of this case.76

[124] If the reports are accurate and reflect the present position in Equatorial Guinea, and if the applicants are extradited to Equatorial Guinea to stand trial there, there would be serious concern about the fairness of the trial that they would face. A concern that goes beyond the differences in legal procedure referred to in cases such as Canada v Schmidt77 and Neely v Henkel.78 What are the obligations of the government to the applicants in such a situation?

[125] The history of coups and counter coups in Africa has undermined democracy on the continent. Such practices are the antithesis of the foreign policy principles of the South African government. These principles and the priorities of the Ministry of Foreign Affairs are referred to in the evidence. They include a commitment to justice and international law in the conduct of relations between nations, a commitment to interact with African partners as equals, and a commitment to the promotion of the New Partnership for Africa’s Development, described as “a continental instrument to advance people-centred development based on democratic values and principles.” It would be a breach of South Africa’s duty to Equatorial Guinea, and its international obligations, in particular to other African states, to frustrate a criminal prosecution instituted there simply because the accused persons are South African nationals.

[126] On the other hand, if the allegations by the applicants that they will not get a fair trial in Equatorial Guinea prove to be correct, and they are convicted and

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76 See International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd 1953 (3) SA 343 (W) at 346B.

77 Above n 41.

78 Above n 42.
sentenced to death, there will have been a grave breach of international law harmful to our government’s foreign policy and its aspirations for a democratic Africa. As far as the applicants are concerned the consequences would be catastrophic, and they will have suffered irreparable harm.79

[127] The applicants are not in Equatorial Guinea and they have not been put on trial there. No injury has been done to them by that country and no injury will be done unless they are put on trial there; nor will any wrong be done if they are put on trial and the proceedings are conducted fairly. To this extent the claim for protection is premature. It cannot, however, be said that there is not a risk that the consequences that the applicants fear will happen. Should that risk become a reality the government would be obliged to respond positively. Given its stated foreign policy, there is no reason to believe that this will not be done.

[128] This matter has been complicated by the excessive and precipitate demands that the applicants have made, and the form in which their claims for relief were couched. They relied directly on the Bill of Rights and not on the privileges and benefits to which they are entitled under section 3 of the Constitution. One of the results of this is that we may not have all the evidence that would be relevant to a section 3 claim.

79 In the case of Öcalan v Turkey Application 46221/99, 12 March 2003, the European Court of Human Rights held the following at para 207:

“[T]o impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence.”

[129] The situation is evolving and it is not known how it will develop. It is complicated by the fact that other South African citizens are already facing the likelihood of being tried in Equatorial Guinea, having been arrested there on allegations that they were party to the attempted coup. The government has to deal with that situation as well, and it appears from the record it is doing so. What happens in that regard may have a bearing on how the government will deal with the applicants’ request for diplomatic protection.

[130] It is also relevant to have regard to the limited power that the government has under international law to affect decisions of a foreign state. It is essentially a power of persuasion, and it is for this reason that courts everywhere are reluctant to intervene in such matters, even if, as in Germany, they have the power to do so. Thus in the Hess case80 the Federal Constitutional Court was at pains to point out that

“the Federal Government enjoys wide discretion in deciding the question of whether and in what manner to grant protection against foreign States.”81

[131] The situation which exists in the present case is one which calls for delicate negotiations to ensure that if reasonably possible the fears that the applicants entertain can be put to rest, and that the trial, if one takes place, is conducted in a way that meets internationally accepted standards. The assessment of the risk, the best way of

80 Above n 52.

81 Id at 395.
avoiding it and the timing of action are essentially matters within the domain of
government.

[132] The situation that presently exists calls for skilled diplomacy the outcome of
which could be harmed by any order that this Court might make. In such
circumstances the government is better placed than a court to determine the most
expedient course to follow. If the situation on the ground changes, the government
may have to adapt its approach to address the developments that take place. In the
circumstances it must be left to government, aware of its responsibilities, to decide
what can best be done.

[133] We were told by counsel for the applicants that there have been ongoing
sensitive discussions between the legal representatives of the applicants and
representatives of government. If those discussions are continued they will no doubt
be conducted in the light of what is said in this judgment. The applicants have not
established that the government breached or threatened to breach any duty it has under
the Constitution or international law. In the circumstances the applicants are not
entitled to relief in this regard.

Claims relating to conditions of detention

[134] The claims dealing with detention are formulated as follows:

"Directing and ordering the Government to ensure as far as is reasonably possible,
that the dignity of the applicants as guaranteed in section 9 of the Constitution of

South Africa (the Constitution) are at all times respected and protected in Zimbabwe
or Equatorial Guinea, as the case may be.

Directing and ordering the Government to ensure as far as is reasonably possible, that
the applicants' right to freedom and security of person including the rights not to be
subjected to torture, or cruel, inhuman or degrading treatment or punishment, as
guaranteed in section 12 of the Constitution, are at all times respected and protected
in Zimbabwe or Equatorial Guinea, as the case may be.

Directing and ordering the Government to ensure as far as is reasonably possible, that
the rights of the applicants to fair detention and fair trial as guaranteed in section 35
of the Constitution, are at all times respected and protected in Zimbabwe or
Equatorial Guinea, as the case may be.

Directing and ordering the Government to, through the office of the second
respondent, report in writing to the Registrar of this Honourable Court on a weekly
basis as to the issues set out above where applicable."

[135] The applicants are presently in custody in Zimbabwe, and the claim in so far as
it relates to what might happen if they were to be held in Equatorial Guinea is
premature. I will confine myself, therefore, to the allegations made concerning
Zimbabwe.

[136] The claim concerning detention in Zimbabwe arises out of the conditions in
which the applicants have been detained and treated in Chikurubi Prison. I consider it
desirable to deal with these allegations notwithstanding the inappropriate form in
which their claim has been formulated, and to consider whether there is any other
relief to which they may be entitled.

[137] In the founding affidavit the following allegations are made. It is said that the
applicants were assaulted and abused at the time of their arrest on 7 March 2004.
They were initially denied access to legal advisers, and some were tortured and forced to make untruthful statements against their will. When they were ultimately allowed access to legal advisers a number of obstacles were placed in the way of the advisers. They had difficulty in gaining access to the prison. When they did, they were not allowed to consult with the applicants in private, and members of the investigating team insisted on being present during consultations. The court proceedings are being held in hospital wards in the prison, and the public, including journalists and members of the applicants’ families, have difficulty in gaining access to the venue because of obstructions placed in their way. Members of the Central Intelligence Organisation (CIO) interrogate them in the absence of their legal representatives despite being asked not to do so. The applicants are shackled with leg irons and handcuffs when they attend court, and court orders requiring the shackles to be removed have been ignored. The explanation given was that this was “on instructions from above”.

[138] The conditions in which the applicants are being held in Chikurubi Prison are described in the founding affidavit as follows. There are no beds. The applicants are issued with lice ridden blankets under which they have to sleep. Most are being held in overcrowded cells, but four are being held in solitary confinement. All receive inadequate food, less than the minimum standards prescribed for prisoners. They are required to wear tunics and short trousers which provide inadequate protection against the cold of an approaching winter. They have been refused permission to accept jerseys which were knitted for them and which comply with prison regulations. On one occasion eighteen of the applicants were badly assaulted by prison warders using batons, and after that salt was thrown on the wounds. Criminal charges were laid and a number of warders have been arrested and charged.

[139] If these allegations are correct, and there is no evidence to contradict them, the applicants have been held in deplorable conditions. They have been humiliated, assaulted, abused and denied proper access to their lawyers. The persons alleged to be responsible for these abuses are officers of the Zimbabwean government. The applicants apparently attempted to address these complaints through court proceedings. In the founding affidavit reference is made to various court applications brought in connection with these matters. The outcome of the applications is not always referred to, though it is said that 13 favourable court orders have been obtained. It appears, however, that there have been occasions on which orders given in favour of the applicants were ignored by the authorities in control of them. Having failed to secure relief through the courts, the applicants have turned peremptorily to the South African government and demanded that it secure relief for them. The first time that this seems to have been raised is in the peremptory demand made the day before the proceedings were launched.

[140] In the founding affidavit it is said that despite various requests the government has been slow, unhelpful and ineffective in protecting the constitutional rights of the applicants. A bald allegation is then made that the “government’s response to the plight of the applicants has been most disappointing”. The affidavit goes on to say that “except for a few isolated consular services provided by [the] government...
recently, it has been most unresponsive to the violation of the applicants’ constitutional rights.” No specific allegations are made in the founding affidavit that the applicants requested assistance from the South African High Commission to address their complaints, and that this was refused.

It appears from a letter dated 24 March 2004 written by an attorney acting for the applicants to the South African National Director of Public Prosecutions, that attorneys for the applicants met the South African Minister of Justice and Constitutional Development and the National Director of Public Prosecutions and others on 23 March 2004. This was the date on which the applicants were charged in Zimbabwe. There is no evidence as to what took place at this meeting. In the letter written the following day, the National Director of Public Prosecutions is requested to intervene to ensure that the applicants have proper access to lawyers of their choice and that full consular services be rendered to them. It is conceded in the founding affidavit that the High Commission did provide assistance to the applicants to get access to their lawyers. The letter also requests that consideration be given to applying for the extradition of the applicants to South Africa. No reference is made in the letter to the assaults or the conditions in which the applicants were being detained, and no request is made for assistance by the government to alleviate those conditions. What contact there was after that is not clear. The founding affidavit mentions that there have been various discussions with the Deputy National Director of Public Prosecutions, Mr Henning SC. It seems that they were concerned with the request to be extradited to South Africa, but no details are given about what took place. We were also informed by counsel for the applicants that there have been confidential discussions with the government, but we do not know when they commenced or what they addressed.

[142] The government disputes the allegation that it has been unhelpful, and says in its answering affidavit that it and its agencies continue to do what, in law and its foreign policy, they are entitled to do regarding the conditions of the applicants in Zimbabwe. A supporting affidavit from the Director General of the Department of Foreign Affairs made on 23 May gives details of the assistance that has been given, including, on occasions, formal interventions with the Zimbabwean government, on 10 March, 11 March, 12 March, 13 March, 4 April, 15 April, 19 April, 26 April, 11 May, 13 May and 14 May 2004. The Director General then summarises the averments made saying:

“From the above it is thus clear that when the family members, the applicants themselves and their legal representatives requested assistance of the officials of the South African Embassy in Zimbabwe, in regard to food, clothing, stationery and access by the legal representatives to the applicants, the South African Embassy addressed official requests to the Zimbabwean authorities in order to provide the necessary assistance to the applicants. At times, the requests were approved immediately by the Zimbabwean authorities and other times the requests were not approved immediately. In cases of delays the South African Embassy addressed appropriate complaints to the Zimbabwean authorities and thereafter the approvals were given. I am not aware of any request for assistance made by the applicants and which was not taken up by the South African Embassy. To the extent that the applicants allege that the South African Embassy and its diplomats did not provide assistance to them, I deny those allegations.”
[143] In their reply the applicants do not deny this. They say that they do not contend that there was a failure on the part of the South African Embassy to provide assistance. Their complaint is that the Embassy did not act pro-actively. The claim as formulated by the applicants is misconceived. There is moreover nothing to show that the government has not provided assistance to the applicants in Zimbabwe when it was requested to do so. The claims made in this regard must be dismissed.

**Conclusion**

[144] To sum up, therefore, the findings I make in the light of the evidence on record, the provisions of the Constitution and South Africa’s obligations under international law, are:

1. The application raises complex questions of law, of vital importance not only to the applicants but to our society as a whole. In the circumstances the application for leave to appeal directly to the Constitutional Court should be granted.

2. South Africa had an obligation to cooperate with Zimbabwe and Equatorial Guinea in the prevention and combating of crime, including, in particular, the duty to share information on suspected coup attempts or mercenary activity.

3. South Africa is under no obligation to apply for the extradition of the applicants from Zimbabwe.

4. The applicants’ claims as formulated in the notice of motion that the court direct and order the government to ensure that the rights that the applicants have in terms of the South African Bill of Rights are at all times respected and protected in Zimbabwe, and if extradited to Equatorial Guinea, that they be respected and protected there have no basis in law and cannot be granted.

5. South African nationals facing adverse state action in a foreign country are, however, entitled to request the South African government to provide protection against acts which violate accepted norms of international law. The government is obliged to consider such requests and deal with them appropriately.

6. Decisions made by the government in these matters are subject to constitutional control. Courts required to deal with such matters will, however, give particular weight to the government’s special responsibility for and particular expertise in foreign affairs, and the wide discretion that it must have in determining how best to deal with such matters.

7. Stated government policy concerning nationals in foreign countries, who are required to stand trial there on charges for which capital punishment is competent, is to make representations concerning the imposition of such punishment only if and when such punishment is imposed on a South African
8. Stated government policy concerning the conditions of detention and the conduct of trials of nationals in foreign countries is to ensure that all South African citizens are detained in accordance with international law standards, have access to their lawyers and receive a fair trial. This policy adopted by South Africa in its relations with foreign states is not inconsistent with international law or any obligation that the government has under the Constitution.

9. The applicants’ uncontradicted evidence is that whilst in detention in Zimbabwe some of them have been assaulted, all of them have been held in deplorable conditions, and at times humiliated, abused, and denied proper access to their lawyers. Criminal charges have been brought against the warders alleged to have committed the assaults. It is not disputed that all requests for assistance by the applicants to the South African High Commission have been taken up, and that the South African High Commission made representations to the Zimbabwean authorities about these matters.

10. How to respond to the events which have taken place requires great sensitivity, calling for government evaluation and expertise. It would not be appropriate in the circumstances of this case for a Court to require or propose any approach with regard to timing or modalities different to that adopted by government.

11. The applicants have failed to establish that the government’s response to requests for assistance is inconsistent with international law or the South African Constitution.

12. In the circumstances the appeal must be dismissed. Because of the importance of the case and the complexity of the issues raised this is not a case in which a costs order should be made in respect of the application for leave to appeal, or the appeal.

[145] The following order is made:

1. The application for leave to appeal is granted.
2. The appeal is dismissed and the order made by Ngoepe JP in the High Court is confirmed.
3. No order as to costs is made concerning the application for leave to appeal and the appeal.

Langa DCJ, Mosenek J, Skweyiya J, van der Westhuizen J and Yacoob J concur in the judgment of Chaskalson CJ.
Introduction

[146] I have read the judgment prepared by the Chief Justice. I am in substantial agreement with the broad theme of the judgment and therefore concur in the order he proposes. However, my approach to the issues confronting us differs to that of the Chief Justice. In particular, my approach to and treatment of section 3(2), including the emphasis I place on its proper approach, differ to that adopted by the Chief Justice.

The central question presented in this case is whether, under international law or our Constitution, the government has a legal duty to provide diplomatic protection to South African nationals who are arrested and imprisoned in a foreign country.

International law

[147] The practice of imposing a legal duty to exercise diplomatic protection for an injured national or a national threatened by an injury by a foreign state, upon the national’s request, is a victim of this irony. Despite numerous countries which impose this legal duty in their constitutions, there is still a reluctance to recognise this practice as a rule of customary international law. It remains a matter of an exercise in the progressive development of international law.

[150] The position in international law is summed up by the International Court of Justice in the following passage in the Barcelona Traction case:

“The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress . . .

[149] The practice of imposing a legal duty to exercise diplomatic protection for an injured national or a national threatened by an injury by a foreign state, upon the national’s request, is a victim of this irony. Despite numerous countries which impose this legal duty in their constitutions, there is still a reluctance to recognise this practice as a rule of customary international law. It remains a matter of an exercise in the progressive development of international law.

1 The International Law Commission has described diplomatic protection to mean “action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State” (see article 1 of the draft articles contained in the “First report on diplomatic protection” by John R Dugard, Special Rapporteur, 7 March 2000, published as a General Assembly document, A/CN.4/506 at 11 (Special Rapporteur’s Report)). The Encyclopaedia of Public International Law gives a substantially similar definition of diplomatic protection and defines it as “the protection given by a subject of international law to individuals, i.e. natural or legal persons, against a violation of international law by another subject of international law” (Dugard at 14, citing Geck “Diplomatic Protection” Encyclopaedia of Public International Law (1992) at 146). For the purpose of this judgment I will use the term diplomatic protection to refer to the diplomatic intervention by a state to protect its nationals against a violation or threatened violation of the internationally recognised human rights of its nationals.

2 Countries that have constitutionalised the duty to provide diplomatic protection include Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Hungary, Italy, Kazakhstan, Lao People’s Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Spain, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, Vietnam and Yugoslavia. The Special Rapporteur’s Report above n 1 at 30.
The state must be viewed as the sole judge to decide whether its protection will be
granted, to what extent it is granted, and when it will cease. It retains in this respect a
discretionary power the exercise of which may be determined by considerations of a
political or other nature, unrelated to the particular case. Since the claim of the State
is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any
change of attitude, the fact cannot in itself constitute a justification for the exercise of
diplomatic protection by another government, unless there is some independent and
otherwise valid ground for that.10

[151] It is true that customary international law is part of our law, but it can be altered
by our law and, in particular, by our Constitution. Section 232 of the Constitution
says that customary international law is the law in South Africa, “unless it is
inconsistent with the Constitution or an Act of Parliament.” It follows therefore that
the next inquiry is whether a duty exists under our Constitution.

Is there a duty under our Constitution?

[152] Both the applicants and the amicus contended that such a duty exists and that it
derives from the Constitution. In support of this contention, reliance was placed upon
section 7(2) of the Constitution. In addition the amicus also relied on section 3(2).4

[153] For its part, the government contended that no such duty exists under our
Constitution.

4 See paras 174-179 for further discussion of these sections.

[154] The question whether there is a constitutional duty contended for is essentially
one of a proper construction of the relevant provisions of the Constitution, in
particular, sections 3(1), 3(2) and 7(2). These provisions must be construed in the
light of, amongst other things, the Constitution as a whole and international and
regional human rights instruments to which the government is a party. Before
construing these constitutional provisions, it is necessary to discuss some of the
considerations that are relevant in determining whether there is a constitutional duty to
provide diplomatic protection to nationals abroad. These considerations provide the
context in which the applicable constitutional provisions must be construed and
understood.

Relevant considerations

(a) The constitutional context

[155] The question whether the government has a constitutional duty to provide
diplomatic protection in this case must be determined in the light of our Constitution,
and, in particular, the provisions of the Bill of Rights. To paraphrase Mohamed J in S
v Makwanyane,5 our Constitution articulates our shared aspirations; the values which
bind us, and which discipline our government and its national institutions; the basic
premises upon which all arms of government, and at all levels, are to exercise power;
the national ethos that defines and regulates the exercise of that power; and the moral
and ethical direction which our nation has identified for itself. The founding values

5 S v Makwanyane and Another 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262.
upon which our constitutional democracy is founded are especially relevant in this context.

[156] As a nation, we have committed ourselves to establishing “a society based on democratic values, social justice and fundamental human rights”. The very first provision of the Constitution sets out the founding values upon which our constitutional democracy is founded. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms. Our democratic state is therefore committed to the advancement and protection of fundamental human rights. This commitment is immediately apparent in the Bill of Rights, which is the cornerstone of our constitutional democracy and which affirms democratic values of human dignity, equality and freedom.

[157] In this sense our Constitution must be seen as a promissory note. Indeed, in peremptory terms, section 7(2) provides that “[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

[158] The commitment to the advancement and protection of fundamental human rights is also apparent in the ratification of the African Charter on Human and Peoples' Rights (African Charter) and the International Convention on Civil and Political Rights (ICCPR). These international instruments enshrine the fundamental human rights that are generally to be found in our Constitution.

[159] It is this commitment to the promotion and protection of fundamental human rights that binds us and defines us as a nation and which must discipline our government and inform the duty which it owes to its nationals. This commitment “must be demonstrated by the State in everything that it does.” It must inform its foreign relations policy. Indeed the principles that underpin the government’s foreign policy include a commitment to the promotion of human rights, democracy, justice and international law in the conduct of relations between nations.

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6 Preamble to the Constitution. See also Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (7) BCLR 687 (CC) at para 73:

“South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed ‘to create a new order based on equality in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms.’ This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution ‘recognises the injustices of our past’ and makes a commitment to establishing ‘a society based on democratic values, social justice and fundamental rights’. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms.”

7 Section 1(a) of the Constitution.

8 Section 7(1) states: “This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”


11 Above n 5 at para 144.

12 See paras 198-202 and 207-208 which discuss state policy.
[160] In construing the provisions of the Constitution we are enjoined to consider, amongst other things, international law. International law consists, inter alia, of the international human rights instruments to which the government is a party. These instruments are also relevant to the question whether there is a constitutional duty to provide diplomatic protection to nationals who are abroad. By ratifying the African Charter, the government “recognises the rights, duties and freedoms enshrined” in the African Charter, and it assumed the “duty to promote and protect human and peoples’ rights and freedoms” enshrined in the African Charter. These rights and freedoms include the right to a fair trial, fair detention and the right against torture. Article 7 provides:

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

Article 6 provides:

“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.”

And article 5 provides:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

[161] Also, by ratifying the ICCPR, the government recognises that:

“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.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”

13 See para 223 in the judgment of O’Regan J.

14 Article 1 of the African Charter states that: “The Member States of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.” Zimbabwe and Equatorial Guinea have also ratified the African Charter.

15 Id at Preamble.

16 Above n 10 article 9.
And:

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

[162] The ratification of the African Charter and the ICCPR are an unequivocal commitment by the government to the promotion and protection of fundamental international human rights and to do so in co-operation with other nations. Indeed ratification of international human rights instruments is a positive statement by the government to the world and to South African nationals that it will act in accordance with these instruments if any of the fundamental human rights enshrined in the international instruments it has ratified are violated. These international instruments should therefore inform the government’s foreign policy. They provide the government with a tool to protect the internationally recognised human rights of South African nationals. What is more, these instruments are binding under our Constitution.

[163] These international instruments make provision for steps that member states can take when any of the rights contained therein are violated or threatened with violations. Consistent with its commitment to the protection and promotion of fundamental human rights, the government cannot therefore remain silent when a member state commits the most egregious violations of any of the fundamental human rights enshrined in these instruments.

[164] It is true that these provisions are permissive in that they provide that the state “may” take action. That in my view does not detract from the obligation to promote and protect the rights in these instruments, an obligation which the state has assumed by ratifying these instruments. I would venture to suggest that the state is obliged to take some steps when an egregious violation of the very fundamental human rights, enshrined in the document it has ratified, is being committed by a member state.

[165] Apart from the procedures for the protection of the rights enshrined in these instruments, there may be other effective means available to member states to protect human rights. Diplomatic intervention is another important tool in the protection of international human rights.

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17 Id article 7.
18 Zimbabwe did not ratify the ICCPR but there was an accession on 31 August 1991. Equatorial Guinea also submitted to an accession on 25 December 1987. Zimbabwe ratified the African Charter on 30 May 1986 and Equatorial Guinea ratified it on 7 April 1986.
19 Thus under the African Charter, the government is entitled to take action against another state party where it has reason to believe that that State has violated a provision of the African Charter. Article 47 provides:

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

Article 49 provides:

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

20 Written Statement Submitted by the Government of the Republic of South Africa, on 30 January 2004, to the International Court of Justice in the matter of the request by the United Nations General Assembly for an Advisory Opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory.
Diplomatic protection

[166] International human rights instruments such as the ICCPR and the African Charter are important documents in that they extend protection to both aliens and nationals in the state parties. However, the remedies they provide are said to be somewhat weak and they are at times slow in providing the remedy.\(^{21}\) An individual may lodge a complaint with the African Commission concerning the violation of a fundamental human right guaranteed in the African Charter. However, in circumstances where urgent action is required, the procedure that has to be followed in processing the complaint may result in delays. What is more, its powers are to make recommendation to the offending state. This points to the urgent need to establish a court of justice to enforce the rights guaranteed in the African Charter.

[167] Having regard to this, Dugard submits that diplomatic protection, albeit only to protect individuals, offers a more effective remedy. According to him, states “will treat a claim of diplomatic protection from another State more seriously than a complaint against its conduct to a human rights monitoring body”.\(^{22}\) Diplomatic protection therefore is an important weapon in the arsenal of human rights protection. In certain circumstances, where urgent action is required, it may prove to be one of the most, if not the most, effective remedy for the protection of human rights.

[168] Therefore, states that are committed to the protection and promotion of international human rights have an important tool at their disposal to fulfil their commitment. Indeed a growing number of states now have provisions in their constitutions that recognise the right of individuals to have diplomatic protection for injuries sustained abroad.\(^{23}\) This reflects a growing recognition within the international community of the desirability of the need to protect human rights across the globe. Thus although the United Kingdom does not recognise the right of individuals to enforce a duty of diplomatic protection on the crown in the British courts, the recent decision of the Court of Appeals in the Abbasi\(^{24}\) case demonstrates that British nationals can rely on the doctrine of legitimate expectation to request that they be afforded diplomatic protection if certain conditions are met.

[169] In the light of the above, there is in my view, a compelling argument for the proposition that states have, not only a right but, a legal obligation to protect their nationals abroad against an egregious violation of their human rights. Those states that have ratified international human rights instruments and are committed to the promotion and protection of international human rights have a special duty in this regard. The Special Rapporteur’s Report concludes:

"Today there is general agreement that norms of jus cogens reflect the most fundamental values of the international community and are therefore most deserving of international protection. It is not unreasonable therefore to require a State to react

\(^{21}\) See the Special Rapporteur’s Report above n 1 at 10.

\(^{22}\) Id (footnote omitted).

\(^{23}\) Special Rapporteur’s Report above n 1 at 30.

\(^{24}\) Abbasi and Another v Secretary of State for Foreign and Commonwealth Affairs and Another [2002] EWCA Civ 1598.
by way of diplomatic protection to measures taken by a State against its nationals which constitute the grave breach of a norm of *jus cogens*. If a State party to a human rights convention is required to ensure to everyone within its jurisdiction effective protection against violation of the rights contained in the convention and to provide adequate means of redress, there is no reason why a State of nationality should not be obliged to protect its own national when his or her most basic human rights are seriously violated abroad.’

[170] This growing trend within the international community of providing diplomatic protection to nationals abroad is not an irrelevant consideration in determining whether such a duty exists under our law. It is particularly relevant for our country given our commitment to the promotion and protection of fundamental international human rights and freedoms as evidenced by our Constitution and our ratification of international instruments embodying such commitments. Diplomatic protection provides the state with a tool to protect the fundamental human rights that we have committed ourselves to promoting and protecting.

[171] But the exercise of diplomatic protection invariably implicates foreign relations.

*The conduct of foreign relations*

[172] The conduct of foreign relations is a matter which is within the domain of the executive. The exercise of diplomatic protection has an impact on foreign relations. Comity compels states to respect the sovereignty of one another; no state wants to interfere in the domestic affairs of another. The exercise of diplomatic protection is therefore a sensitive area where both the timing and the manner in which the intervention is made are crucial. The state must be left to assess foreign policy considerations and it is a better judge of whether, when and how to intervene. It is therefore generally accepted that this is a province of the executive, the state should generally be afforded a wide discretion in deciding whether and in what manner to grant protection in each case and the judiciary must generally keep away from this area. That is not to say the judiciary has no role in the matter.

[173] It is within this context that sections 3(2) and 7(2) of our Constitution must be construed and understood.

*The construction of sections 3(2) and 7(2)*

[174] The relevant provisions of section 3 provide:

‘(1) There is a common South African citizenship.
(2) All citizens are –
   (a) equally entitled to the rights, privileges and benefits of citizenship; and
   (b) equally subject to the duties and responsibilities of citizenship.”

While the relevant provisions of section 7 provide:

‘(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.”

[175] The starting point in the determination of the question whether there is a duty to provide diplomatic protection is section 3(2)(a). This section provides that all South
African citizens are “equally entitled to the rights, privileges and benefits of citizenship”. This provision is the source of the rights, privileges and benefits of citizenship to which South African citizens are entitled under our Constitution.

[176] What section 7(2) does on the other hand is to bind the state to respect, protect, promote and fulfil the rights in the Bill of Rights. Here it must be borne in mind that the right to citizenship is constitutionally entrenched in the Bill of Rights.26 It is clear from section 3(2)(a) that, in addition to certain rights, there are benefits and privileges to which South African citizens are entitled. In this sense, sections 3(2) and 7(2) must be read together as defining the obligations of the government in relation to its citizens.

[177] Section 3(2)(a) therefore confers a right upon every citizen to be accorded the rights, privileges and benefits of citizenship. This provision also makes it clear that citizens should be treated equally in the provision of rights, privileges and benefits. This of course does not mean that citizens may not be treated differently where there are compelling reasons to do so. For present purposes, it is not necessary to determine the circumstances under which the government may treat citizens differently. Suffice it to say that any difference in the treatment will have to conform to the Constitution.

[178] Flowing from this, a citizen has the right under section 3(2)(a) to require the government to provide him or her with rights, privileges and benefits of citizenship. The obligation of the government is to consider rationally such request and decide whether to grant such request in relation to that citizen. If the government decides not to grant such request its decision may be subject to judicial review. This is so because such a decision is taken in the exercise of public power and the exercise of public power must conform to the Constitution. The question whether the exercise of public power conforms to the Constitution must be determined by the courts.27

[179] The question that must be considered next is whether the rights, privileges and benefits comprehended in section 3(2)(a) include the right, privilege and benefit to request diplomatic protection.

What are the “rights, privileges and benefits” to which citizens are entitled?

[180] Some of the rights to which citizens are entitled are spelt out in the Bill of Rights. These include “the right to enter, to remain in and to reside anywhere in, the Republic”,28 and the “right to a passport”.29

[181] An important consideration in determining the content of the rights, privileges and benefits of citizens is that, in international law, individuals who are abroad generally have no right to protect themselves against foreign states. Any protection that they enjoy must be found in the municipal law of the foreign state concerned. In

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26 Section 20 provides: “No citizen may be deprived of citizenship.”

27 Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 51.

28 Section 21(3).

29 Section 21(4).
the absence of such protection it is only the state of which they are a national that can protect them against violations of fundamental international human rights. Therefore, unless the South African government grants South African nationals abroad diplomatic protection, they are likely to remain without a remedy for violations of their internationally recognised human rights. And if the government cannot protect South African nationals abroad against violations or threatened violations of their international human rights, it may well be asked, what then are the benefits of being a South African citizen? Or to put it differently, what are the obligations of the South African government towards its citizens?

[182] In De Lange v Smuts NO and Others, this Court made the following observations concerning the positive obligation on the government:

"In a constitutional democratic State, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional State) citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights. The State therefore assumes the obligation of assisting such persons to enforce their rights, including the enforcement of their civil claims against debtors."  

[183] Although these remarks were made in a different context, in my view, they underscore the positive obligation of the state to protect the rights of South African citizens. The question which arises is, does this obligation cease once a South African citizen leaves our borders? I think not.

[184] Authors Erasmus and Davidson argue that the right to citizenship should be interpreted to include entitlement to diplomatic protection. They contend that the rights, privileges and benefits comprehended in section 3(2) are open to such a construction. They argue that diplomatic protection is a benefit which citizens are equally entitled to and that this may not be denied arbitrarily and without good cause. In support of their thesis they draw attention to the fact that citizenship is a fundamental human right which, in terms of section 7(2), the state “must respect, protect, promote and fulfil”. There is much to be said for this view.

[185] The right of citizenship is constitutionally guaranteed. In my view it must be construed purposively so as to give it content and meaning. As a right contained in the Bill of Rights it must be construed, in the light of the object and purpose of the Bill of Rights which is to protect individual human rights. It must therefore be interpreted so as to make its safeguards practical and effective. Thus construed it seems to me that the right of citizenship must comprehend the right of a citizen to request protection from the government when any of his or her human rights are violated or threatened with violation, whether the citizen is in South Africa or abroad. This right should vest in all citizens by virtue of their South African citizenship.


33 See above n 26.
Having regard to the absence of an obligation in international law to grant diplomatic protection; the commitment of our government to promote and protect fundamental human rights; the obligation of the government, in general, to protect South African citizens here and abroad; the fact that citizenship is a constitutionally entrenched right; the fact that diplomatic protection is one of the tools available to protect human rights; and the fact that there is a growing trend within international law to grant diplomatic protection to nationals abroad, I am satisfied that diplomatic protection is one of the benefits, if not the right, of citizenship. For the purposes of this judgment it is not necessary to decide whether this is a right or a benefit. The effect is the same because whether it is a right or a benefit both are constitutionally guaranteed in section 3(2)(a). This benefit accrues to South African nationals by virtue of their citizenship.

This benefit is constitutionally entrenched in section 3(2)(a). If South Africa is required to ensure that everyone within its borders enjoys the fundamental human rights contained in the African Charter and the ICCPR and has adequate means of redress, there is no reason why South Africa should not be obliged under our Constitution to protect its own nationals when their most basic human rights are violated or threatened with violation abroad.

I conclude therefore that diplomatic protection is a benefit within the meaning of section 3(2)(a). It follows therefore that sections 3(2)(a) and 7(2) must be read together as imposing a constitutional duty on the government to ensure that all South African nationals abroad enjoy the benefits of diplomatic protection. The proposition that the government has no constitutional duty in this regard must be rejected. Such a proposition is inconsistent with the government’s own declared policy and acknowledged constitutional duty.

But what is the scope of this constitutional duty? In determining the scope of this duty it is necessary to bear in mind that the exercise of diplomatic protection has an impact on the conduct of foreign relations. As I have pointed out earlier, the conduct of foreign relations is a matter which is within the domain of the executive. When and how to intervene may be crucial to the outcome of the intervention. States are better judges of whether to intervene and if so, the timing and the manner of such intervention. At times there may be compelling reason why there should be no intervention at all or only at a later stage. It is for this reason that states are generally allowed a wide discretion in deciding whether and in what manner to grant diplomatic protection.

The width of the discretion that the state enjoys in the field of diplomatic protection is exemplified by two foreign decisions: the first is the decision of the German Federal Constitutional Court in the case of Rudolph Hess. The court accepted that Germany was under a constitutional duty to provide diplomatic protection but


See paras 198-204.

Hess decision BVerfGE 55, 349; 90 ILR 386 at 395.
emphasised that the government enjoyed a “wide discretion”. The second case is the decision of the English Court of Appeal in the Abbasi case. That court accepted that under a doctrine of legitimate expectation a British national may require diplomatic protection. However, it held that the Foreign and Commonwealth Office has “discretion whether to exercise the right, which it undoubtedly has, to protect British citizens.” The discretion enjoyed by the Foreign Office “is a very wide one.”

In my view, it must therefore be accepted that the government has discretion in deciding whether to grant diplomatic protection and if so, in what manner to grant such protection in each case. It must be left to the government to assess the foreign policy considerations in making its decision. However, that does not mean that the whole process is immune from judicial scrutiny. This must depend on the scope of the duty.

In my view, the duty of the government entails a duty to properly consider the request for diplomatic protection. The government must carefully apply its mind to the request and respond rationally to it. This would require, amongst other things, the government to follow a fair procedure in processing the request and it may be required to furnish reasons for its decisions. The request for diplomatic protection cannot be arbitrarily refused.

[191] In my view, it must therefore be accepted that the government has discretion in deciding whether to grant diplomatic protection and if so, in what manner to grant such protection in each case. It must be left to the government to assess the foreign policy considerations in making its decision. However, that does not mean that the whole process is immune from judicial scrutiny. This must depend on the scope of the duty.

[192] In my view, the duty of the government entails a duty to properly consider the request for diplomatic protection. The government must carefully apply its mind to the request and respond rationally to it. This would require, amongst other things, the government to follow a fair procedure in processing the request and it may be required to furnish reasons for its decisions. The request for diplomatic protection cannot be arbitrarily refused.

[193] The decision whether to extend diplomatic protection in a given case is the exercise of a public power and as such it must conform to the Constitution, in particular section 33 of the Constitution. Thus where the government were, contrary to its constitutional duty, to refuse to consider whether to exercise diplomatic protection, it would be appropriate for a court to make a mandatory order directing the government to give due consideration to the request. If this amounts to an intrusion into the conduct of foreign policy, it is an intrusion mandated by the Constitution itself.

[194] It now remains to be considered whether on the facts of this case, the applicants are entitled to any relief in relation to the question of a fair trial and the death penalty.

Fair trial

[195] I agree with the Chief Justice that the claim relating to fair detention and fair trial based on section 35 of the Constitution is misconceived and that, as formulated, that claim cannot succeed. But the applicants have presented evidence of reports about the justice system in Equatorial Guinea by reputable international organisations, including Amnesty International, International Bar Association and a Special Rapporteur of the United Nations Commission on Human Rights. These reports raise

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37 Above n 24 at para 106(iii).
38 Id
39 Hess above n 36.
40 Above n 24 at para 104.
41 Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC); 2002 (10) BCLR 1075 (CC) at para 99.
serious concerns about, amongst other things, torture, fairness of trials, conditions of
detention and the independence of the judiciary in Equatorial Guinea.

[196] In response to these reports the government takes the attitude that its policy is
not to comment or criticise the legal systems of other countries “in particular, in the
circumstances such as the present.” No explanation is given for this statement. The
statement also seems to suggest that the government has not had adequate time to
enable it “to obtain expert opinion relating to the legal status of the Republic of
Equatorial Guinea”. But the government also states that the decision whether or not to
intervene will be made by a responsible authority once the applicants are extradited to
Equatorial Guinea.

[197] The right to a fair trial is a basic human right to which all those who are
accused of a crime are entitled. The nature of the crime charged is irrelevant. It is a
fundamental human right enshrined in both the African Charter and the ICCPR.42 A
South African national who is facing a criminal trial in a foreign country is entitled to
this most basic human right. When this right is threatened, the South African national
affected has a constitutional right to seek protection from the government against such
a threat. This right flows from section 3(2)(a) which confers a right on South African
citizens to request diplomatic protection against violations of fundamental human
rights. The government has a constitutional duty to grant such protection unless there
are compelling reasons for not granting it.

[198] The government has a policy regarding nationals facing criminal trials abroad.
Its policy is to ensure that such nationals get a fair trial within the framework of the
Geneva Convention and international law. This policy emerges from a statement by
the Deputy Minister of Foreign Affairs in an interview, a transcript of which was
attached to the papers submitted to this Court. In response to the question whether the
Deputy Minister was confident that the applicants would get a fair trial in Zimbabwe
and Equatorial Guinea, the Deputy Minister responded as follows:

“Well, as their government, we have to ensure that all South Africans citizens,
whatever offence they have carried out or are charged with, must receive fair trial,
they must have access to their lawyers, they must be tried within the framework of
the Geneva Convention, they must be held in prison within the framework of the
Geneva Convention and International Law and we will always, it is our constitutional
duty to ensure that this is getting out within the framework of the Geneva Convention
and International law and that there is a fair trial.”

[199] I should add that in the answering affidavit on behalf of the government, the
response is the following:

“Without admitting the correctness of the transcript referred to in this paragraph, I
wish to state that what the Honourable Deputy Foreign Affairs Minister is alleged to
have stated in the said transcript reflects the policy of the Republic in the conduct of
foreign relations with foreign states and confirms what has been stated in the affidavit
of Ntsaluba.”

[200] Dr Ntsaluba in turn states that:

42 Above paras 160-161.
“On 4 April 2004, the South African Embassy requested permission from the Zimbabwean ministry of foreign affairs to allow its staff to attend the criminal proceedings of the applicants. Permission was given to staff members to attend the court proceedings.”

According to him, “all the requests by the South African Embassy to attend court proceedings were granted and the accredited diplomats from the South African Embassy attended each and every court proceedings” in Zimbabwe. The applicants do not seriously dispute these allegations by Dr Ntsaluba. Mr Griebenow who deposed to a replying affidavit on behalf of the applicants stated that it was not necessary for anyone to request permission to attend the trial and that the South African diplomats did not attend all the trials. What Mr Griebenow seems to ignore is that a formal request from one government addressed to another government to attend a criminal trial of a national of the requesting government is one form of diplomatic intervention. It puts the requested government on notice that the requesting state is observing the trial.

[201] The request by the government for permission to attend the trial could only have been done with a view to ensuring that the applicants get a fair trial. What Dr Ntsaluba says is therefore consistent with the government policy as stated by the Deputy Minister of Foreign Affairs. In addition, the attendance of trials by South African diplomats in Zimbabwe is consistent with this policy.

[202] The declared policy of the government to ensure that nationals abroad who face criminal trials get a fair trial within the framework of fundamental international human rights is consistent with the government’s constitutional duty under section 3(2). If the applicants are extradited to Equatorial Guinea, the government will be expected to act in accordance with this policy in fulfilment of its constitutional obligation. There is nothing in the papers before this Court to show that the government will not comply with its policy and its constitutional duty. On the contrary the indications are that it will. The main deponent to the affidavit on behalf of the government, Ms Bezuidenhout, states that if the applicants are extradited to Equatorial Guinea, a responsible government authority will take a decision whether or not to intervene.

[203] We are dealing here with events that are rapidly evolving. These papers were prepared in May 2004. We have not been told what has been happening since then. In addition, as pointed out earlier, the government is in a better position to make judgment as to when to make a decision whether or not to intervene. It has a wide discretion in deciding whether, how and when to grant diplomatic protection. The government has not made such a decision. It has taken the attitude that the appropriate time to make that decision is when the applicants are extradited to Equatorial Guinea.

[204] I cannot, on this record, hold that this attitude of the government is in violation of its constitutional duty. More importantly, there is nothing on the papers to show that the applicants had previously requested diplomatic protection against an unfair trial and detention and torture. The government has not refused such protection. It
follows therefore that the relief sought in relation to an unfair trial and detention and torture is not only misconceived but is also premature. It must therefore be dismissed.

The claims relating to the death penalty

[205] Different considerations apply to the claims relating to the death penalty. As the Chief Justice holds, the death penalty does not violate international law. This is so notwithstanding a growing number of states which have outlawed the death penalty. However, that does not mean that a South African national who is facing the death penalty abroad cannot request diplomatic protection under section 3(2)(a).\textsuperscript{43}

[206] The death penalty is unconstitutional under our Constitution. It infringes the right to life. Our country is committed to a society founded on the recognition of human rights. We must give particular value to the right to life and this must be demonstrated in everything we do. This commitment requires the state to take steps to protect its nationals against the death penalty. A South African who faces the death penalty has a right to request the government for protection against it. This is one of the benefits of being a South African citizen. The government is obliged to consider such a request properly and to decide whether, how and when to intervene on behalf of such national.

[207] The government has a policy in respect of nationals who face the death penalty. Its policy is to intervene and make representations once the death penalty is imposed. Dr Ntsaluba states in his affidavit that:

“[T]he Republic would make representations to the executive authorities in the country concerned not to implement the sentence of death. The executive authorities in that country would then consider the representations made and decide either to implement the sentence of death or commute it to some other form of punishment.”

[208] This policy is consistent with the government’s constitutional duty. It was contended on behalf of the applicants and the amicus that to wait until the death penalty is imposed before making representations not to implement the death penalty will be too late. There is nothing on the record to support this contention. Similarly, the heavy reliance on the \textit{Mohamed} case is misplaced. That case is distinguishable from the present. It follows that the claims relating to the death penalty must also be dismissed.

[209] The fundamental flaw in the applicants’ case is that it was premised on the proposition that the government has a constitutional duty to require Zimbabwe and Equatorial Guinea to comply with the rights contained in our Bill of Rights. The rights in the Bill of Rights bind this government and not foreign governments. Our government cannot require foreign governments to act in accordance with our Constitution. The applicants misconceived the nature of their rights and their remedies. I agree that none of the orders sought by the applicants can be granted.

\textsuperscript{43} Above paras 174-179.
[210] The applicants did not seek a declarator. The question whether they are entitled to a declarator was therefore not debated in this Court. I therefore consider it sufficient in this case to hold that under section 3(2)(a) of the Constitution the government has a constitutional duty to grant diplomatic protection to nationals abroad against violations or threatened violations of fundamental international human rights. This duty entails an obligation to consider properly the request for diplomatic protection with due regard to the provisions of the Constitution. The government has a wide discretion in deciding whether, when and in what manner to grant such protection. The policy of the government is to grant such protection. The government says the appropriate time to consider whether to grant such protection is when the applicants are extradited to Equatorial Guinea. In all the circumstances of this case I have no reason to believe that the government will not do what it says it will do. I therefore consider it unnecessary to issue a declarator.

[211] In the event, I concur in the order proposed by the Chief Justice.

O’REGAN J:

[212] I have had the opportunity of reading the judgment prepared by the Chief Justice in this matter. I agree with his analysis of section 3 of the Constitution to the extent that he holds that it entitles citizens to ask government to make representations and seek diplomatic protection on their behalf. However, I am in respectful disagreement with him in relation to the question whether under our Constitution, and in the circumstances of the present case, the state bears an obligation (independent of a request by its citizens) to take steps to seek to protect the applicants against the conduct of other states that may amount to a fundamental breach of the human rights of the applicants as recognised in customary international law and the African Charter on Human and Peoples’ Rights.

[213] The Chief Justice has set out the facts of the case in some detail and they do not need to be restated at length here. Briefly, the applicants were arrested on 7 March 2004 shortly after they had landed at Harare International Airport in Zimbabwe on a chartered flight from South Africa. They have been charged with a variety of offences relating mainly to the possession of unlawful firearms and are currently being held in a prison near Harare. It is alleged by the applicants that Equatorial Guinea is seeking to extradite them from Zimbabwe to face charges in relation to a coup d’état that, it is alleged, they were going to launch. The applicants further allege that there is a real risk that, if extradited to Equatorial Guinea, their trial will not be fair and that following upon an unfair trial, the death penalty will be imposed upon them by the court there.

1 Customary international law constitutes those binding rules of international law which are “evidence of a general practice [of states] accepted as law”. (Article 38 of the Statute of the International Court of Justice). See the discussion in Brownlie, Principles of Public International Law 6 ed (Oxford University Press, Oxford 2005) at 6-12.
That states have the right to provide diplomatic protection to their nationals is a recognised principle of customary international law. The content of the right to provide diplomatic protection is closely related to the customary international law principle of the responsibility of states to avoid acts or omissions in respect of foreign nationals on their territory that would constitute a breach of the state’s international law obligations. Diplomatic protection has accordingly been defined as

“the protection given by a subject of international law to individuals, i.e. natural or legal persons, against a violation of international law by another subject of international law.”

However, it is also clear that a state has the right to make representations to other states on behalf of its nationals even when there is no established infringement of international law, although this does not constitute diplomatic protection, but merely diplomatic or at times consular representations. The precise content of what may be done pursuant to the right to provide diplomatic protection is the subject of some debate by international lawyers. It is clear that diplomatic protection embraces a range of actions, including consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals and severance of diplomatic relations.

Although international law confers the right upon states to provide diplomatic protection in respect of their citizens, at present, states are not obliged to provide diplomatic protection to their citizens under international law. As the International Court of Justice stated in the Barcelona Traction case in 1970:

“[W]ithin the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and whatever extent it thinks fit, for it is its own right that the State is asserting. Should the national or legal persons on whose behalf it is acting consider their rights are not adequately protected, they have no remedy in international law. All they can do is resort to international law, if means are available, with a view to furthering their cause or obtaining redress . . .

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.”

However, as Professor Dugard, Special Rapporteur to the International Law Commission on Diplomatic Protection noted in his first report to the Commission in 2000:

“Much has changed in recent years. Standards of justice for individuals at home and foreigners abroad have undergone major changes. Some 150 states are today parties

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4 See the distinction drawn by Warbrick between diplomatic representations, on the one hand, and diplomatic protection, on the other in “Diplomatic Representations and Diplomatic Protection” (2002) 51 International and Comparative Law Quarterly 723 at 724-5. See also article 5 of the Vienna Convention on Consular Relations which lists consular functions.

5 See the discussion in the First Report of the Special Rapporteur on Diplomatic Protection, above n 2 at paras 41 ff.


7 Barcelona Traction, Light and Power Company Limited Case 46 ILR 178 at paras 78-9.
to the International Covenant on Civil and Political rights and/or its regional counterparts in Europe, the Americas and Africa, which prescribe standards of justice to be observed in criminal trials and in the treatment of prisoners. Moreover, in some instances the individual is empowered to bring complaints about the violation of his human rights to the attention of international bodies such as the United Nations Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights or the African Commission on Human and Peoples’ Rights."

8 It is indeed true that since 1945 the growth of international human rights law and principles has been remarkable. But as Professor Dugard also noted, despite the growth in the number of international conventions and treaties, the remedies available at international law to individuals whose human rights are violated or threatened still remain weak.9 One of the important mechanisms that can be used to protect and promote international human rights thus remains the right of states to make diplomatic representations on behalf of their nationals to other states which are threatening to infringe or have infringed the internationally recognised human rights of the nationals.10

9 Id at para 31. Perhaps the most effective international law remedies for the protection of international human rights norms are provided by regional human rights courts. A Protocol to the African Charter on Human and Peoples’ Rights establishing an African Court on Human and Peoples’ Rights entered into force on 25 January 2004 after receiving sufficient ratifications. The Court should, thus, be established shortly.

10 At least one commentator expressly states that diplomatic protection may be instituted in the face of the threatened infringement of human rights. See Dunn above n 6 at 18 where he states that “[Diplomatic protection] embraces generally all cases of official representation by one government on behalf of its citizens of their property interests within the jurisdiction of another, for the purpose, either of preventing some threatened injury in violation of international law, or of obtaining redress for such injuries after they have been sustained.”

[217] There can be no doubt then that at international law, the state is entitled to take diplomatic steps to protect its nationals against the violation of internationally recognised human rights standards. This entitlement in turn gives rise to two more difficult questions: does the state, under our Constitution, bear an obligation to exercise its international law rights in respect of its nationals? And if it does bear such an obligation, in what circumstances is that obligation justiciable in our courts? I shall consider these two questions separately.

Is there a constitutional duty upon the state?

[218] Before considering this question, some preliminary remarks must be made. First, it must be emphasised that South Africa is a constitutional democracy. This has two clear implications: as the preamble to our Constitution asserts, government should be based on the “will of the people”; and secondly, the powers of government are delineated by the terms of the Constitution. So, the powers of all three arms of government arise from and are limited by the Constitution.11 All law and conduct inconsistent with the Constitution is invalid.12 Moreover, our Constitution embodies “an objective, normative value system”13 as is asserted in the opening clause of the Constitution which states that:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.

11 See, for example, President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at paras 8-10, in which the Court held that the prerogative powers under previous constitutions were now those enumerated in our new Constitution; Pharmaceutical Manufacturers Association of South Africa: In re Ex parte the President of the RSA 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 19.

12 Section 2 of the Constitution.

13 Carmichele v Minister of Safety and Security and Another 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 54.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness.”

The conduct of all three arms of government, the legislature, executive and judiciary must thus be consistent with the Constitution.

[219] Secondly, the Constitution not only sets a boundary within which the three arms of government must operate, but it also requires that the state must “promote and fulfil the rights in the Bill of Rights”. This constitutional injunction is not surprising in the light of the history of our country and the purpose of our Constitution. As Ngcobo J stated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*: 15

“South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed ‘to create a new order based on equality in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms’. This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution ‘recognises the injustices of our past’ and makes a commitment to establishing ‘a society based on democratic values, social justice and fundamental rights’. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms.”

[220] The leitmotif of our Constitution is thus the promotion and protection of fundamental human rights. Again and again, our Constitution restates the foundational importance of human rights to our constitutional vision. In the Preamble, it speaks of the need to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”; in section 1, the founding values clause quoted above, the Constitution commits us to the “advancement of human rights and freedoms”; and in section 7(1), the Constitution asserts that the Bill of Rights is a “cornerstone of democracy in South Africa.”

[221] Our Constitution thus asserts as a foundational value the need to protect and promote human rights. This value informs all the obligations and powers conferred by the Constitution upon the state. The importance of that foundational value is to be understood in the context of a growing international consensus that the promotion and protection of human rights is part of the responsibility of both the global community and individual states, and that there is a need to take steps to ensure that those fundamental human rights recognised in international law are not infringed or impaired.

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15 Section 7(2) of the Constitution.
16 See also the judgment of Mahomed J in *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262.
Thirdly, our Constitution recognises and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law. The Preamble of our Constitution states that the Constitution is adopted as the supreme law of the Republic so as to, amongst other things, “build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.” Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Courts, when interpreting the Bill of Rights, “must consider international law”, and, when interpreting legislation, must prefer any reasonable interpretation consistent with international law over alternative interpretations that are not.

In line with this constitutional acknowledgement of the importance of both international law and international human rights, South Africa has, since 1994, signed and ratified a range of international human rights conventions including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the African Charter on Human and Peoples’ Rights. In ratifying these international agreements and conventions, our government is promoting the protection of human rights in the international arena.

I turn now to consider the obligations imposed upon government by the Constitution. Counsel for the respondent argued that there could be no duty imposed upon the government to provide diplomatic protection to its nationals against the grave infringement of international human rights norms because this would constitute the extraterritorial application of our Bill of Rights. It is correct that the relief formulated by the applicants in prayers 6, 7, and 8 does suggest that they were seeking the extraterritorial application of the Bill of Rights. However, in argument, counsel for both the applicants and the amicus submitted that the government was under an obligation to provide diplomatic protection to its nationals under the Constitution.

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17 Section 232 of the Constitution.
18 Section 39(1)(b) of the Constitution.
19 Section 233 of the Constitution.
22 Ratified on 15 December 1995.
25 Ratified on 9 July 1996.
26 These prayers sought the following:

"6. Directing and ordering the Government to ensure as far as is reasonably possible, that the dignity of the applicants as guaranteed in section 9 of the Constitution of South Africa (the Constitution) are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.
7. Directing and ordering the Government to ensure as far as is reasonably possible, that the applicants' right to freedom and security of person including the rights not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, as guaranteed in section 12 of the Constitution, are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be.
8. Directing and ordering the Government to ensure as far as is reasonably possible, that the applicants' right to fair detention and fair trial as guaranteed in section 35 of the Constitution are at all times respected and protected in Zimbabwe or Equatorial Guinea, as the case may be."
Counsel for the applicants conceded that the formulation of the relief in the notice of motion may not have accurately reflected this submission.

[225] The ordinary principle of international law is that jurisdiction of states is territorial. In *R v Cook*, the Canadian Supreme Court had to consider the question whether an accused could rely on the provisions of the Canadian Charter of Rights and Freedoms in respect of her interrogation by Canadian law enforcement officials in the United States. The majority of the Court concluded (as the Chief Justice notes in his judgment) as follows:

> "In our view, the reasoning adopted in both *Harrer* and *Terry* can accommodate a finding that on the jurisdictional basis of nationality, the *Charter* applies to the actions of *Canadian law enforcement authorities* on foreign territory (which satisfies s. 32(1), provided that the application of *Charter* standards would not interfere with the sovereign authority of the foreign state."  

[226] In his judgment, Bastarache J convincingly explains that there is no threat to the sovereignty of the United States of America where the Canadian Charter is held by a Canadian court in Canadian criminal proceedings to be applicable to the conduct of Canadian law enforcement officers interrogating a suspect in the United States of America. The effect of the Charter, in such circumstances, has no impact whatsoever on the jurisdiction of the United States.

[227] It is obvious that the Bill of Rights in our Constitution binds the executive and that the state is under an obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights." It is also clear that the provisions of our Bill of Rights are not binding on the governments or courts of other countries. So, a South African may not rely on the provisions of our Bill of Rights before other courts in other jurisdictions. To this extent, then, our Bill of Rights has no direct extraterritorial effect.

[228] It does not follow, however, that when our government acts outside of South Africa it does so untrammelled by the provisions of our Bill of Rights. There is nothing in our Constitution that suggests that, in so far as it relates to the powers afforded and the obligations imposed by the Constitution upon the executive, the supremacy of the Constitution stops at the borders of South Africa. Indeed, the contrary is the case. The executive is bound by the four corners of the Constitution. It has no power other than those that are acknowledged by or flow from the Constitution. It is accordingly obliged to act consistently with the obligations imposed upon it by the Bill of Rights wherever it may act. It is not necessary to consider in this case whether the provisions of the Bill of Rights bind the government

[29] At paras 142-144 of his judgment.

[30] Section 8(1).

[31] Section 7(2) of the Constitution.
in its relationships outside of South Africa with people who have no connection with South Africa.

[229] Were the enforcement of the Bill of Rights against the government in any particular case to constitute an infringement of international law, our Constitution would not countenance it. So, the extraterritorial application of the provisions of the Bill of Rights will be limited by the international law principle that the provisions will only be enforceable against the government in circumstances that will not diminish or impede the sovereignty of another state. The enquiry as to whether the enforcement will have this effect will be determined on the facts of each case. As a general principle, however, our Bill of Rights binds the government even when it acts outside South Africa, subject to the consideration that such application must not constitute an infringement of the sovereignty of another state.

[230] This case, however, does not concern a situation where a South African government official has acted outside of South Africa in a manner inconsistent with the provisions of the Bill of Rights. It concerns the question whether the South African government, to the extent that it has the right in international law to make diplomatic representations to another state on behalf of one of its nationals, is under an obligation under our Constitution to make such representations.

[231] It is quite clear that the right to provide diplomatic protection in this way does not involve the extraterritorial application of our Constitution. International law affords South Africa the right to provide diplomatic protection to its nationals in respect of the breach of the provisions of international law, not our Constitution. There will of course be some overlap between the provisions of our Bill of Rights and the principles of customary international human rights law and conventional human rights law. The international law right to take steps to protect nationals relates only to breaches of international law. The question whether a duty exists under our Constitution to take such steps does not raise the question of the extraterritorial effect of our Bill of Rights at all. I turn now to consider the question whether such a duty exists under our Constitution.

[232] As the Chief Justice points out, our Constitution contains no express provision conferring a right to diplomatic protection from the state, unlike some other recently adopted constitutions. Nor is there a right to diplomatic protection asserted in the Universal Declaration of Human Rights, nor in the ICCPR or the African Charter.

[233] However our Constitution does contain an express recognition of the rights of citizenship. Section 3 of the Constitution provides that:

“(1) There is a common South African citizenship.
(2) All citizens are –
   (a) equally entitled to the rights, privileges and benefits of citizenship; and

32 See for example article 69(3) of the Hungarian Constitution which provides that: “Every Hungarian citizen is entitled to enjoy the protection of the Republic of Hungary, during his/her legal staying abroad”, as cited in Lee Consular Law and Practice 2 ed (Oxford University Press, Oxford 1991) at 125. The Special Rapporteur on Diplomatic Protection to the ICJ also mentions the Constitutions of Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Italy, Kazakhstan, Lao People’s Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Turkey, Ukraine, Vietnam and Yugoslavia. See First Report on Diplomatic Protection above n 2 at para 80.
(b) equally subject to the duties and responsibilities of citizenship.

(3) National legislation must provide for the acquisition, loss and restoration of citizenship.”

Section 3 thus confers an entitlement to the “rights, privileges and benefits of citizenship” upon South African citizens. What are the rights, privileges and benefits of citizenship? This question needs to be answered in the context of the other provisions of the Constitution.

[234] As to the “rights of citizens”, certain provisions of the Bill of Rights expressly confer rights upon citizens. So citizens are given the right to make political choices (which includes the right to form political parties, to participate in the activities of political parties, to free, fair and regular elections and the right to vote and stand for public office); the right not to be deprived of citizenship; the right to enter, remain in and reside anywhere in South Africa; the right to a passport; and the right to choose their trade, occupation or profession freely. These fall within the concept of the rights of citizenship as contemplated in section 3.

[235] There are no explicit provisions in the Constitution that give content to the “privileges and benefits” of citizenship. We must start from an assumption that citizens do enjoy some privileges and benefits in addition to the rights conferred by the Constitution, for otherwise the reference to “privileges and benefits” in section 3 would be meaningless. Moreover, in giving meaning to the words, it is important to bear in mind both the constitutional recognition of the importance of the international sphere and international law, as well as the priority given to the promotion and protection of human rights in our Constitution. We should also bear in mind the importance of the role of the state, under our constitutional democracy, in the protection of human rights. As Ackermann J stated in De Lange v Smuts NO and Others:

“In a constitutional democratic state, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional State) citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights.”

[236] The state is entitled to make diplomatic representations on behalf of its nationals under international law, even though at international law it is not obliged to do so. When it does so, the state clearly confers a privilege or benefit upon the person concerned. In my view, when section 3 speaks of the “privileges and benefits” of citizenship it includes within it the right of the state to make diplomatic representations on their behalf to protect them against a breach of international law. It is true that historically international law has taken the view that in making such diplomatic representations, the state acts in defence of its own interests, not in the

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33 Section 19.
34 Section 20.
35 Section 21(3).
36 Section 21(4).
37 Section 22.

38 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).
39 Id at para 31. See also Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening) 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 44.
interests of its nationals, who are not “subjects” of international law. However, it is increasingly being recognised that this is a fiction in the sense that the primary beneficiaries of diplomatic representations made by the state are those nationals in respect of whom the state makes representations. This has recently been acknowledged by the South African government in its representations to the International Court of Justice. Given that it is widely accepted that the right to diplomatic protection does serve the interests of individuals, it seems appropriate to consider the provision of diplomatic protection by the state to fall within the “privileges and benefits” of citizenship as contemplated by section 3.

What then does section 3 mean when it states that a citizen is “equally entitled to the . . . privileges and benefits of citizenship”? It is quite clear that it means in the first place that the state may not act in respect of some citizens and not others, the state must treat citizens equally. However, the question that arises is whether the subsection imposes an obligation upon government to provide diplomatic protection to its citizens when it would be entitled to do so in terms of international law in the light of my conclusion that the provision of diplomatic protection constitutes a privilege or benefit of citizenship. In other words, are citizens entitled to diplomatic protection, in itself, or merely entitled to equal protection of it, which otherwise may be refused by the state, as long as it refuses it equally? The latter interpretation of course may add little to the protection of the equality clause in section 9 of the Constitution, but that does not seem to me to be the most powerful interpretative concern. The question has to be answered in the light of the normative commitment to human rights emphasised in our Constitution, the importance accorded to international law and human rights in our Constitution and the conception of democratic government that underlies our Constitution. Most importantly, our Constitution must be interpreted in a way that will promote rather than hinder the achievement of the protection of human rights.

In the light of these constitutional imperatives, government would not be constitutionally permitted simply to ignore a citizen who is threatened with or has experienced an egregious violation of human rights norms at the hands of another

40 See, for example, the classic reasoning in the Mavromattis Palestine Concession (Jurisdiction) Case, PCIJ Reports, series A, no 2, at 12 where the International Court of Justice reasoned as follows:

"By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law."

This traditional view has its origins in the writings of Vattel in the 18th century. See Vattel The Law of Nations (1758) chap VI at 136. However, see the more contemporary reasoning of the Umpire in the Mixed Claims Commission between the US and Germany quoted by Erasmus and Davidson in “Do South Africans have a right to diplomatic protection?” 2000 (25) SA Yearbook of International Law 113 at 119.

41 See the discussion in the First Report of the Special Rapporteur on Diplomatic Protection above n 2 at paras 18-19.

42 See the Written Statement submitted by the Government of the Republic of South Africa to the International Court of Justice on 30 January 2004 in respect of the request of the United Nations General Assembly for an advisory opinion on the legal consequences of the construction of a wall by Israel in the occupied Palestinian territory.

43 Section 9 provides that:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to promote or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”
state. Were government to be entitled to do so, the achievement of human rights would be obstructed and international human rights norms undermined. Accordingly, and in the light of my understanding of the values of our Constitution, I would conclude that it is proper to understand section 3 as imposing upon government an obligation to provide diplomatic protection to its citizens to prevent or repair egregious breaches of international human rights norms. Where a citizen faces or has experienced a breach of international human rights norms that falls short of the standard of egregiousness, the situation may well be different. Thus, I conclude that to the extent that section 3(2) states then that “citizens are equally entitled to the . . . privileges and benefits” of citizenship, it is not only an entitlement to equal treatment in respect of the privilege and benefit of diplomatic protection, but also an entitlement to diplomatic protection itself.

[239] One final problem needs to be addressed. It might be thought that it would be inappropriate to interpret section 3 in this way given that the state’s right to make representations relates to its nationals as contemplated by international law, while section 3 speaks of citizens. The relationship between citizenship and nationality is often confused. Nationality is a term of international law. It is nationals who may be entitled to the protection of their state and to various other benefits under international law. It is generally accepted that there must be a “genuine link” between state and individual if conferral of nationality is to be recognised at international law.

[240] By contrast, citizenship is a concept of municipal law and concerns the rights and the obligations between citizens and the state at a domestic level. Its effect is internal. Problems arise only where the nationality of persons is contested by states on the international plane, at which point, the international law on “nationality” becomes decisive. However, when applying the international law test of “genuine link”, it is important to note that there is a presumption of validity of an act of naturalisation, and that the conferment of nationality as a status is not to be invalidated except in very clear cases.

[241] Article I of the 1930 Hague Convention on the Conflict of Nationality Laws provides:

“It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international law.”

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45 Brownlie above n 1 at 388. See also the Nottebohm Case (Liechtenstein v. Guatemala) 1955 ICJ 4, which dealt with the issue of fraudulent naturalisation.
47 Iran-United States Case No. A/18 (1984-1) 5 Iran-USCTR 251, Iran-United States Claims Tribunal discussed in Aldrich The Jurisprudence of the Iran-United States Tribunal (Clarendon Press, Oxford 1996) at 56-7. The issue was whether the Tribunal had jurisdiction over claims against Iran by persons who were, under US law, citizens of the US and who were, under Iranian law, citizens of the Islamic Republic of Iran. The Tribunal held that it did have jurisdiction where the dominant and effective nationality of the claimant during the relevant period was that of the United States. For further discussion of the case, see Dixon & McCounquodale Cases and Materials on International Law 4 ed (Oxford University Press, New York 2003) at 423.
48 Brownlie above n 1 at 388.
In practice, save where a state’s claim that persons are its nationals is contested in an international forum, a state’s citizens are its nationals, as international law generally leaves it to states to determine who their nationals are. For the purposes of this case, there is nothing to suggest that the applicants, who are all South African citizens, are not also South African nationals.

[242] In my view, therefore, to the extent that section 3 entitles citizens to the privileges and benefits of citizenship, this obliges the state to provide diplomatic protection to citizens at least in circumstances where citizens are threatened with or have experienced the egregious violation of international human rights norms binding on the foreign state that caused or threatened to cause the violation. It is interesting that this conclusion of law is echoed in the statement made by the Deputy Minister of Foreign Affairs in an interview with a journalist on 11 May 2004, a transcript of which was made available to the Court. In response to questions concerning the likelihood that the applicants would receive a fair trial in Zimbabwe and Equatorial Guinea, the Deputy Minister responded as follows:

"As their government, we have to ensure that all South African citizens, whatever offence they have carried out or are charged with, must receive a fair trial, they must have access to their lawyers, they must be tried within the framework of the Geneva Convention and International law and we will always, it is our constitutional duty to ensure that this is getting out within the framework of the Geneva Convention and that there is a fair trial". (own emphasis)

Such a statement, of course, cannot be constitutive of the meaning of the Constitution, which remains a matter for this Court. It must also be noted that in this Court counsel for the respondents firmly resisted the proposition that the respondents bore any constitutional duty that would require them to provide diplomatic protection to the applicants. The legal submissions of counsel must of course be taken to represent the attitude of their clients, the respondents in the case. The question that now needs to be considered is the question of the extent to which that obligation is justiciable.

The justiciability of the duty to make diplomatic representations

[243] The obligation to provide citizens with diplomatic protection conferred by our Constitution is one that must be construed within the terrain in which it is operative. That terrain is the conduct of foreign relations by the South African government. It is clear, though perhaps not explicit, that under our Constitution the conduct of foreign affairs is primarily the responsibility of the executive. That this is so, is signified by a variety of constitutional provisions including those that state that the President is responsible for receiving and recognising foreign diplomatic and consular representatives, appointing ambassadors, plenipotentiaries and diplomatic and consular representatives, and that the national executive is responsible for negotiating and signing international agreements. The conduct of foreign relations is

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49 Shaw above n 44 at 463.
therefore typically an executive power under our Constitution. This is hardly surprising. Under most, if not all constitutional democracies, the power to conduct foreign affairs is one that is appropriately and ordinarily conferred upon the executive;\textsuperscript{53} for the executive is the arm of government best placed to conduct foreign affairs.

[244] It is clear from the existing jurisprudence of this Court that all exercise of public power is to some extent justiciable under our Constitution,\textsuperscript{54} but the precise scope of the justiciability will depend on a range of factors including the nature of the power being exercised.\textsuperscript{55} Given that the duty to provide diplomatic protection can only be fulfilled by government in the conduct of foreign relations, the executive must be afforded considerable latitude to determine how best the duty should be carried out.

[245] Like other powers of the executive, the power must be exercised lawfully and rationally.\textsuperscript{56} It may be subject to other requirements as well, but in any proceedings in which the exercise of the power is challenged, a court will bear in mind that foreign relations is a sphere of government reserved by our Constitution for the executive and it will accordingly “be careful not to attribute to itself superior wisdom”\textsuperscript{57} in relation to it.

[246] Similar considerations obtain in Germany where the Federal Government is under a constitutional duty to provide diplomatic protection to German nationals and their interests in relation to foreign states. In giving effect to this duty, the Court has been at pains to acknowledge the importance of recognising that the conduct of foreign policy is primarily the constitutional task of the executive. In the leading case of Rudolf Hess, the applicant asked the Court, amongst other things, to compel the Federal Government (a) to take all possible initiatives to persuade the four occupying powers to grant his immediate release; and (b) to refer the complainant’s case to the International Court of Justice for an order declaring that his continued imprisonment was in breach of the United Nations Charter. The Constitutional Court, whilst acknowledging that there was a constitutional duty on the government, dismissed his application for relief. The Court held that:

"[I]n the sphere of foreign policy, the Federal government, as all other organs with responsibility for political dealings, generally has more room for political manoeuvre and consequently wider discretion. The scope of discretion in the foreign policy sphere is based on the fact that the shape of foreign relations and the course of their development are not determined solely by the wishes of the Federal Republic of Germany and are much more dependent upon circumstances beyond its control. In order to enable current political objectives of the Federal Republic of Germany to be achieved within the framework of what is permissible under international and constitutional law, the Federal Basic Law (GG) grants to the organs of foreign affairs wide room for manoeuvre in the..."
assessment of foreign policy issues as well as the consideration of the necessity for possible courses of action. 58

The Court continued:

“The Federal Government has maintained . . . that it has already undertaken the necessary steps to obtain the release of the Complainant, whose detention is a matter beyond its control. The Federal Government also wishes to continue to undertake further similar initiatives with the Occupying Powers. In so doing it is clearly aware of the Complainant’s personal situation and the nature of his constitutional rights which are at issue . . . . The mere fact that the steps hitherto taken by the Federal Government have failed to produce the Complainant’s release is certainly not, of itself, sufficient to give rise to a duty under constitutional law for the Federal Government to take specific further measures of possibly greater scope and consequence. It must be left to the Government to assess the foreign policy considerations in order to decide how far other measures are appropriate and necessary, bearing in mind the Complainant’s interests as well as the interests of the community as a whole. 59

[247] The approach adopted by the German Constitutional Court in this regard seems correct. In enforcing the obligation of the state to provide diplomatic representations, a court will pay due regard to the sensitivities of the conduct of foreign affairs and not presume knowledge and expertise that it does not have, nor substitute its opinion for the rational and lawful opinion of the government in respect of how best the obligation should be honoured.

The reliance on Mohamed’s case

58 See Rudolf Hess case (Case No 2 BvR 419/80) reported in 90 ILR 386 at 395-396.

59 Id. See also the Cruise Missile case 66BVerfGE 30 (1983).

[248] Before I turn to the facts of this case, I wish to deal with one further issue. The applicants relied upon the judgment of this Court in Mohamed and Another v President of the RSA and Others 60 and argued that the facts of this case were no different to the facts of that case. In Mohamed, South African officials had colluded with officials from the United States of America to remove Mr Mohamed from South Africa and take him to the United States where he was wanted on charges of terrorism. No extradition proceedings were launched, and the court found that Mr Mohamed was not lawfully deported to the United States. After he had arrived in the United States, he launched urgent proceedings in the South African courts seeking a declaratory order that the conduct of the South African officials had been unlawful and in conflict with the Bill of Rights, and mandatory relief requiring the government urgently to intercede on his behalf with the authorities in the United States.

[249] This Court held that the government was ordinarily under an obligation to secure an assurance that the death penalty will not be imposed on a person whom it causes to be removed from South Africa to another country. 61 It also held that the procedure by which Mr Mohamed had been removed from South Africa was unlawful. The Court made a declaratory order to these effects, and instructed that it be brought to the attention of the court in which Mr Mohamed was being tried in the United States.

60 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).

61 Id at para 42.
[250] In this case, the applicants submitted that they had been apprehended in Zimbabwe as a result of information passed to the Zimbabwean authorities by South African law enforcement officials. Although this was disputed on the papers, we were informed from the Bar by the respondents’ counsel that it was admitted by them that an exchange of information had occurred between South African and Zimbabwean authorities. Given that the applicants were arrested immediately upon landing it seems likely, and I am prepared to assume in favour of the applicants, that their arrest in Zimbabwe did result from this exchange of information.

[251] The applicants further argued that the conduct of the South African officials in informing the Zimbabwean authorities of the imminent arrival of the applicants was conduct sufficient to give rise to an obligation upon the South African government to seek assurances from the other jurisdictions to which they were proffering information that the death penalty would not be imposed upon the applicants. This obligation, it was submitted, like the obligation in Mohamed, arose from the action of government officials.

[252] The Chief Justice rejects this argument and distinguishes Mohamed on the basis that the action of the state officials in that case had been unlawful and wrongful. He points to the fact that the exchange of information in this case is lawful, and indeed, a failure to pass information of a suspected coup to another state might constitute a breach of South Africa’s international law obligations. Accordingly, the Chief Justice concludes that as the state officials had not acted unlawfully or wrongfully, the reasoning in Mohamed was not relevant.

[253] In my respectful opinion, this is not a valid basis upon which to distinguish that case. On my reading of Mohamed, it is clear that the Court would have held that there was an obligation upon the state to seek assurances that the death penalty would not be imposed or, if imposed, not carried out even were the extradition to have been otherwise lawful. This conclusion, it seems to me follows from passages such as the following in the judgment:

“It [The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] makes no distinction between expulsion, return or extradition of a person to another State to face an unacceptable form of punishment. All are prohibited, and the right of a State to deport an illegal alien is subject to that prohibition. That is the standard our Constitution demands from our government in circumstances such as those that existed in the present case.”

[254] Nor on my reading of Mohamed, can the facts in that case and this be distinguished on the basis that all the relevant facts took place in South Africa, for as in the case at hand, the application to this Court was only made after Mr Mohamed had arrived in the United States. Nor can the facts be distinguished on the ground that the applicants left voluntarily, for in Mohamed too, the Court was willing to accept that Mr Mohamed had consented to his removal from South Africa.

62 Id at para 59. See also para 63 where the Court reasoned as follows:

“An indispensable component of such consent would be awareness on the part of Mohamed that he could not lawfully be delivered by the South African authorities to the United States without obtaining an undertaking as a condition to such delivery that if convicted the death sentence would not be imposed on him or, if imposed, would not be carried out.”
In my view, there is a ground for distinguishing *Mohamed* from the present case, but it is not based on the lawfulness or otherwise of the conduct of state officials. It is based on the different types of state conduct in issue. When a state takes steps to deport or extradite a person to another country, it is an appropriate and practical time for the state to seek assurances to prevent the imposition or execution of the death penalty. On the other hand, when law enforcement officials exchange information about potential criminal conduct, it is not an appropriate time to seek such assurances. The need for the exchange of such information in our rapidly globalising world is indisputable. Without the timely exchange of information between different law enforcement agencies, international crime such as terrorism, drug trafficking, money laundering, crimes against humanity and unlawful mercenary activities will flourish. This has been recognised by the international community and a range of conventions and bilateral treaties have been adopted to foster such co-operation.63 Were an obligation of the sort argued for by the applicants to be imposed upon South African government officials every time they engaged in such co-operative endeavours, the co-operative endeavours themselves might severely be hampered if not stalled entirely. The same cannot be said of imposing such obligations in respect of extradition or deportation. It is not necessary to decide in this case what legal consequences may flow from such co-operation were it to be established that it was undertaken mala fide or for an unconstitutional purpose. There is no suggestion that that was the case here.

In my view, therefore, the facts of this case can be distinguished from the facts in *Mohamed* and the applicants’ submissions in respect of that case must fail.

Application to facts of this case and the prayers for relief sought by the applicants

In this case, I agree with the Chief Justice’s reasoning in paragraphs 82-95, that the applicants have not made out a case to compel government at this stage to institute proceedings to extradite them from Zimbabwe to South Africa, or to obtain the release of the applicants by Zimbabwe.64 Extradition only becomes possible when it is clear

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63 See, for example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, article 9(1) of which provides that:

*"The Parties shall co-operate closely with one another, consistent with their respective domestic legal and administrative systems, with a view to enhancing the effectiveness of law enforcement action to suppress the commission of offences established in accordance with article 3, paragraph 1. They shall, in particular, on the basis of bilateral or multilateral agreements or arrangements:
 a) Establish and maintain channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences established in accordance with article 3, paragraph 1, including, if the Parties concerned deem it appropriate, links with other criminal activities;
b) Co-operate with one another in conducting enquiries, with respect to offences . . . having an international character . . .;
c) In appropriate cases and if not contrary to domestic law, establish joint teams, taking into account the need to protect the security of persons and of operations, to carry out the provisions of this paragraph . . .;d) Provide, when appropriate, necessary quantities of substances for analytical or investigative purposes;"

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64 This relief was sought in prayers 2 and 3 of the notice of motion as follows:

*"2. Directing and ordering the Government of the Republic of South Africa ("the Government") to take all reasonable and necessary steps as a matter of extreme urgency, to seek the release and/or extradition of the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa.
3. Declaring that the Government of the Republic of South Africa ("the Government") is, as a matter of law, entitled to request the release and/or extradition of the applicants from the Governments of Zimbabwe and/or Equatorial Guinea, as the case may be, to South Africa."*
that a prima facie case on a criminal charge has been established against those whom
the government wishes to extradite. On the papers before us, the prosecuting
authority indicates that it has not completed its investigations, and accordingly the
prayers of the applicants compelling government to seek to extradite them cannot
succeed. Nor is it clear at this stage (particularly given that it is not clear what
offences, if any, the applicants would be charged with in South Africa) that the double
criminality principle would be met.65

[258] Prayers 4 and 5 of the notice of motion read as follows:

“4. Directing and ordering the Government to seek an assurance as a matter of
extreme urgency from the Zimbabwean Government that the applicants will not be
released or extradited to Equatorial Guinea.
5. Directing and ordering the Government to seek assurance as a matter of extreme
urgency from the Zimbabwean and Equatorial Guinea Governments, as the case may
be, to not impose the death penalty on the applicants.”66

It is clear that at international law the state is only entitled to institute diplomatic
protection on behalf of its nationals when internationally recognised human rights
norms have been infringed.

65 Section 14 of the Revised Edition of the Extradition Act of 1996 (Zimbabwe) makes it a requirement that
extradition may not take place unless the offence for which the person is extradited is an offence both under
Zimbabwean law and under the law of the extraditing country.
66 At the hearing, applicants’ counsel asked for the relief sought in paragraph 4 of the notice of motion to be
modified. The reformulated relief is set out in the judgment of the Chief Justice at para 109. The reformulation
of the relief does not affect the reasoning in these paragraphs.

[259] As the Chief Justice makes clear in his judgment (at para 98), at this stage of
the development of international law, capital punishment is not inconsistent with the
principles of international law. Accordingly, the applicants cannot make out a claim
based on the state’s obligation to provide them with diplomatic protection that the
South African government should seek assurances from the Zimbabwean and
Equatorial Guinean governments in respect of the death penalty. To the extent that
the applicants have a right to request government to make diplomatic representations
on its behalf under section 3 of our Constitution, short of diplomatic protection, I
agree with the reasoning of the Chief Justice (at paras 110-113) that the applicants
have not established a basis for the grant of prayers 4 and 5.

[260] I also agree with the Chief Justice that prayers 6, 7 and 8 to the extent that they
require the state to take steps to require another state to apply the provisions of our
Constitution are not competent prayers. Concluding that the applicants are not
entitled to relief on these prayers as formulated, however, is not the end of the
enquiry.

[261] I have found that section 3 of the Constitution read in the light of the other
provisions of our Constitution imposes an obligation upon government to take
appropriate steps to provide diplomatic protection to its citizens who are threatened
with or who have experienced egregious violations of international human rights
norms by a foreign state upon whom the international rights norms are binding.
Article 5 of the African Charter on Human and Peoples’ Rights provides that:

“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

And Article 7 of the same Charter provides:

“1. Every individual shall have the right to have his cause heard. This comprises:
(a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;
(b) the right to be presumed innocent until proven guilty by a competent court or tribunal;
(c) the right to defence, including the right to be defended by counsel of his choice;
(d) the right to be tried within a reasonable time by an impartial court or tribunal.”

South Africa, Zimbabwe and Equatorial Guinea have all ratified the African Charter.67 They are all therefore bound by its provisions.

Article 7 of the International Covenant on Civil and Political Rights provides that:

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

And Article 9 provides that:

“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 procedures as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.”

And Article 10 that:

“1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.”

South Africa, Zimbabwe and Equatorial Guinea have also all ratified this convention68 and all are accordingly also bound by these provisions. Moreover, it is clear that the right of an accused person to a fair trial is a fundamental international human rights norm69 that forms part of customary international law.

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67 South Africa signed and ratified the Charter on 9 July 1996; Zimbabwe signed the Charter on 20 February 1986 and ratified it on 30 May 1986; and Equatorial Guinea signed the Charter on 18 August 1986 and ratified it on 7 April 1986.

68 Equatorial Guinea ratified the Covenant on 25 December 1987; Zimbabwe ratified it on 13 August 1991 and South Africa ratified it on 10 March 1999.

69 Article 10 of the Universal Declaration of Human Rights provides that: “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.”
The European Court of Human Rights has recently held that it is a breach of customary international law where accused persons who face the possibility of the imposition of the death penalty are prosecuted in proceedings that fall short of the requirement of a fair trial. As we do not know what charges the applicants will face in Equatorial Guinea, it is not necessarily the case that such a breach of customary international law may arise. It is however a consideration that renders the need for diplomatic protection for the applicants more acute.

The Chief Justice has set out in his judgment in some detail at paras 116-121, the information that has been placed before this Court concerning the criminal justice system in Equatorial Guinea. I agree with him that this information originating as it does from well-respected international agencies concerned with the protection and promotion of human rights raises serious concerns about the criminal justice system in Equatorial Guinea and the question whether the applicants, should they be extradited to Equatorial Guinea, would face a fair trial in that country.

The respondents’ response to that evidence is that it constitutes the “opinion” of the agencies concerned, that it is not sufficient to “prove” the inadequacies of the criminal justice system in Equatorial Guinea and further that it is not the government’s policy to comment on the criminal justice systems of other countries. In argument before us the government persisted in this position, and argued that it was under no constitutional obligation to provide diplomatic protection to the applicants either at present, or if they face trial in Equatorial Guinea.

Although it is quite clear that the consideration and assessment of another country’s criminal justice system is a sensitive matter for our government, the demands of comity and sensitivity should not mean that government remains blind to the risk of egregious violation of human rights of its nationals by other jurisdictions. It is not only its constitutional obligation to take appropriate steps to provide diplomatic protection to its nationals that requires government to consider this matter, but the developing global and regional commitment to the protection of human rights also requires government to be responsive to these issues. It is not satisfactory therefore for government merely to say that it is not its policy to comment on the criminal justice system of other countries. Counsel for the respondents did make it clear during argument that government was taking some steps in relation to this matter. However, no details of these steps were provided. In argument before this Court, and despite the contrary statement of the Deputy Minister of Foreign Affairs to the media, counsel for the respondents continued to assert that government was under no constitutional obligation to take any steps on behalf of the applicants.

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70 See, Öcalan v Turkey Application 46221/99, 12 March 2003, in which the European Court on Human Rights held at para 207 that:

“[T]o impose the death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence. . .”

71 Id

72 Id
I also do not agree, with respect, that the application is premature in relation to the relief sought in respect of Equatorial Guinea. It is not disputed on the papers that Equatorial Guinea has sought the extradition of the applicants, though the charges that they will face in Equatorial Guinea, if they are extradited there, are not clear at this stage. In my view, the extradition application gives rise to an appreciable risk that the applicants will be extradited to Equatorial Guinea, sufficient to give rise to an obligation upon the state to provide diplomatic protection. In the light of the constitutional obligation imposed upon government, and in the light of the range of evidence put before the Court to suggest that there may be a real risk that the applicants, if extradited to Equatorial Guinea might not receive a fair trial, and may then face the death sentence, there is a clear obligation upon government to take some appropriate steps to provide diplomatic protection to the applicants. It is not for this Court to determine what the appropriate steps should be, that is, at least in the first place, a matter for government.

In my view, the appropriate relief would therefore be that a declaratory order be made by this Court with regard to the obligations of government. I am satisfied that declaratory relief is appropriate as the central issues argued in this Court were the question whether government bore such an obligation; and if it did so, the scope of its obligation and its justiciability. A declaratory order would assist government by delineating the constitutional obligation that exists. It would not, however, be appropriate for mandatory relief to be ordered, at this stage, as government is already taking steps to protect the applicants, and it is best placed to determine what steps should be taken to provide appropriate protection to the applicants in the circumstances.

In conclusion, it should be stated that there can be no doubt that it is important that South African law enforcement agencies co-operate with the law enforcement agencies of other states to prevent the commission of crime and to facilitate the detection and effective prosecution of crime. Included within this injunction must be the obligation upon our government to take steps to minimise the threats that mercenary activity often presents to the independence, sovereignty and security of other governments. Nothing in this judgment suggests otherwise. However, in carrying out these tasks, it is imperative that internationally recognised human rights norms must not suffer. As part of a growing global commitment to the protection and promotion of fundamental human rights, our Constitution requires government to take appropriate steps to protect citizens who face the infringement of such norms. That obligation is an important one that reaffirms the primacy of human rights in our constitutional order, and the principle of constitutional democracy in South Africa.

I would propose therefore that a declaratory order in the following terms be made:

It is declared that the First to Sixth Respondents are under a constitutional obligation to take appropriate steps to provide diplomatic protection to the
applicants to seek to prevent the egregious violation of international human rights norms.

Mokgoro J concurs in the judgment of O’Regan J.

SACHS J:

[272] Section 198(b) of the Constitution makes it clear that one of the principles governing national security is:

“The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.”

Mercenary activities aimed at producing regime-change through military coups violate this principle in a most profound way. As the main judgment trenchantly establishes, the government is under a duty to act resolutely to combat them, the more so if they are hatched on South African soil.

[273] At the same time, section 199(5) provides that:

“The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.”

This section emphasises that in dealing with even the most serious threats to the state, a noble end does not justify the use of base means. On the contrary, as I stated in S v Basson

Basson

“none of the above should be taken as suggesting that because war crimes might be involved, the rights to a fair trial of the respondent as constitutionally protected are in any way attenuated. When allegations of such serious nature are at issue, and where the exemplary value of constitutionalism as against lawlessness is the very issue at stake, it is particularly important that the judicial and prosecutorial functions be undertaken with rigorous and principled respect for basic constitutional rights. The effective prosecution of war crimes and the rights of the accused to a fair trial are not antagonistic concepts. On the contrary, both stem from the same constitutional and humanitarian foundation, namely the need to uphold the rule of law and the basic principles of human dignity, equality and freedom.”

[274] The values of our Constitution and the human rights principles enshrined in international law are mutually reinforcing, interrelated and, where they overlap, indivisible. South Africa owes much of its very existence to the rejection of apartheid by the organised international community and the latter’s concern for the upholding of fundamental human rights. It would be a strange interpretation of our Constitution that suggested that adherence by the government in any of its activities to the foundational norms that paved the way to its creation was merely an option and not a duty.

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1 S v Basson 2004 (6) BCLR 620 (CC).
2 Id at para 128.
I believe that the main judgment, with which I agree, as well as the two complementary judgments all underline the importance and correctness of the acceptance by the government of its constitutional obligations in the present matter. In my view, in their basic outline the judgments of Ngcobo J and O'Regan J are compatible with and give added texture to the principal judgment of Chaskalson CJ. I do not think that the present matter calls for a definitive position on all the doctrinal nuances of Mohamed. Nor do I believe that a declarator concerning the government’s obligations is required. Subject to keeping an open mind on Mohamed, I accordingly concur in the principal judgment, and with the order it makes. I also agree with the additional points of substance made in the two separate judgments. In my opinion, the government has a clear and unambiguous duty to do whatever is reasonably within its power to prevent South Africans abroad, however grave their alleged offences, from being subjected to torture, grossly unfair trials and capital punishment. At the same time, the government must have an extremely wide discretion as to how best to provide what diplomatic protection it can offer.

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For the respondents: I. A. M. Semenya SC, I. V. Maleka SC, M. Mphaga and E. Mokutu instructed by the State Attorney (Pretoria).


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5 Mohamed and Another v President of the Republic of South Africa and Others 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).
Supreme Court of Appeal of South Africa


[2007] SCA 109
HARMS ADP

INTRODUCTION

[1] This appeal relates to a claim for diplomatic protection, i.e., action by one state against another state in respect of an injury to the person or property of a national of the former state that has been caused by an international delict that is attributable to the latter state. Diplomatic protection includes, in a broad sense, consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, a retort, severance of diplomatic relations, and economic pressures.¹

[2] The appellants requested the Government of the RSA to provide them with diplomatic protection against the Government of Lesotho. The international delict on which they relied was the cancellation and revocation of five mineral leases that had been granted by the Government of Lesotho.

[3] The President of the RSA was advised that the Government was under no obligation to afford diplomatic protection to the appellants; that any decision to intervene would involve a policy and not a legal decision; that the decision is the sole prerogative of the Government; that the disputes between the appellants and the Government of Lesotho had been decided by the Lesotho courts; that mediation or intervention by the Government would imply a lack of faith in the judicial system of a sovereign state; and that diplomatic intervention would set an unhealthy precedent. The President in the result refused to accede to the appellants’ request and they were informed that they were not, in the circumstances of the case, entitled to diplomatic protection.

[4] Dissatisfied with this ruling, the appellants sought to review the Government’s decision. They also applied for a mandamus directing the Government ‘to take all steps necessary to vindicate the rights of the

¹ Kaunda v President of the RSA 2004 (10) BCLR 1009 (CC), 2005 (4) SA 235 (CC) para 26-27.
applicants, including but not limited to providing diplomatic protection. The application was heard by Patel J in the Pretoria High Court. He dismissed the application but granted leave to appeal to this Court.

[5] Courts should act with restraint when dealing with allegations of unlawful conduct ascribed to sovereign states. Unfortunately, in order to decide this case it is necessary to deal with the allegations made by the appellants to determine whether or not Patel J was correct in dismissing their application.

[6] This judgment holds that the appellants have no right under South African law to diplomatic protection, especially not in respect of protection of a particular kind. Nationals have a right to request Government to consider diplomatic protection and Government has a duty to consider it rationally. Government received the request, considered the matter properly and decided to decline to act on rational grounds. This judgment further holds that the Government is not entitled under international law to afford the appellants diplomatic protection under the particular circumstances of the case. Accordingly, the appeal stands to be dismissed.

THE PARTIES

[7] There are nine appellants but the driving force behind the litigation is the first appellant, Mr Josias van Zyl. He and his wife are in their capacity as trustees of two trusts, the Burmilla Trust and the Josias van Zyl Family Trust, the second and third appellants respectively. Both trusts are registered in South Africa. Mr and Mrs van Zyl are South African citizens.

[8] There are six corporate appellants, all companies incorporated and registered in Lesotho. The important one is Swissbourgh Diamond Mines (Pty) Ltd. The issued shares in Swissbourgh belong to Mr van Zyl (5%), Burmilla Trust (90%) and the family trust (5%). Swissbourgh holds 99% of the shares in the other companies and the family trust holds the remaining 1%. The mineral leases were all held by Swissbourgh and the other appellant companies derived their interests from Swissbourgh by means of tributary agreements (effectively sub-leases). Because of this it will not be necessary to distinguish between the appellant companies and references to Swissbourgh will usually be in a generic sense to include a reference to all or most of the appellants. All the directors are also South African citizens.

[9] The respondents are, respectively, the Government of the RSA, the President, the Minister of Foreign Affairs and, last, the Deputy Minister. It is for purposes of the judgment not important to distinguish between them and I shall refer to them (unless the context requires otherwise) as the Government. I also do not intend to distinguish between the State and the Government and will use the terms interchangeably.

THE HISTORY

[10] This case has a long and convoluted history. The appellants displayed an obsessive attention to peripheral facts and factoids and their affidavits raise speculation to the level of fact and thereafter raise argument based on the speculation. And as in the Kaunda case, this case has been complicated by the appellants’ excessive demands and the form in which the notice of motion was framed. In what follows I intend to limit myself to the salient facts. They are briefly related at this juncture to set the stage for a more detailed discussion where and when required.

[11] The RSA and the Kingdom of Lesotho concluded a treaty concerning the Lesotho Highlands Project on 24 October 1986. The main purpose of the project was to supply water to the Witwatersrand from a dam that had to be built in Lesotho. Joffe J in previous proceedings between the appellants and
the Government dealt with the detail of the treaty and what he said need not
be repeated.\(^5\) During June 1988, construction operations by the Lesotho
Highlands Development Authority, a Lesotho statutory body established
pursuant to the treaty, began in the Rampai area.

[12] Shortly thereafter, on 4 August 1988, the Government of Lesotho and
Swissbourgh entered into five mining leases. One of these leases covered the
Rampai area in the basin of the proposed dam. The terms of the Rampai
lease are typical. The lease was entered into in Lesotho in terms of s 6 and 15
of the Lesotho Mining Rights Act, 1967. The Commissioner of Mines
represented the Basotho Nation and Mr van Zyl represented Swissbourgh.
Swissbourgh obtained the sole right to prospect for and mine and dispose of
precious stones within the Rampai area for a period of ten years with a right of
renewal for a further five years. Swissbourgh had to pay the Government of
Lesotho a yearly rental of R13 600 (R100 per square kilometre) and a royalty
of 14% on the value of the stones recovered. The agreement contained an
arbitration clause. The lease had to be registered in terms of the Mining
Rights Act, which happened soon thereafter. (For purposes of the rest of the
judgment a distinction will be drawn between the Rampai lease and the other
four because of subsequent events.)

[13] The Authority proceeded with its work on the dam project until July
1991 when Swissbourgh obtained an interim interdict against the Authority
preventing it from performing any work within the Rampai area. The rule was
subsequently discharged by agreement but the final determination of the
application was kept in abeyance pending settlement negotiations.

[14] Faced with the consequences of a grant of competing rights to
Swissbourgh and the Authority as well as a breach of its treaty obligations, the
Government of Lesotho took a number of steps which the Lesotho courts in
due course found were unlawful.\(^6\) These acts form the crux of the appellants’
complaints against the Government of Lesotho.

[15] The first step was the cancellation by the Commissioner of Mines of all
the mining leases. This enabled the Authority to rely on the cancellation of the
Rampai lease as a defence to the interdict application. (The other leases did
not affect the construction activities.) However, on 20 November 1991, the
court, at the behest of Swissbourgh, on an interim basis set aside the
cancellation of the mining leases by the Commissioner. It also issued an
interim interdict preventing the Authority from proceeding with its dam
construction activities within the Rampai area. One may assume that this
order must have had a devastating effect on the construction activities of the
Authority.

[16] In another attempt to undo the mining leases the governing Military
Council issued the ‘Revocation of Specified Mining Leases Order’ of 20 March
1992. This executive order revoked the five mining leases of Swissbourgh;
provided that no person would be entitled to compensation for loss or damage
as a result of the cancellation; and prohibited the institution of any legal
proceedings, including arbitration proceedings, resulting from or in connection
with the order or the cancellation of the leases.

[17] Another application to court followed immediately, this time for an order
setting aside the revocation order and for another interim interdict.\(^7\)
Swissbourgh was successful and Cullinan CJ in his judgment of September
1994 had some harsh words about the actions of the Government of Lesotho,
especially for the disrespect for the Constitution and the negation of the rule of
law.

[18] The subsequent appeal was not successful. During January 1995 the
Court of Appeal held that the revocation order was in conflict with the

\(^5\) In particular, he found (at 327C and follows) that the appellants did not derive any rights
from the treaty.

\(^6\) How it came about that the Government of Lesotho granted conflicting rights at that stage
has been the subject of much speculation in Lesotho but has never been explained.

\(^7\) The terms of the order are quoted at Swissbourgh Diamond Mines (Pty) Ltd v Government
of the RSA 1999 (2) SA 279 (T) 297E-I.
provisions of the Lesotho Human Rights Act and consequently void. The appeal against the interim interdict, however, succeeded on the ground that Cullinan CJ had not exercised a proper discretion. The balance of convenience, the court found, did not favour Swissbourgh and that an award of damages would compensate Swissbourgh adequately. Swissbourgh was given time to do exploratory work in the Rampai area to quantify its damages.

During March 1995, the Government of Lesotho and the Authority conceded that the cancellation of the mining leases by the Commissioner had been invalid. The Authority nevertheless lodged a counter-application for a declaration that the Rampai lease had been void ab initio because the required formalities had not been followed. The court consequently set the cancellation aside and referred the validity issue for oral evidence. This led to a 58-day trial before the Chief Justice, Mr Justice Kheola.

Kheola CJ found against Swissbourgh on 28 April 1999, holding that the Rampai lease was void ab initio. Swissbourgh appealed to the Court of Appeal but the appeal was dismissed on 6 October 2000. The reasons are fairly basic. According to Lesotho customary law all land belongs to the Basotho Nation; this principle is entrenched in the Lesotho Constitution; any grant of rights in relation to land required the consent of the relevant Chiefs; since its promulgation the Lesotho Mining Rights Act, 1967 (under which the mineral leases were granted) required the Chiefs’ consent for the grant of mineral rights; and the evidence established that no consent had been sought or granted. The Rampai lease was accordingly void.

Less than three weeks later the appellants made the initial request for diplomatic protection, which led to these proceedings. It is convenient to mention two intervening matters. The first relates to the other four leases that were not involved in the Rampai appeal. Faced with the revocation order, which denied it access to court, Swissbourgh decided to regard the Government of Lesotho’s denial of the validity of these leases as a repudiation of contract and to accept the repudiation, thereby bringing to an end any contractual relationship between the parties. (Notably, probably for tactical reasons, Swissbourgh did not cancel the Rampai lease.) On 25 October 1993, Swissbourgh instituted action claiming R 930m damages. There was an additional claim of R 15m in respect of physical damage to plant and equipment.

On 16 September 1994, Swissbourgh ceded its rights in respect of the pending action and the contractual and delictual damages claims to Burmilla Trust. Although the rights were valued at R2 637m, the consideration was a mere R1 000. Burmilla Trust has not yet been substituted as plaintiff and the action has not been pursued. Another action relating to the same or similar causes of action was instituted during May 1996 by Swissbourgh. This action is also in limbo.

Two years later Swissbourgh entered into another cession agreement with Burmilla Trust in amplification of the first one. It ceded all Swissbourgh’s claims against the Government of Lesotho in the event of a declaration that any of the mining leases were invalid.

The second set of intervening facts concerns the adoption of legislation by the Government of Lesotho to place matters on a proper legal footing and to comply with its national and, coincidentally, its international obligations especially in relation to the treaty with the RSA. The Lesotho Act 5 of 1995, which came into effect on 16 August 1995, provided for the expropriation by the Authority of mineral rights for purposes of the water project. Thus far the Authority had been entitled to take ‘land’ and pay compensation but the initial legislation did not deal with mineral rights and did not have adequate compensation provisions. This Act, however, provided for full compensation, properly determined, in respect of any such expropriation to a person in
whose favour a ‘duly granted and executed mineral right’ was registered. Pursuant to this Act, the Authority purported to expropriate the Rampai lease on 17 August 1995 but in the light of the Rampai judgment expropriation was unnecessary because there was nothing to expropriate.

[26] On the same day another piece of legislation was promulgated, namely Lesotho Act 6 of 1995. It validated certain dam construction activities of the Authority ‘subject to any accrued or vested right to damages’. Again, as a result of the Rampai judgment Swissbourgh had no accrued or vested rights, at least not in relation to the Rampai lease.

THE REQUEST FOR DIPLOMATIC PROTECTION

[27] The first request for diplomatic protection was made per letter of 25 October 2000 to the Department of Foreign Affairs. It relied on the unlawful revocation of the mineral leases during 1992 and the destruction and confiscation of assets by the Government of Lesotho. The appellants also complained about corruption ‘at the highest level’ in the Government of Lesotho. In addition they alleged that Swissbourgh had suffered a miscarriage of justice at the hand of the Lesotho courts. The appellants further said that they had ‘no faith in the independence and impartiality’ of the Lesotho courts and they ‘rejected’ the Rampai judgment because the judges were ‘specially appointed’ and their analysis of the evidence and their findings were ‘one-sided and manifested bias.’

[28] The next letter of consequence was dated 8 December 2000. Before dealing with its terms it is necessary to contextualise it. During 1993, Swissbourgh instituted action against the Government of the RSA for damages suffered as a result of the loss of their leases. The particulars of this action (and a related action against a local statutory body) need not be mentioned – they are to be found in the judgment of Joffe J. In summary, Swissbourgh alleged that the Government of the RSA interfered unlawfully with its mining rights, which caused it to suffer damages of R 945m. Swissbourgh, in addition, claimed R 507,8m from the statutory body on similar grounds. The unlawful interference, according to the particulars of claim, was done with the improper motive of obtaining an unlawful advantage for the joint water supply venture. The defendants in that case allegedly ‘procured’ (followed by ten alternatives) the unlawful interference with Swissbourgh’s rights by the Government of Lesotho.

[29] The conspiracy issue also formed part of the case before Khela CJ and was the main reason for the length of the trial. He found that the allegations were without any merit and made a special costs order against Swissbourgh. The Court of Appeal did not consider the merits of the issue because it became irrelevant in the light of the finding that the Rampai lease was invalid.

[30] During 1995, Mr van Zyl approached the RSA Government with settlement proposals. This elicited a letter from the State Attorney written on the instructions of the Minister of Water Affairs (under whose jurisdiction the dam project fell), dated 15 May 1995. It is necessary to quote from the letter: 3/136

- ‘The Minister is in principle not averse to endeavours aimed at settling legitimate claims against the Government.’

- ‘The manner in which you have conducted the pursuit of your interests as you perceive them, has, however, created the firm impression that you set out to coerce the Republic of South Africa to meet a claim which you may or may not have against the Government of the Kingdom of Lesotho and the Lesotho Highlands Development Authority. This you set out to do inter alia by calling upon the international community to take up your perceived cause against the Government of the Republic of South Africa, by widely publicizing allegations of immoral collusion and improper conduct on the part of the Government and by making similar allegations in respect of the present Government in your recent correspondence to the Minister.’

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12 In a letter of 10 April 2001 it is referred to as a confiscation through the cancellation of the mineral leases.
13 The letter of 19 December 2000 repeated the statement.
"You have indeed succeeded in creating a situation where you have offended the dignity of the Republic of South Africa, not only under the previous Government, but also under the present one. The dispute is thus no longer a simple commercial dispute. Settlement of the actions with you may amount to an acknowledgement of the veracity of your allegations and may compromise the credibility of the present Government, not only in its international relations with the Kingdom of Lesotho, but also with the other states and international institutions whose assistance you sought to muster."

"As long as you persist in your allegations of improper collusion between the Government of the Republic of South Africa and the independent and sovereign Kingdom of Lesotho, no advances of settlement can be entertained."

"Should you withdraw the actions as well as the offensive allegations against the Government of the Republic of South Africa unreservedly and publicly, my Government may find itself in a position where it may consider attempts to facilitate mediation of the various disputes between yourself and the Government of the Kingdom of Lesotho and the Lesotho Highlands Development Authority."

"As matters presently stand this is, however, impossible without prejudicing the dignity of the Government of the Republic of South Africa and its credibility in the international community."

[31] The appellants rejected the suggestion that they withdraw the allegations; instead, as mentioned, they proceeded to conduct a lengthy trial in order to prove the allegations of collusion and they harassed the Government in the local litigation as appears from the judgment of Joffe J. During July 1999 (shortly after the judgment of Kheola CJ), Mr van Zyl went yet further: he submitted a voluminous request for an inspection by the World Bank (a financier of the scheme) alleging that the Bank, the RSA Government, the Government of Lesotho and the Authority were involved in the ‘patently unlawful acts’ surrounding the water project and the leases.

[32] Having lost the Rampai appeal the appellants in the mentioned letter of 8 December 2001, rather cynically relied on the promises contained in the State Attorney’s letter; they withdrew the South African actions and the allegations ‘in respect of the ANC government’s involvement’ in an unlawful conspiracy; and they released a press statement apologising to Government.

[33] The next letter of importance, dated 15 December 2000, argued the existence of a ‘right to diplomatic protection’ under the Constitution at length (an assertion repeated in later correspondence) and submitted that ‘the State is under a constitutional obligation to provide diplomatic protection to its citizens’. The letter also requested the Government to ‘act in terms of its undertaking’ contained in the letter of the State Attorney.

[34] The appellants insisted that Government should provide them with diplomatic protection by mediating the dispute and convincing the Government of Lesotho to pay a ‘settlement’ amount of R 85,4m with interest within a given period. Otherwise Government had to institute legal proceedings against the Government of Lesotho in an international court or arbitration tribunal for payment of some R1 812,5m with interest on the appellants’ behalf.

[35] In spite of its refusal to grant the request, the Government sent a Note Verbale to the Government of Lesotho, informing that government of the complaint. The Government of Lesotho did not respond but its view appears forcefully from a letter dated 19 November 2001, by its attorneys to Swissbourgh in response to a parallel paper campaign against the Government of Lesotho. It rejected the allegations in no uncertain terms, stating that a number of premises of the arguments put forward were, to the knowledge of the claimants, fundamentally flawed; that the attacks on the judiciary were scurrilous; and that there was no prospect of any settlement. (A copy of the letter is annexed to this judgment.) This six page letter drew a reply of 138 pages from Mr van Zyl. The Government of Lesotho responded by reiterating that it would not submit to any form of arbitration, international or otherwise.
THE COURT APPLICATION

[36] Review applications, in the ordinary course of events, have to be brought under Uniform rule 53 (unless covered by the Promotion of Administrative Justice Act 3 of 2000 – PAJA). This one was not, and the failure to follow the rule caused much aggravation.

[37] The founding affidavit of Mr van Zyl set out the nature of the application under a separate heading. He relied on a violation of the appellants’ rights by the cancellation of the mining leases without payment of compensation (and nothing more). This, he said, constituted an expropriation that did not comply with minimum international standards. The Government of Lesotho was accordingly obliged to pay the appellants some R 3 089m damages.

[38] Mr van Zyl proceeded to say, as foreshadowed in the correspondence, that the appellants have ‘a constitutional right to diplomatic protection’ and that the Government has ‘a corresponding obligation to provide such protection’; the issue (he said) was the failure of Government to exercise its power in a constitutionally permissible manner; the decision was irrational because it was based on a wrong understanding of its legal obligation; and that the merits of the disputes with the Government of Lesotho were not directly in issue.

[39] Then followed 70 pages of ‘history and background’ interspersed with legal argument. Two aspects need to be noted. The first concerns the Lesotho courts. After alleging that the appellants had exhausted their local remedies, Mr van Zyl proceeded to state (contrary to the line taken in the preceding correspondence) that the application was not ‘a reflection on the integrity of any of the judges in the Courts of Lesotho’ or on those courts. The second is a one-liner based on the State Attorney’s letter of 15 May 1995: this letter allegedly gave the appellants a legitimate expectation that the Government would afford them diplomatic protection should they withdraw their South African litigation, something they had now done.¹⁴

[40] Attached to the founding affidavit are about 850 pages of exhibits. The allegations contained in these annexures were not confirmed in the founding affidavit and are therefore not evidence. Mr van Zyl and his legal advisers knew that it is not open to a party merely to annex documentation to an affidavit and during argument use its contents to establish a new case. A party is obliged to identify those parts on which it intends to rely and must give an indication of the case it seeks to make out on the strength thereof.¹⁵ The fact that the appellants again have ignored the procedural rules dealt with by Joffe J is probably due to Mr van Zyl’s belief, as he said during argument, that fifty per cent of all court rules are unconstitutional and can be ignored.

[41] The main affidavit in answer was by the Deputy Minister, Mr Aziz Pahad. It dealt in 91 pages with the appellants’ right to diplomatic protection and with the decision of Government in response to the request. He added that Mr van Zyl had failed to disclose five material facts. These facts, according to the deponent, went to the heart of the application.

[42] This elicited a replying affidavit of about 550 pages and annexures of some 1700 pages. The main ‘justification’ proffered was that Mr van Zyl indeed had disclosed the five material facts in the founding affidavit. In other words, this mass of material was required to underpin five common cause facts. One illustration should suffice. Mr Pahad alleged that the cession of Swissbourgh’s claims to Burmilia Trust was material and had not been stated in the founding affidavit. Mr van Zyl took Mr Pahad to task because, he pointed out, the fact of the cession appeared from a note on two of the annexures to the founding affidavit. Instead of admitting the cession and giving the reference, Mr van Zyl now sought to traverse new ground. In

¹⁴ I do not propose to deal with the legitimate expectation argument separately because the facts are destructive of any such argument. The expectation was not legitimate or reasonable. There is also something schizophrenic about the argument because, as will appear later, the replying affidavit resurrected the abandoned conspiracy argument.
¹⁵ Swissbourgh Diamond Mines (Pty) Ltd v Government of the RSA 1999 (2) SA 279 (T) 323F-325C.
addition, Mr van Zyl resurrected the conspiracy case in the reply because, he said, of the Government’s allegations concerning his failure to disclose material facts. He also attacked the Government’s decision on new grounds.

The Government applied for the striking out of major parts of the reply as either new matter or as otherwise objectionable, namely being scandalous, vexatious, irrelevant or inadmissible.

THE PROCEEDINGS IN THE TPD

During the hearing before Patel J, the appellants were represented by three counsel. Patel J granted the Government’s striking out application and dismissed the appellants’ application. His judgment dealt in great detail with all the legal issues raised. As will appear in the course of this judgment, I agree in general terms with his reasoning but I do not find it necessary to decide all the issues he did.

It is convenient to deal at this stage with the application to strike out. Both sides filed lengthy heads dealing with each and every finding made by Patel J. The learned judge, it should be noted, took great pains to analyse the complaint. I do not think that a court of appeal could reasonably be asked to redo an exercise concerning an interlocutory matter, especially in the circumstances of this case. Schutz JA once made these pointed remarks:16

‘There is one other matter that I am compelled to mention – replying affidavits. In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest – and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the courts declare war on unnecessarily prolix replying affidavits and upon those who inflate them.’


A reply in this form is an abuse of the court process and instead of wasting judicial time in analysing it sentence by sentence and paragraph by paragraph such affidavits should not only give rise to adverse costs orders but should be struck out as a whole. Since I am of the view that Patel J should have taken that route mero motu, I am not going to deal with those few instances where he quoted a wrong paragraph number (one of the grounds, as I understood from what Mr van Zyl volunteered during argument, that led to a complaint to the Judicial Services Commission against the late judge) or erred. I shall nevertheless have regard to the reply to the extent that it contains relevant and admissible material that impacts on the merits of the case.17

THE HEARING IN THE SCA

It is unfortunately necessary to say something (but not all) about the appeal hearing. Mr Redelinghuys, an attorney with the right of appearance, appeared for all appellants excepting Mr van Zyl. Mr Redelinghuys knows the case because he was Swissbourgh’s attorney in Lesotho. Mr van Zyl argued in person but chose to follow Mr Redelinghuys.

The heads of argument filed by the appellants ran to 530 pages. A few days before the hearing, without explanation, another set of 325 pages was filed.18 After a short and well prepared introductory argument, Mr Redelinghuys proceeded to deal with the additional heads. His main point was that the appellants had suffered a denial of justice at the hands of the Lesotho courts. The nub of the argument was that ‘national legal systems can be judged objectively for acts and omissions of its courts with respect to aliens’ and that ‘a state incurs international responsibility if it administers justice to aliens in a fundamentally unfair way’. He relied on art 10 of the Universal Declaration of Human Rights, which provides that

17 A party is in principle not entitled to rely on new matter, even if it has not been struck out: Director of Hospital Services v Mistry 1979 (1) SA 626 (A) 635H-636B; Bowman NO v De Souza Roldao 1988 (4) SA 326 (T).
18 At the end of argument, when Mr van Zyl was told he could file further argument in reply, he immediately produced a third set of heads running to 65 pages that had nothing to do with the reply. The appellants also filed 2 600 pages of authorities.
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.'

[49] Mr Redelinghuys was asked on what basis could he argue this point since it did not form part of the case set out in the founding affidavit – indeed, the case of the appellants was, as mentioned, that the application was no reflection on the Lesotho courts – nor was it the case in the high court or in the main heads of argument. He sought in response to rely on unsupported allegations made against the judiciary in the attached correspondence to which he added *ex cathedra* allegations. It was pointed out to Mr Redelinghuys that he, as an officer of the court, could not make submissions that do not have an evidential basis. Mr Redelinghuys subsequently retracted and abandoned the point.

[50] This gave Mr van Zyl the opportunity to attack this Court for having already decided the case; to lecture the Court about justice; and to renew the attack on the Lesotho judiciary. Those courts, he said, were not only biased, they were manipulated. Mr van Zyl was given more than one opportunity to identify the passages in the record where the allegation of a denial of justice had been made. He did not. I do not wish to belabour the point. Although the failure of justice was raised in the preceding correspondence, the appellants deliberately chose to omit it as a cause of complaint from the founding affidavit and, apart from a generalised statement, also from the replying affidavit. The appellants are not entitled in this manner to resurrect an abandoned case.

THE REVIEW

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59 Mr van Zyl’s wrath was not limited to the judges of Lesotho. It spilled over to local judges who had held against him and counsel who appeared against him. All were involved in a Machiavellian plot. He even made snide remarks about a professor of law who, he said, was in court and advised Government.

60 Relying on J Paulsson’s *Denial of Justice in International Law* (2005). The argument of a denial of justice at the hand of the Government of Lesotho was just a variation of the argument which will be dealt with later.

[51] The approach to Government and the Government’s response occurred before the Constitutional Court delivered the *Kaunda* judgment,21 which brought some clarity on the issue of the right to diplomatic protection. For purposes of this case the following principles there set out are relevant:

- Traditional international law acknowledges that states have the right to protect their nationals beyond their borders but they are under no obligation to do so (para 23).
- Diplomatic protection is not recognised by customary international law as a human right and cannot be enforced as such and it remains the prerogative of the state to exercise it at its discretion (para 29).
- It would be inconsistent with the principle of state sovereignty for South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign state and its officials meet not only the requirements of the foreign state’s own laws, but also the rights that our nationals have under our Constitution (para 44).
- Although there is no enforceable right to diplomatic protection, South African citizens are entitled to request South Africa for protection under international law against wrongful acts of a foreign state and the citizen is entitled to have the request considered and responded to appropriately (para 60).
- The entitlement to request diplomatic protection flows from citizenship and is part of the constitutional guarantee given by s 3 of the Constitution, which provides that all citizens are equally entitled to the rights, privileges and benefits of citizenship (para 67, 178, 188, 236).
- The government has an obligation to consider the request and deal with it consistently with the Constitution ( para 67, 192).
- There may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances where the

21 *Kaunda and Others v President of the RSA* 2004 (10) BCLR 1009 (CC), 2005 (4) SA 235 (CC).
evidence is clear would be difficult, and in extreme cases possibly impossible to refuse (para 69, cf 242).
- A court cannot tell the government how to make diplomatic interventions for the protection of its nationals (para 73).
- A decision as to whether, and if so, what protection should be given, is an aspect of foreign policy that is essentially the function of the executive (para 77).
- If government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly (para 80, 193). This does not mean that courts could substitute their opinion for that of the government or order the government to provide a particular form of diplomatic protection (para 79).

[52] The appellants' request was premised on a 'right' to diplomatic protection and not on a right to have a request considered. It was further based on the duty of Government to provide a particular type of diplomatic protection. These demands were, in the light of the Constitutional Court's judgment, ill-founded. A further demand (coupled with a threat of an urgent court application) that Government should withhold all royalties due to the Government of Lesotho under the treaty until the latter had agreed to mediate or arbitrate was not only ill-founded but also presumptuous.

[53] I have at the outset of this judgment set out the advice given to the President. From this (and further documentation attached to the answering affidavit) it appears that the Government acted within the framework of the principles of the Kaunda judgment: Government knew that the appellants did not have a 'right' at international law; it recognised the fact that the Constitution might impact on the matter; it recognised the appellants' right to have a request considered; it was acutely aware of the appellants' serious attack on the Lesotho judiciary as evidenced by the first letter of request; and it realised that it had to make a policy decision bearing in mind what it called the sensitive relationship between the two countries. (Such decisions are always political and the prime consideration remains the relationship with the defendant state and the grounds for refusing to act may be unrelated to the particular case.) The Government obtained legal advice from different persons; it held meetings with Mr van Zyl and his delegation of lawyers and international legal experts; inter- and intra-departmental memoranda were prepared; the Government considered the request carefully over a period of time; and it made a policy decision – first by the Deputy Minister, then by the Minister and, eventually, by the President himself who twice considered the matter.

[54] Patel J dealt with the facts correctly and fairly there is no need to redo a job done well. Once again the appellants' position shifted in the replying affidavit. The justification for the new case was the fact that they did not have the Government's internal documents when the application was launched. The answer to this is that had they bothered to follow Uniform rule 53, they would have had the documents before the answering affidavit was filed; they would have been entitled to amplify their founding affidavit; and the case would have proceeded in an orderly manner and without complications.

[55] The appellants argue that the Government was not entitled to introduce a 'new' reason during a judicial review, the new reason being the reliance on policy considerations. This reason was not mentioned to the appellants in the preceding correspondence. The first answer is that had the appellants followed rule 53, the Government would have disclosed the policy reason. The second answer is that the case on which the appellants rely for the principle that an organ of state is not entitled to raise new reasons for an administrative decision in an answering affidavit was one where the new reasons were ex

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22 The argument submitted at the end of the proceedings was that the appellants have an unwritten constitutional right to diplomatic protection and that Government has an unwritten duty to provide it. It is in conflict with the main submission that the appellants have a right to submit a request and have a right that the request should be properly considered.
23 Because the President made the ultimate decision the preceding decisions were subsumed and do not require separate consideration.

25 Kaunda v President of the RSA (2) 2004 (10) BCLR 1009 (CC) para 23.
The notice of appeal filed in this Court recited the relief sought in the notice of motion and, once again, gave no indication of what order was sought. Appellants’ heads of argument were, however, of a different order. Government must be ordered to ‘demand’ the payment of compensation. Should this demand not be met, Government must ‘require’ of the Government of Lesotho to submit to international arbitration or to adjudication before the International Court of Justice. And, finally, if adequate compensation is not paid within 90 days, the Government of the RSA must pay these claims as constitutional damages.

The order now sought is procedurally out of order (the claim for constitutional damages was not anticipated in nor does it reasonably arise from the founding affidavit); it flies in the face of the Kaunda principle that a court cannot tell the Government how to conduct foreign affairs and make diplomatic interventions; and it ignores the fact that the Government of Lesotho has stated repeatedly and explicitly that it will not engage in international dispute settlement (its consent is required for both arbitration and engaging the International Court of Justice).

The Interface Between National and International Law

A major problem with the appellants’ case is the way they seamlessly move between national and international law, depending on what is convenient at any particular moment. They recognise that their application is based on South African municipal law because international law does not recognise a right of a national to diplomatic protection. However, when arguing their entitlement under local law, they rely on international law principles that deal with the power of states to provide diplomatic protection. Although customary international law is part of our law, it is conceptually difficult to understand how an international law rule dealing with one relationship (state : state) can be transformed into a local rule regulating another relationship (citizen : state).

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26 Jicama 17 (Pty) Ltd v West Coast District Municipality 2006 (1) SA 116 (C) at para 12. The court nevertheless dealt with the additional reasons and found them bad.

27 Discussed in R v Westminster City Council, ex parte Ermakov [1996] 2 All ER 302 (CA), a case quoted in Jicama (supra).

28 Constitution s 232.
[61] One example suffices. The right to ask for diplomatic protection derives from s 3 of the Constitution as an aspect of citizenship – and nothing else.29 How then can the Lesotho companies claim diplomatic protection from Government? The appellants seek the answer in a proposal of the International Law Commission30 that the state of nationality of shareholders (the RSA) in a corporation is entitled to exercise protection 'on behalf of' such shareholders (Mr van Zyl and the two Trusts) in the case of an injury to the corporation (Swissbourgh) if the corporation had, at the time of the injury, the nationality of the delinquent state (Lesotho) and incorporation under the 'law' of Lesotho was required as a precondition of doing business there. Even if one accepts that this is a rule of international and, therefore, South African law, I fail to see how this ‘rule’ can determine the corporate appellants’ entitlement to diplomatic protection under municipal law.

[62] Having said this, it remains necessary to consider whether Government is entitled in terms of international law to grant the appellants diplomatic protection. Unless the appellants are able to establish such a right vesting in Government their application has to fail for this further reason, both in relation to the review and the mandamus.

[63] The appellants argue that they only have to make out a prima facie case of entitlement but this understates the position. An applicant must make out a clear case for a mandamus or a review. Whether an applicant has a right is a matter of substantive law and whether that right is clear depends on evidence. But the test is not really germane for present purposes. In this case the material and admissible facts are mainly common cause and the general principle applies that in motion proceedings the case has to be determined on the respondent’s version.

29 Gerhard Erasmus and Lyle Davidson ‘Do South African have a right to diplomatic protection?’ (2000) 25 SA YIL 113 at 130.
30 Seventh Report on Diplomatic Protection by John Dugard, Special Rapporteur (7 March 2006). The appellants laid great score on this report as setting out international law in spite of the fact that it has not yet been adopted. In what follows I shall assume in favour of the appellants the correctness of the supposition.

[64] It is necessary to state a number of trite international law principles in order to understand the debate that follows.

- The appellants are not subjects at international law and have, accordingly, no rights at international law.31
- Aliens in a foreign country are subject to the laws of that country to the same extent as the nationals of that country.
- Property rights are determined by municipal law. The questions whether any rights have been granted, exist or whether they have terminated are all questions that have to be determined according to local law:
  ‘In principle, the property rights and the contractual rights of individuals depend in every State on municipal law and fall therefore more particularly within the jurisdiction of municipal tribunals.’32
- There is no universally acceptable concept of property rights because the Western concept based on Roman law principles does not apply everywhere. According to African customary law, as expressed in the Lesotho Constitution, land belongs to the nation, in this case the Basotho Nation, and all interests in land are granted by the nation, represented by the King and the Chiefs. Chinese law, for instance, has its own complexities.33 The finding by Patel J that there is no support for the thesis that international law recognises the protection of property (at least in the Roman-Dutch legal sense) as a basic human right appears to have merit.34
- Contracts concluded between states and aliens, are also governed by municipal law.35
- Contracts between states and aliens may be ‘internationalised’, i.e., the contracts may be made subject to international law principles and

31 Dugard International Law: A South African Perspective 3 ed and Booysen Principles of International Trade Law as a Monistic System deal with most of the propositions that follow.
32 Panevezys-Saldutoskis Railway case (Estonia v Lithuania) 1939 PCIJ Reports Series A/B no 76 at 18.
35 Serbian and Brazilian Loans Case [1929] PCIJ Series A No 20/21 at 41.
international adjudication by agreement, expressly or by necessary implication. 36

- Aliens are entitled to request the country of their nationality to protect them against a breach of international minimum standards such as the breach of a basic human right. These basic rights are defined in international human rights instruments:

'It is an elementary principle of international law that a State is entitled to protect its subject, when injured by acts contrary to international law committed by another State, from which they have been unable to obtain satisfaction through ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic protection or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its rights to ensure, in the person of its subject, respect for the rules of international law.' 37

- A sending state that is willing to afford diplomatic protection can only do so if: (a) the victim has the nationality of the sending state; (b) the victim has exhausted local remedies in the errant jurisdiction; and (c) an international delict whereby the victim has been injured by an unlawful act imputable to the other state has been committed. 38

- An international delict presupposes the existence of a right because without a right there cannot be a wrong. 39

- A state may confiscate or expropriate the property of an alien provided it is in accordance with a law of general application, in the public interest and prompt and adequate compensation is paid.

- The responsible state is under an obligation to make full reparation for the injury caused by an internationally wrongful act.

INTERNATIONAL RIGHTS AND WRONGS

36 Revere Copper and Brass Inc v Overseas Private Investment Corp (1978) 56 ILR 258 at 275.
37 Mavrommatis Palestine Concessions 1924 PCIJ Series A No 2.
38 'Seventh Report on Diplomatic Protection' art 1; Gerhard Erasmus and Lyle Davidson 'Do South African have a right to diplomatic protection?' (2000) 25 SAYIL 113 at 130.
39 'Draft Articles on State Responsibility' provisionally adopted by the International Law Commission.

[65] Before there can be an international wrong there must be an international right. In this case the appellants have to show that the Rampai mineral lease was subject to international law, i.e., that it had been internationalised. (Although I am limiting this part of the discussion to the Rampai lease, what follows applies equally to the other four leases save for the fact that their invalidity has not yet been determined by the Lesotho courts.)

[66] As Patel J held, and is apparent from the terms of the lease discussed earlier, the Rampai lease was entered into in Lesotho by the Government of Lesotho with a Lesotho company under the Lesotho mining laws in respect of Lesotho diamond rights. Therefore, its validity had to be determined under Lesotho law by Lesotho courts.

[67] It is important to emphasise that this is not a case of expropriation or confiscation of existing rights. The issue is whether rights had come into existence according to local law that requires compliance with prescribed formalities. All the authorities quoted by the appellants, and there were many, deal with a situation where a state that had agreed not to amend its laws in order to undo an international contract (so-called stabilisation clauses), reneges on its undertaking. This is not such a case. A state is as much bound by its own laws as are its citizens and I do not know of a principle whereby a state, when entering into contract with a corporation with alien shareholders, can ignore municipal law that governs that type of contract. 40

[68] For the sake of completeness I proceed to consider whether the Government of Lesotho had otherwise agreed to internationalise the agreement, i.e., agreed that its validity would be determined according to international law and by an international tribunal. This depends on an interpretation of the lease, i.e., whether there are any tacit terms to that effect.

40 Cf the approach of the arbitrator, Sir Herbert Sisnett in the Shufeldt Claim (United States of America v Guatemala II RIAA 1080.
The appellants argue that the lease was not covered by the general principle that agreements between governments and aliens are governed by one or other municipal law. Because (they submit) these leases were long-term international economic agreements or bi-lateral investment treaties, the implications of these agreements may by virtue of their character import international law by implication. In this regard they rely on the opinion of Prof Dupuy referred to in the Revere Copper case.

Such leases may bear certain characteristics of international economic agreements or bi-lateral investment treaties. In this latter respect he refers to such characteristics of these agreements as their broad subject matter, the introduction into developing countries of investments and technical assistance, their importance in the development of the countries concerned, their long duration implying “close cooperation between the State and the contracting party”, and requiring permanent installations as well as the acceptance of exclusive responsibilities by the foreign investor, and the close association of the foreign contract with the realization of the economic and social progress of the host country. Because of the required cooperation between the contracting party and the State and the magnitude of the investments to which it is necessary for the pursuit of the task entrusted to the private enterprise, the characteristic referred to in the cited passage. Apart from the fact that the lease was of a relatively long duration, there was no ‘required cooperation’ between the parties; there was no obligation to introduce any foreign investment (unless the R13 000 per annum can be regarded as foreign technical assistance); and there was no evidence that the lease was important for the development of Lesotho; and there was no requirement for permanent installations or the acceptance of exclusive responsibilities by Swissbourgh.

The appellants’ argument is opportunistic. The lease had hardly any of the characteristics referred to in the cited passage. Apart from the fact that the Rampai lease was invalid ab initio, whatever the Government of Lesotho did by cancellation or revocation to undo the putative lease was without effect because there was nothing to undo. The acts of the Government of Lesotho at the time may have been wrong in the moral sense but they were not wrongful (at least not with full knowledge of the facts). The appellants further rely on the arbitration clause in the lease. According to the argument the clause, in spite of its minimal terms (which it has far-reaching consequences because it does not say that Lesotho law applies and because it does not say that the arbitration had to be a local one, it follows from the fact that Swissbourgh had foreign shareholders that international law applied and that the arbitration had to be an international one. The argument need merely be stated to be rejected.

A related argument concerns the Convention on the Settlement of Investment Disputes between States and Nationals of other States, the Washington Convention of 18 March 1965, referred to as ICSID. The Government of Lesotho acceded to this Convention and erred the Arbitration (International Investment Disputes) Act 23 of 1974. The appellants argue that because of this the Government of Lesotho is bound to submit the dispute to ICSID arbitration. The Convention Art 25 provides that the jurisdiction of this arbitral court “extends to any legal dispute arising directly out of an investment between a Contracting State and another Contracting State, which the parties to the dispute consent in writing to submit to the Centre”.

Without delving any deeper into this murky argument it suffices to state that South Africa is not another Contracting party to the Convention, that the lease was not an investment contract, that Swissbourgh was not a South African company, and that the Government of Lesotho was not a South African foreign investor.
African national; and that the parties did not agree – in writing or otherwise – to submit to this form of arbitration.

[75] There remains the issue concerning the so-called extension leases. According to Mr van Zyl, the Government of Lesotho undertook to extend the terms of the four leases in settlement of their dispute. He, in turn, agreed to cancel the Rampai lease. The extension leases were also to be subject to the provisions of the Minerals Rights Act and required the same formalities as the original leases. The extension leases were never signed. The Government of Lesotho did not sign, why is irrelevant. Mr van Zyl says that he refused to sign because someone demanded a bribe in spite of an anti-corruption clause in the draft agreement. His refusal was noble but how this entitles him to relief in relation to non-existent leases is not understood. A promise to contract is not a contract.  

[76] I accordingly conclude that the appellants did not establish that they had any rights and, accordingly, that no international wrong could have been committed against them which would have entitled the Government to afford diplomatic protection. It is, however, necessary to say something about the appellants’ subtext. Their real complaint is that the Rampai judgment amounted to an expropriation without compensation committed by an organ of state (the courts) for which the Government of Lesotho was responsible; and this was an international wrong because of a denial of justice by the Lesotho courts.

[77] I have already shown that this was not part of the appellants’ case and that the underlying requirement of the existence of an international right is absent. As the appellants correctly accept, they have to show a fundamental failure of justice. 46 The main thrust of the argument was, however, directed at the merits of the judgment and because the appellants believe that the courts have reached a wrong conclusion they assume that the courts must have been biased, another fanciful proposition. But there are other attacks, which I shall mention briefly to illustrate the lack of merit of the appellants’ case.

[78] They allege that the Court of Appeal was manipulated because it consisted of acting judges and the permanent judges of the court did not sit in the matter. 48 Because this issue was not raised on the papers it was not possible for Government to respond with evidence. Nevertheless, the appellants knew (according to Mr van Zyl) a month in advance, of the composition of the bench. They did not complain. If they had a ground for complaint they were obliged to raise it then. They chose not to do so, maybe because four of the five judges were retired South African judges. (The fifth, according to the published report, was a permanent Lesotho appeal judge.) As far as the permanent judges are concerned, we know that Mr van Zyl was of the view that the President of the court was disqualified to hear the matter. 49 Another member of the court (as appears from the law reports) acted as counsel for the Government of Lesotho in the revocation appeal and was therefore disqualified to sit. 50 There may have been similar explanations why the other two judges did not sit.

[79] The appellants also complain about the amount of security they had to provide for the Rampai appeal and say that it was many times higher than the amount set for the revocation appeal. We do not know what evidence was before that court in relation to both matters but one could guess that security for an appeal on a 58-day trial and one for an appeal on an application could differ materially. In any event, the determination of security did not lead to a

46 Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs 1991 (4) SA 718 (A).
47 Loewen v USA (ICSID case ARB (AF)98/3) (2003) 42 ILM 811.
denial of justice because the appellants were able to provide and did provide security.

[80] The third point under this heading relates to the fact that the appellants allege that they discovered new evidence after judgment. They wrote a letter to the President of the court, insisting that he revoke the judgment. His refusal is said to be yet further evidence of the bias of the Lesotho courts.

NATIONALITY

[81] I have therefore found that Government is not entitled to intervene on behalf of the appellants because no international delict had been committed. The claim of the corporate appellants and the trusts has to fail on an additional ground, namely the issue of nationality or citizenship

[82] It is necessary to distinguish between an international wrongful act that causes ‘direct injury to the rights of shareholders as such’ (in which event the state of nationality of the shareholders is entitled to exercise diplomatic protection in respect of its nationals) in contradistinction to injury to the rights ‘of the corporation itself’ (where that state is not entitled to act on behalf of its national shareholders). This case concerns a delict against the companies and not one against the shareholders ‘as such’.

[83] As mentioned earlier, the appellants rely on draft art 11 contained in the International Law Commission report. It bears quoting:

“The State of nationality of the shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of an injury to the corporation unless:

(a) ...”

[54] The shareholder appellants rely on art 11 because the Government of Lesotho required the incorporation of Swissbourough in Lesotho as a precondition for entering into the mining leases. Patel J, however, found that art 11 does not reflect customary international law — it is but a recommendation that awaits acceptance by the international community. I tend to agree with his reasoning, which is partly based on the Barcelona Traction case, but do not find it necessary to decide the issue because the shareholders’ claim fails for reasons stated and that follow.

[84] The corporate appellants cannot rely on the rule as formulated. The rule is expressed in favour of shareholders who are nationals of the sending state, and not in favour of the corporation itself. Article 11 is not and does not purport to be an exception to the nationality rule (art 3). (It is different with stateless persons and refugees; they are expressly stated to be exceptions to art 3.)

[85] Another aspect of the nationality rule is the continuing nationality rule. According to the amended proposal of the International Law Commission, a state is only entitled to exercise diplomatic protection in respect of a person who was a national of that state continuously from the date of the injury to date of claim. As Patel J held, the cession by the corporate appellants to Burmilla Trust disqualified both the corporate appellants and the Trust from diplomatic protection. The whole object of diplomatic protection is to protect

54 The Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) 1970 ICJ 3 to which must now be added Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) Preliminary Objections 2007 ICJ General List no 103.
56 The appellants rely on a report of the International Law Association (2006) according to which the rule may be dispensed with ‘in the context of global and financial markets’. Why this possible exception is mentioned I fail to understand. The appellants also argue that the rule
a national against a wrong committed against that national. Someone who has not been wronged cannot, by virtue of a cession, become a victim. The cessionary may be entitled to the proceeds of any claim but that does not transform the cessionary into a victim. Likewise, a cedent cannot be entitled to diplomatic protection in relation to a right which that person no longer holds. It follows from this that the nationality rule disqualified the Government from affording any diplomatic protection to all the appellants save, possibly, Mr van Zyl and the family trust.

EXHAUSTION OF LOCAL REMEDIES

[87] There is yet another reason why Government is not entitled to grant the appellants diplomatic protection. A state may not bring a claim for diplomatic protection before the injured person has exhausted all local legal remedies unless these do not provide a reasonable effective redress or there is undue delay attributable to the state concerned.57

[88] The wrong, as defined in the founding affidavit, was the cancellation and revocation of the mining leases without payment of compensation: initially the Commissioner of Mines cancelled the leases and they were then cancelled by means of the revocation order. (The Rampai judgment did not cancel any lease; it merely held that the Rampai lease was void from the beginning.)

[89] It is common cause that these two acts were wrongful. This the Lesotho courts have held and the Government of Lesotho conceded in relation to the acts of the Commissioner and accepted by abiding by the revocation judgment. It means that the Lesotho courts have rectified the wrongs by declaring the acts void and without effect. One of the reasons for the existence of the ‘local remedy’ rule is that it is necessary

‘that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.’58

If this principle is applied the violation by the Government of Lesotho has been redressed within the framework of its domestic legal system. The appellants are not entitled to hark back, resurrect the past and ignore the supervening facts.

[90] If the cancellation and revocation of the four leases was illegal, Swissbourgh would in principle be entitled to damages. As mentioned, Swissbourgh cancelled these leases and instituted action for breach of contract against the Government of Lesotho but the action has not been pursued by Swissbourgh.

[91] The appellants argue that their acceptance of the repudiation must be discounted because they were forced by the actions of the Government of Lesotho to cancel the four leases. The argument is disingenuous because if that were the case they would also have had to cancel the Rampai lease, something they studiously avoided doing. Their second argument is that they cannot succeed in the case because of the Court of Appeal judgment on the Rampai lease. The argument lacks substance: that judgment is not res judicata in respect of the four leases and the appellants are entitled to use the ‘new’ evidence, which they say they have since uncovered, to show that the Rampai judgment was wrongly decided. Furthermore, if they never had any valid mineral rights (on the supposition that Rampai was decided correctly) they can hardly have any cause of complaint.

[92] Another claim to which their request relates is the claim for damages for the loss and destruction of Swissbourgh’s plant. The cause of this is said (without any evidence) to have been unlawful acts committed by servants or

57 Seventh Report on Diplomatic Protection arts 14 and 16. The other exceptions are not relevant. Panevezys-Saldutoskis Railway case (Estonia v Lithuania) 1939 PCIJ Reports Series A/B no 76. This rule presupposes the existence of an international delict and compliance with the nationality rule.

58 Interhandel Case (Switzerland v United States) 1959 ICJ 6 at 27 quoted with approval in the Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) Preliminary Objections 2007 ICJ General List no 103 at para 42.
agents of the Government of Lesotho. This cause of action, as mentioned, forms part of the litigation, which has been pending in Lesotho for more than ten years. There is no valid explanation why these actions have not been pursued and local remedies exhausted.

CONCLUSION

[93] The conclusion is therefore that the appeal must be dismissed with costs. The employment by the respondents of three counsel was fully justified.

[94] ORDER: The appeal is dismissed with costs, including the costs consequent on the employment of three counsel.

ANNEX:

Dear Sir,


1. Introduction

We have now had an opportunity to study the voluminous documents in which your clients’ offer of settlement has been set out and motivated and to consult with our client in that regard. The documents occupy some 1600 pages in all and range from the two-page document left by your clients’ counsel, Mr H Louw, with the Deputy Attorney-General, Mr K R K Tampi, on or about 2 May, 2001, in which payment of M300 000,00 plus costs, coupled with some conditions is called for; to the “Financial Claims against the Kingdom of Lesotho and Claims in respect of the Extension Leases” handed to Mr Tampi on 3 May, 2001, and five volumes of attachments thereto subsequently received; the “Proposed All in Settlement”, dated 21 May 2001 and signed by Mr Louw, claiming M79 941 943,00, plus interest thereon; and, finally, the Supplementary Memorandum of 6 August 2001, explaining why the dispute must be settled, or adjudicated upon if settlement is not reached, according to the rules of Public International Law.

No useful purpose will be served, in view of the decision on the offer which has been reached by our client, in debating the various arguments advanced on behalf of your clients as to their entitlement to compensation. But there are a number of premises put forward for such arguments which are, to the knowledge of your clients, so fundamentally inaccurate that we can only believe that they are intended for readers who do not have knowledge of the facts, and must be corrected:

2. Expropriation without compensation
The oft repeated justification for the claims made on behalf of your clients is that their rights were expropriated without the payment of compensation. The following are the facts in this regard:

It is correct that the Revocation of Specified Mining Leases Order, No 7 of 1992, purported to deprive SDM and its associated companies, without compensation, of their rights in the mining leases they held. That legislation was passed by the military government which succeeded the military government of General Justin Lekhanya which had granted the leases. However, that legislation was struck down as unlawful by the High Court of Lesotho whose judgment was confirmed by the Lesotho Court of Appeal on 13 January, 1995.

By the time the courts’ judgments were delivered SDM and its subsidiaries, (save for Rampai Diamonds (Pty) Limited) had already, on 15 March, 1993, cancelled four of the mining lease agreements pertaining to them on the grounds that the Government of Lesotho (“GOL”) had unlawfully repudiated its obligations under such agreements, inter alia, by passing the Revocation Order aforementioned.

Consequently, as far as four of the five leases in question are concerned there is no longer any question of expropriation without compensation. Expropriation by the Revocation Order was declared unlawful and there has been no subsequent expropriation. It is SDM and its subsidiary companies who terminated the leases by electing to cancel them and claim damages (as to which, see paragraph 3 below).

As to the Rampai lease, this was indeed, subsequent to the Revocation Order, expropriated. It lies largely in the catchment area of the Katse Dam and was expropriated under provisions providing for expropriation against payment of full compensation, appearing in the Lesotho Highlands Development Authority (Amendment) Act, No 5 of 1995. (It was to the introduction of this legislation that the Minister of Natural Resources was referring in the Memorandum to Cabinet quoted at pp 18/19 of your clients’ memorandum dated 6 August 2001).

However, that Act provides for compensation (by LHDA) only to the holder of a “duly granted and executed mineral right registered in terms of the Deeds Registry Act, 1967”. Consequently the finding of the High Court and the Court of Appeal that the Rampai lease was not lawfully granted prevents SDM and Rampai from claiming compensation from LHDA. But it is not without remedy (see paragraph 4.3 below).

3. Claimants have exhausted their remedies in the courts of Lesotho

In paragraph 3.8 of your clients’ Supplementary Memorandum of 6 August 2001 it is said:

“This also demonstrates that all judicial remedies have been exhausted. This requirement for diplomatic protection to be exercised has been met.”

The averment that Claimants have exhausted their remedies in the courts of Lesotho is exactly contrary to the facts.

3.1 As to the Motsoku, Patisang, Orange and Motete lease areas, under Case No CIV/T/213/96, SDM and the four subsidiaries just mentioned instituted action against the Government of Lesotho for damages amounting, in all, to M958 702 281,00 on 20 May 1996.

3.2 Further particulars to the claim were requested and supplied, and a Plea was filed on behalf of Defendant on 9 October, 1996. The pleadings have been closed and the matter is ripe for hearing.

4. As to the Rampai lease:

On 23 July, 1996, SDM and Rampai filed a claim for compensation under the provisions of section 46A of the LHDA Order, as amended by Act 6 of 1995, in the amount of M521 846 548,00.

As pointed out in paragraph 2.5 above the provision for compensation by LHDA applies only to a lease duly granted and records have held that the lease in question was not lawfully granted to SDM or Rampai.
However, there is nothing to prevent SDM and Rampai from instituting action against GOL in the courts of Lesotho, claiming such damages as are alleged to have been suffered.

5. Loss of confidence in the courts of Lesotho

It is the courts of Lesotho which struck down, at the instance of your clients, the legislation which is repeatedly invoked as justification for turning to other fora for assistance, namely the Revocation of Specified Mining Leases Order, No 7 of 1992.

In a memorandum submitted to the Government of South Africa by SDM (before the result of its application to strike down the Revocation Order was known) and quoted in your clients' Supplementary Memorandum on settlement of 6 August 2001 it is said that:

"SDM has not yet exhausted the available judicial remedies in Lesotho. As the Lesotho Court of Appeal has a high reputation both for competence and independence it cannot seriously be suggested that if the application pending before Cullinan, CJ, fails, it would be "obviously futile" to appeal against such decision."

Of course, not only were your clients successful before Cullinan, CJ, but the Court of Appeal upheld his judgment.

Now that a judgment goes the other way, it is said by your clients that the Judges of Appeal were biased and their findings one-sided. In correspondence Mr Van Zyl has gone further, insulting the President of the Court of Appeal and the present Chief Justice, who set aside the Rampai lease and whose decision was confirmed on appeal.

There is no foundation to these scurrilous remarks. The five judges who sat on the appeal, four of whom have held high judicial office in other Southern African countries and do not live in Lesotho, behaved throughout with perfect propriety. The distasteful accusations which you have seen fit to forward in this regard are rejected.

6. The settlement offer

Our client has carefully considered the settlement offer presented to it and has decided that it is not prepared to accept it. Naturally, the factual distortions dealt with above have contributed to that decision. Some additional considerations are mentioned below.

The financial averments upon which the offer is based:

Fundamental to the offer of settlement is that your clients have spent in the region of M18 million in developing the lease areas. Examination of the figures put forward in that regard, and knowledge of what occurred in the lease areas, gives rise to what appears to our client to be a well-founded suspicion that they are fabricated. No original vouchers bearing witness to the expenditure allegedly incurred have ever been presented. The figures are all taken from financial statements prepared in respect of each company by a firm of chartered accountants, Messrs Glutz and Hlusa, practising in Maseru.

However, it is not Messrs Glutz and Hlusa who substantiate the correctness of the statements, but a Mr A N Walker, a chartered accountant conducting a one-man practice in the town of Potchefstroom in the Republic of South Africa. Mr Walker states that he has verified your clients' not expenditure "from the audited accounts prepared by Messrs Glutz and Hlusa". That, in our client's respectful view, hardly constitutes reliable impartial substantiation of the claim.

The reliability of Mr J van Zyl, the chief source of information for the claim:

The impression is created throughout the submissions made on behalf of your clients that one is dealing here with people and bodies of substance who have contributed very large amounts of money to mining development in Lesotho. That is misleading.
The driving and controlling force behind all the Plaintiffs is Mr Josias van Zyl. In the papers opposing the application for an interdict by SDM some idea of the chequered career of Mr Van Zyl is provided, together with details of the trail of debt which his enterprises have left. Our clients have reason to doubt that the millions of Maloti it is claimed were spent were indeed either spent or, to the extent that expenditure may have been incurred, paid for by any of the Claimants. Mr Van Zyl’s word is not considered acceptable and it is felt that the only way to test the essentially unsupported contentions about expenditure upon which your clients’ claims rest is by reference to proper documentary proof through the process of discovery for which the Court Rules provide, and by cross-examination of the witnesses who are called to substantiate them, chief of whom must be Mr Van Zyl.

Defences to the claim:

The submissions motivating the settlement are based on the premise that no defence exists to the claims. That is not so. On the contrary, the latest information regarding the cession of the claims to the Burmilla Trust give rise to a further defence which will be raised in an amendment to the Plea in the aforementioned action instituted by SDM and four of its subsidiaries.

Government’s resistance to corruption:

This elected Government has demonstrated, by word and deed, that it is implacably opposed to corruption. The manner in which the leases giving rise to your clients’ claims were awarded, especially that in the Rampai area, by the Military Government of General Lekhanya give rise to grave suspicion of impropriety. Not only were none of the area chiefs consulted (the reason why the lease was set aside) but General Lekhanya did not provide a satisfactory explanation, when called as your clients’ witness, as to how his government came to award a mining lease for, effectively, 15 years, in an area which was to be flooded in five years’ time. On the information available to Government, no mining was done in that area until work on the Katse dam was well advanced, when there was an attempt to hold Government to ransom by a court interdict.

By the same token, while huge amounts are claimed for expenses and lost profits, no cent was ever paid by way of royalties to Government by any of your clients, who alleged that no profit had been made and, indeed, that the leases granted to them could not be viably mined without further rights to large tracts of land.

It is true that Government is not in possession of hard proof of corruption. But it is felt that the circumstances giving rise to these claims are such that they should be resisted and thoroughly tested. And it is Government’s view that the best way to test them is by subjecting them to scrutiny in open court.

7. We have dealt herein with only the most glaring examples of misinformation contained in the documents put forward and some of the reasons for rejecting the proposals therein. As part of settlement negotiations, what is contained in that offer and this response is privileged from disclosure in further proceedings. But in case your clients should not abide by that rule of law we record that apart from what is set out herein, none of the averments made on your clients’ behalf in the documents in which the settlement offer is contained are admitted.

8. Finally, as to the contention that the claims will be pursued in other fora, we are instructed to advise you that if that should occur our client will resist any such attempt to the extent that it may be advised that that is necessary. It is denied that any other forum has jurisdiction in the disputes which exist. Your clients’ remedies lie in pursuing the claims already instituted and, if so advised, instituting fresh claims in the courts of Lesotho. (Subject, of course, to our client’s right to raise whatever defences are available to it.)