STUDY MATERIALS
INTERNATIONAL HUMANITARIAN LAW

Codification Division of the United Nations Office of Legal Affairs

Addis Ababa, Ethiopia
7 April - 2 May 2014
Legal Instruments and Documents

A. The 1949 Geneva Conventions and the Additional Protocols

1. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949
   For text, see the *The Geneva Conventions of August 12, 1949, International Committee of the Red Cross*, p. 23

2. Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949
   For text, see the *The Geneva Conventions of August 12, 1949, International Committee of the Red Cross*, p. 51

3. Geneva Convention (III) relative to the Treatment of Prisoners of War, 1949
   For text, see the *The Geneva Conventions of August 12, 1949, International Committee of the Red Cross*, p. 75

4. Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 1949
   For text, see the *The Geneva Conventions of August 12, 1949, International Committee of the Red Cross*, p. 153

5. Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977
   For text, see the *Protocols Additional to the Geneva Conventions of 12 August 1949*, p. 9

6. Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977
   For text, see the *Protocols Additional to the Geneva Conventions of 12 August 1949*, p. 83

7. Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 2005
   For text, see the *Protocols Additional to the Geneva Conventions of 12 August 1949*, p. 113


<table>
<thead>
<tr>
<th>No.</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>11.</td>
<td>Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 1980</td>
<td>52</td>
</tr>
<tr>
<td>17.</td>
<td>Amendment to Article I of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 2001</td>
<td>69</td>
</tr>
</tbody>
</table>

### D. San Remo Manual on International Law Applicable to Armed Conflicts at Sea

<table>
<thead>
<tr>
<th>No.</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
</table>

### E. Methods and Means of Warfare

<table>
<thead>
<tr>
<th>No.</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>20.</td>
<td>Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1972</td>
<td>98</td>
</tr>
<tr>
<td>23.</td>
<td>Convention on Cluster Munitions, 2008</td>
<td>188</td>
</tr>
</tbody>
</table>

### Case Law

#### A. International Court of Justice

<table>
<thead>
<tr>
<th>No.</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
</table>

#### B. International Criminal Tribunal for the former Yugoslavia

<table>
<thead>
<tr>
<th>No.</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
</table>
Legal Writings and Recommended Readings


INTERNATIONAL HUMANITARIAN LAW: COURSE OUTLINE
PROFESSOR ANDREAS ZIMMERMANN

Part A – Introduction: Notion and relevance of international humanitarian law (IHL) in the international legal system

I. Relationship between the legality of the use of force (jus ad bellum) and the rules to be respected in warfare (jus in bello)
II. Foundations and general principles of IHL

Part B – Historical development of international humanitarian law

I. Until 1945
II. The 1949 Geneva Conventions and their 1977 Protocols
   1. The 1949 Geneva Conventions (system of “grave breaches” and common Article 3)
   2. The 1977 Additional Protocols I and II to the 1949 Geneva Conventions
      a) Additional Protocol I
      b) Additional Protocols I and II
IV. Prohibited Weapons
   1. Chemical Weapons
   2. Biological Weapons
   3. Nuclear Weapons
   4. Conventional Weapons
V. Development of customary international humanitarian law

Part C – General issues: relationship between IHL and human rights; applicability of IHL

I. Relationship between IHL and human rights
II. Applicability of IHL
   1. Applicability ratione materiae (threshold issues)
      a) International armed conflicts
      b) Non-international armed conflicts
      c) Internationalized non-international armed conflicts
      d) “Transnational armed conflicts”?
   2. Applicability ratione personae (parties to a conflict)
   3. Applicability ratione loci (geographical scope of application)
   4. “War on terror”?
Part D – Means and methods of warfare / conduct of hostilities

I. Limits to means and methods of warfare
   1. Fundamental principles
   2. Definition of military objectives (including “dual use” objects)
   3. Collateral civilian damages
II. Prohibition or restriction to use certain conventional weapons
III. Prohibition of weapons of mass destruction
IV. Protection of cultural objects
V. Protection of the natural environment
VI. Works and installations containing dangerous forces

Part E – Combatants and direct participation in hostilities

I. Status of combatant
II. Armed forces and other groups having the status of combatant
III. Notion of direct participation in hostilities
IV. Dissident armed forces in non-international armed conflicts (“continuous combat function”)

Part F – Protection of the wounded and sick; women; children; journalists

I. The wounded and sick
   1. Definitions
   2. Respect, protection and human treatment
   3. Medical personnel, units and transport
   4. Protective emblems
II. Women
III. Children
IV. Journalists

Part G – Prisoners of war (POW) and other detainees in armed conflicts

I. Definition of a POW
II. Capture, evacuations and registration
III. Rights in detention
IV. Repatriation
V. Detention of persons having participated in hostilities without having the status of combatant
VI. Detention of fighters captured in non-international armed conflicts
VII. Persons captured in the so-called “war on terror”
VIII. Visit to detainees

Part H – Occupation

I. Definition; beginning and end of occupation
II. Prohibition of annexation
III. Rights and duties of the occupying power

Part I – Humanitarian Assistance

Part J – Implementation of International Humanitarian Law

I. Preventive measures
II. Means of control
III. Repression of violations and development of international justice

Part K – Future perspectives / outlook

I. “Asymmetrical wars”; international terrorism
II. Cyberwarfare and new technologies
CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT.
DONE AT THE HAGUE, ON 14 MAY 1954

The High Contracting Parties,
Recognizing that cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction;
Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;
Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection;
Guided by the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of The Hague of 1899 and of 1907* and in the Washington Pact of 15 April, 1933;*
Being of the opinion that such protection cannot be effective unless both national and international measures have been taken to organize it in time of peace;
Being determined to take all possible steps to protect cultural property;

Have agreed upon the following provisions:

---

* Came into force on 7 August 1956, three months after the deposit of five instruments of ratification, in accordance with article 35. Instruments of ratification or accession (a) have been deposited on behalf of the following States on the dates indicated:

<table>
<thead>
<tr>
<th>Country</th>
<th>Date of deposit</th>
<th>Date of entry into force</th>
</tr>
</thead>
<tbody>
<tr>
<td>Egypt</td>
<td>17 August 1955</td>
<td>7 August 1956</td>
</tr>
<tr>
<td>San Marino</td>
<td>9 February 1956</td>
<td>7 August 1956</td>
</tr>
<tr>
<td>Burma</td>
<td>10 February 1956</td>
<td>7 August 1956</td>
</tr>
<tr>
<td>Yugoslavia</td>
<td>13 February 1956</td>
<td>7 August 1956</td>
</tr>
<tr>
<td>Mexico</td>
<td>7 May 1956</td>
<td>7 August 1956</td>
</tr>
<tr>
<td>Hungary</td>
<td>17 May 1956</td>
<td>7 August 1956</td>
</tr>
<tr>
<td>Poland</td>
<td>6 August 1956</td>
<td>6 November 1956</td>
</tr>
<tr>
<td>Bulgaria (a)</td>
<td>7 August 1956</td>
<td>7 November 1956</td>
</tr>
</tbody>
</table>


* De Martens, Nouveau Recueil général de Traité, troisième série, tome XXXI, p. 650.
Article 7

MILITARY MEASURES

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

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

CHAPTER II

SPECIAL PROTECTION

Article 8

GRANTING OF SPECIAL PROTECTION

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

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

(b) are not used for military purposes.

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

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

4. The guarding of cultural property mentioned in paragraph 1 above by armed custodians specially empowered to do so, or the presence, in the
vicinity of such cultural property, of police forces normally responsible for
the maintenance of public order shall not be deemed to be use for military
purposes.

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

6. Special protection is granted to cultural property by its entry in the
"International Register of Cultural Property under Special Protection". This
entry shall only be made, in accordance with the provisions of the present
Convention and under the conditions provided for in the Regulations1 for the
execution of the Convention.

Article 9
IMMUNITY OF CULTURAL PROPERTY UNDER SPECIAL PROTECTION

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

Article 10
IDENTIFICATION AND CONTROL

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

Article 11
WITHDRAWAL OF IMMUNITY

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

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

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

CHAPTER III
TRANSPORT OF CULTURAL PROPERTY

Article 12
TRANSPORT UNDER SPECIAL PROTECTION

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

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

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

Article 13
TRANSPORT IN URGENT CASES

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

1 See p. 270 of this volume.
2. The High Contracting Parties shall take, so far as possible, the necessary precautions to avoid acts of hostility directed against the transport described in paragraph 1 of the present Article and displaying the distinctive emblem.

Article 14

Immunity from seizure, capture and prize

1. Immunity from seizure, placing in prize, or capture shall be granted to:

(a) cultural property enjoying the protection provided for in Article 12 or that provided for in Article 13;
(b) the means of transport exclusively engaged in the transfer of such cultural property.

2. Nothing in the present Article shall limit the right of visit and search.

CHAPTER IV

PERSONNEL

Article 15

Personnel

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

CHAPTER V

THE DISTINCTIVE EMBLEM

Article 16

Emblem of the Convention

1. The distinctive emblem of the Convention shall take the form of a shield, pointed below, per saltire blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle).

2. The emblem shall be used alone, or repeated three times in a triangular formation (one shield below), under the conditions provided for in Article 17.

Article 17

Use of the emblem

1. The distinctive emblem repeated three times may be used only as a means of identification of:

(a) immovable cultural property under special protection;
(b) the transport of cultural property under the conditions provided for in Articles 12 and 13;
(c) improvised refuges, under the conditions provided for in the Regulations for the execution of the Convention.

2. The distinctive emblem may be used alone only as a means of identification of:

(a) cultural property not under special protection;
(b) the persons responsible for the duties of control in accordance with the Regulations for the execution of the Convention;
(c) the personnel engaged in the protection of cultural property;
(d) the identity cards mentioned in the Regulations for the execution of the Convention.

3. During an armed conflict, the use of the distinctive emblem in any other cases than those mentioned in the preceding paragraphs of the present Article, and the use for any purpose whatever of a sign resembling the distinctive emblem, shall be forbidden.

4. The distinctive emblem may not be placed on any immovable cultural property unless at the same time there is displayed an authorization duly dated and signed by the competent authority of the High Contracting Party.

CHAPTER VI

Scope of application of the Convention

Article 18

Application of the Convention

1. Apart from the provisions which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one or more of them.

2. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
3. If one of the Powers in conflict is not a Party to the present Convention, the Powers which are Parties thereto shall nevertheless remain bound by it in their mutual relations. They shall furthermore be bound by the Convention, in relation to the said Power, if the latter has declared that it accepts the provisions thereof and so long as it applies them.

**Article 19**

**CONFLICTS NOT OF AN INTERNATIONAL CHARACTER**

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

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

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

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

**CHAPTER VII**

**EXECUTION OF THE CONVENTION**

**Article 20**

**REGULATIONS FOR THE EXECUTION OF THE CONVENTION**

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

**Article 21**

**PROTECTING POWERS**

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

**Article 22**

**CONCILIATION PROCEDURE**

1. The Protecting Powers shall lend their good offices in all cases where they may deem it useful in the interests of cultural property, particularly if there is disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention or the Regulations for its execution.

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

**Article 23**

**ASSISTANCE OF UNESCO**

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

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

**Article 24**

**SPECIAL AGREEMENTS**

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

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

**Article 25**

**DISSEMINATION OF THE CONVENTION**

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the text of the present Convention and the Regulations for its execution as widely as possible in their respective countries.
They undertake, in particular, to include the study thereof in their programmes of military and, if possible, civilian training, so that its principles are made known to the whole population, especially the armed forces and personnel engaged in the protection of cultural property.

Article 26

Translations, reports

1. The High Contracting Parties shall communicate to one another, through the Director-General of the United Nations Educational, Scientific and Cultural Organization, the official translations of the present Convention and of the Regulations for its execution.

2. Furthermore, at least once every four years, they shall forward to the Director-General a report giving whatever information they think suitable concerning any measures being taken, prepared or contemplated by their respective administrations in fulfilment of the present Convention and of the Regulations for its execution.

Article 27

Meetings

1. The Director-General of the United Nations Educational, Scientific and Cultural Organization may, with the approval of the Executive Board, convene meetings of representatives of the High Contracting Parties. He must convene such a meeting if at least one-fifth of the High Contracting Parties so request.

2. Without prejudice to any other functions which have been conferred on it by the present Convention or the Regulations for its execution, the purpose of the meeting will be to study problems concerning the application of the Convention and of the Regulations for its execution, and to formulate recommendations in respect thereof.

3. The meeting may further undertake a revision of the Convention or the Regulations for its execution if the majority of the High Contracting Parties are represented, and in accordance with the provisions of Article 39.

Article 28

Sanctions

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

1. The present Convention is drawn up in English, French, Russian and Spanish, the four texts being equally authoritative.

2. The United Nations Educational, Scientific and Cultural Organization shall arrange for translations of the Convention into the other official languages of its General Conference.

Article 30

Signature

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

Article 31

Ratification

1. The present Convention shall be subject to ratification by signatory States in accordance with their respective constitutional procedures.

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

Article 32

Accession

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

Article 33

Entry into force

1. The present Convention shall enter into force three months after five instruments of ratification have been deposited.
2. Thereafter, it shall enter into force, for each High Contracting Party, three months after the deposit of its instrument of ratification or accession.

3. The situations referred to in Articles 18 and 19 shall give immediate effect to ratifications or accessions deposited by the Parties to the conflict either before or after the beginning of hostilities or occupation. In such cases the Director-General of the United Nations Educational, Scientific and Cultural Organization shall transmit the communications referred to in Article 38 by the speediest method.

Article 34
Effective application

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

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

Article 35
Territorial extension of the Convention

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

Article 36
Relation to previous conventions

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

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

Article 37
Denunciation

1. Each High Contracting Party may denounce the present Convention, on its own behalf, or on behalf of any territory for whose international relations it is responsible.

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

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

Article 38
Notifications

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

Article 39
Revision of the Convention and of the Regulations for its execution

1. Any High Contracting Party may propose amendments to the present Convention or the Regulations for its execution. The text of any proposed amendment shall be communicated to the Director-General of the United
Nations Educational, Scientific and Cultural Organization who shall transmit it to each High Contracting Party with the request that such Party reply within four months stating whether it:

(a) desires that a Conference be convened to consider the proposed amendment;

(b) favours the acceptance of the proposed amendment without a Conference; or

(c) favours the rejection of the proposed amendment without a Conference.

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

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

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

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

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

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

**Article 40**

**Registration**

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

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

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

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

**CHAPTER 1**

**CONTROL**

**Article 1**

**International list of persons**

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

**Article 2**

**Organization of control**

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

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

(b) The Protecting Power acting for each of the Parties in conflict with such High Contracting Party shall appoint delegates accredited to the latter in conformity with Article 3 below;
(c) A Commissioner-General for Cultural Property shall be appointed to such High Contracting Party in accordance with Article 4.

Article 3

APPOINTMENT OF DELEGATES OF PROTECTING POWERS

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

Article 4

APPOINTMENT OF COMMISSIONER-GENERAL

1. The Commissioner-General for Cultural Property shall be chosen from the international list of persons by joint agreement between the Party to which he will be accredited and the Protecting Powers acting on behalf of the opposing Parties.

2. Should the Parties fail to reach agreement within three weeks from the beginning of their discussions on this point, they shall request the President of the International Court of Justice to appoint the Commissioner-General, who shall not take up his duties until the Party to which he is accredited has approved his appointment.

Article 5

FUNCTIONS OF DELEGATES

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

Article 6

FUNCTIONS OF THE COMMISSIONER-GENERAL

1. The Commissioner-General for Cultural Property shall deal with all matters referred to him in connexion with the application of the Convention, in conjunction with the representative of the Party to which he is accredited and with the delegates concerned.

2. He shall have powers of decision and appointment in the cases specified in the present Regulations.

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

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

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

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

Article 7

INSPECTORS AND EXPERTS

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

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

Article 8

DISCHARGE OF THE MISSION OF CONTROL

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

Article 9

SUBSTITUTES FOR PROTECTING POWERS

If a Party to the conflict does not benefit or ceases to benefit from the activities of a Protecting Power, a neutral State may be asked to undertake those functions of a Protecting Power which concern the appointment of a Commis-
sioner-General for Cultural Property in accordance with the procedure laid down in Article 4 above. The Commissioner-General thus appointed shall, if need be, entrust to inspectors the functions of delegates of Protecting Powers as specified in the present Regulations.

**Article 10**

**EXPENSES**

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

**CHAPTER II**

**SPECIAL PROTECTION**

**Article 11**

**IMPROVISED REFUGES**

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

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

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

**Article 12**

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

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

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

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

**Article 13**

**REQUESTS FOR REGISTRATION**

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

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

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

**Article 14**

**OBJECTIONS**

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

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

   (a) the property is not cultural property;

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

3. The Director-General shall send a copy of the letter of objection to the High Contracting Parties without delay. He shall, if necessary, seek the advice
of the International Committee on Monuments, Artistic and Historical Sites and Archaeological Excavations and also, if he thinks fit, of any other competent organization or person.

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

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

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

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

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

Article 15
REGISTRATION

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

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

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

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

Article 16
CANCELLATION

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

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

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

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

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

Article 17
PROCEDURE TO OBTAIN IMMUNITY

1. The request mentioned in paragraph 1 of Article 12 of the Convention shall be addressed to the Commissioner-General for Cultural Property. It shall mention the reasons on which it is based and specify the approximate number and the importance of the objects to be transferred, their present location, the location now envisaged, the means of transport to be used, the route to be followed, the date proposed for the transfer, and any other relevant information.

2. If the Commissioner-General, after taking such opinions as he deems fit, considers that such transfer is justified, he shall consult those delegates of the Protecting Powers who are concerned, on the measures proposed for carrying it out. Following such consultation, he shall notify the Parties to the conflict concerned of the transfer, including in such notification all useful information.

3. The Commissioner-General shall appoint one or more inspectors, who shall satisfy themselves that only the property stated in the request is to be transferred and that the transport is to be by the approved methods and bears the distinctive emblem. The inspector or inspectors shall accompany the property to its destination.

Article 18
TRANSPORT ABROAD

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

(a) while the cultural property remains on the territory of another State, that State shall be its depository and shall extend to it as great a measure of care as that which it bestows upon its own cultural property of comparable importance;

(b) the depository State shall return the property only on the cessation of the conflict; such return shall be effected within six months from the date on which it was requested;

(c) during the various transfer operations, and while it remains on the territory of another State, the cultural property shall be exempt from confiscation and may not be disposed of either by the depositor or by the depository. Nevertheless, when the safety of the property requires it, the depositor may, with the assent of the depositor, have the property transported to the territory of a third country, under the conditions laid down in the present article;

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

Article 19
OCCUPIED TERRITORY

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

CHAPTER IV
THE DISTINCTIVE EMBLEM

Article 20
AFFIXING OF THE EMBLEM

1. The placing of the distinctive emblem and its degree of visibility shall be left to the discretion of the competent authorities of each High Contracting Party. It may be displayed on flags or armlets; it may be painted on an object or represented in any other appropriate form.

2. However, without prejudice to any possible fuller markings, the emblem shall, in the event of armed conflict and in the cases mentioned in Articles 12 and 13 of the Convention, be placed on the vehicles of transport so as to be clearly visible in daylight from the air as well as from the ground.

The emblem shall be visible from the ground:

(a) at regular intervals sufficient to indicate clearly the perimeter of a centre containing monuments under special protection;

(b) at the entrance to other immovable cultural property under special protection.

Article 21
IDENTIFICATION OF PERSONS

1. The persons mentioned in Article 17, paragraph 2 (b) and (c) of the Convention may wear an armlet bearing the distinctive emblem, issued and stamped by the competent authorities.
2. Such persons shall carry a special identity card bearing the distinctive emblem. This card shall mention at least the surname and first names, the date of birth, the title or rank, and the function of the holder. The card shall bear the photograph of the holder as well as his signature or his fingerprints, or both. It shall bear the embossed stamp of the competent authorities.

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

4. The said persons may not, without legitimate reason, be deprived of their identity card or of the right to wear the armlet.
For Afghanistan:
Por Afganistán:
Pour l’Afghanistan:
За Афганистан:

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

For the German Federal Republic:
Por la República Federal Alemana:
Pou pour la République fédérale d’Allemagne:
За Германскую Федеральную Республику:

K. BUNGER

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

Por el Principado Civil de la Mitra de Urgel en Andorra¹ Ṣ:
Juan TEIXIDOR

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

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

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

Alfred STIRLING

¹ For the Bishop of Urgel, Co-Prince of Andorra.
² Pour l’évêque d’Urgel, Coprinse d’Andorre.
For Ceylon:
Por Ceilán:
Pour Ceylan:
За Цейлон:

For Chile:
Por Chile:
Pour le Chili:
За Чили:

For China:
Por China:
Pour la Chine:
За Китаи:

Chen YUAN

For the Republic of Colombia:
Por la República de Colombia:
Pour la République de Colombie:
За Республику Колумбию:

For the Republic of Korea:
Por la República de Corea:
Pour la République de Corée:
За Корейскую Республику:

For Costa Rica:
Por Costa Rica:
Pour le Costa-Rica:
За Коста-Рика:

For Cuba:
Por Cuba:
Pour Cuba:
За Кубу:

Hilda LABRADA BERNAL

For Denmark:
Por Dinamarca:
Pour le Danemark:
За Данию:

Johannes BRØNSTED
18.10.1954

For Egypt:
Por Egipto:
Pour l'Égypte:
За Египет:

Mahmoud Saleh EL-FALAKI
30.12.1954

For Ecuador:
Por Ecuador:
Pour l'Équateur:
За Эквадор:

Carlos MORALES CHACON

For Spain:
Por España:
Pour l'Espagne:
За Испанию:

Juan TEIXIDOR
Juan Manuel CASTRO-RIAL CANOSA

For the United States of America:
Por los Estados Unidos de América:
Pour les États-Unis d'Amérique:
За Соединенные Штаты Америки:

Leonard CARMICHAEL

For Ethiopia:
Por Etiopia:
Pour l'Éthiopie:
За Эфиопию:

For Finland:
Por Finlandia:
Pour la Finlande:
За Финляндию:

For France:
Por Francia:
Pour la France:
За Францию:

R. BRICHET
For Greece:  
Por Grecia:  
Pour la Grèce:  
За Грецию:  
Constantin Eustathides  
Spiridon Marinatos

For Guatemala:  
Por Guatemala:  
Pour le Guatemala:  
За Гватемалу:

For the Republic of Haiti:  
Por la République de Haïti:  
Pour la République d’Haïti:  
За Республику Гаити:

For the Republic of Honduras:  
Por la República de Honduras:  
Pour la République de Honduras:  
За Республику Гондурас:

For the Hungarian People’s Republic:  
Por la República Popular de Hungría:  
Pour la République populaire de Hongrie:  
За Венгерскую Народную Республику:
FaI B.

For India:  
Por Indıa:  
Pour l’Inde:  
За Индию:  
N. P. Chakravarti

For the Republic of Indonesia:  
Por la República de Indonesia:  
Pour la République d’Indonésie:  
За Индонезийскую Республику:
M. Hutasoit  
24.12.1954

For Iraq:  
Por Irak:  
Pour l’Irak:  
За Ирак:  
F. Basmachi

1956  
Nations Unies — Recueil des Traités  
349

For Iran:  
Por Irán:  
Pour l’Iran:  
За Иран:  
Ad referendum  
G. A. Raadi

For Ireland:  
Por Irlanda:  
Pour l’Irlande:  
За Ирландию:  
Josephine McNeill

For Iceland:  
Por Islandia:  
Pour l’Islande:  
За Исландию:  

For the State of Israel:  
Por el Estado de Israel:  
Pour l’État d’Israël:  
За Государство Израиль:  
M. Amir

For Italy:  
Por Italia:  
Pour l’Italie:  
За Италию:  
Giorgio Rosi

For Japan:  
Por Japón:  
Pour le Japon:  
За Японию:  
Suemasa Okamoto  
6.9.1954

For the Hashemite Kingdom of Jordan:  
Por el Reino Hashemita de Jordania:  
Pour le Royaume Hachémite de Jordanie:  
За Хашимитское Королевство Иордании:  
Ihsan Hashem  
22.12.1954

For the Kingdom of Laos:  
Por el Reino de Laos:  
Pour le Royaume du Laos:  
За Королевство Лaos:  

No. 3511  
Nº 3511
For the Lebanon:
Por Libano:
Pour le Liban:
За Ливан:
Charles Daoud AMMOUN
25.5.1954

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

For Libya:
Por Libia:
Pour la Libye:
За Ливию:
A. H. KHANNAK

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

For Luxembourg:
Por Luxemburgo:
Pour le Luxembourg:
За Люксембург:
J. MEYERS

For Mexico:
Por Mexico:
Pour le Méxique:
За Мексику:
J. TORRES BODET
29.12.1954

For Monaco:
Por Mónaco:
Pour Monaco:
 За Монако:
Jean J. REY

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

For Nicaragua:
Por Nicaragua:
Pour le Nicaragua:
За Никарагуа:
H. H. ZWILLENBERG

For Norway:
Por Noruega:
Pour la Norvège:
За Норвегию:
Guthorn KAHLI
Ad referendum

For New Zealand:
Por Nueva Zelandia:
Pour la Nouvelle-Zélande:
За Новую Зеландию:
Jane ROBERTSON MCKENZIE
20.12.1954

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

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

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

For the Netherlands:
Por los Países Bajos:
Pour les Pays-Bas:
За Нидерланды:
P. Th. ROHLING

For Peru:
Por Perú:
Pour le Pérou:
За Перу:
For the Republic of the Philippines:
Por la República de Filipinas:
Pour la République des Philippines:
За Филиппинскую Республику:

J. P. BANTUG

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

Stanisław LORENTZ

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

Fernando Quartin de OLIVEIRA BASTOS
(Ad referendum)

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

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

С приложением заявления1 2
Павел ЛЮТАРОВИЧ

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

С приложением заявления3 4
Я. СИРЧЕНКО

1 With attached declaration. For the text of the declaration see p. 356 of this volume.
2 Avec déclaration jointe. Voir p. 356 de ce volume, texte de la déclaration.
3 With attached declaration. For the text of the declaration see p. 356 of this volume.
4 Avec déclaration jointe. Voir p. 356 de ce volume, texte de la déclaration.
For the Republic of Syria:
Por la República de Siria:
Pour la République de Syrie:
За Республику Сирию:

George J. ТОМЕН

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

Dr. Владимир ЗАҚ

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

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

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

Subject to ratification by the Government of the Union of Burma
Soe TINT
31.12.1954

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

---

1 Sous réserve de ratification par le Gouvernement de l'Union birmane.

No. 3511

---

1956

Nations Unies — Recueil des Traités

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

С приложением заявления

В. КЕМЕНОВ

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

V. Sampognaro

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

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

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

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

Милан Ристић
Свito Фисковић

---

3 With attached declaration. For the text of the declaration see p. 357 of this volume.

4 Avec déclaration jointe. Voir texte de la déclaration, p. 357 de ce volume.

Nо 3511
DECLARATIONS MADE AT THE TIME OF SIGNATURE OF THE CONVENTION

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

[Russian text — Texte russe]

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

[Translation¹ — Traduction]

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

UKRAINIAN SOVIET SOCIALIST REPUBLIC

[Russian text — Texte russe]

« Подписывая Конвенцию и ее Исполнительный Регламент, считаю необходимым отметить, что ряд положений в Конвенции и Регламент повышен в частности в связи с обеспечением защиты культурных ценностей в случае вооруженного конфликта ».

[Translation¹ — Traduction]

On signing the Convention and Regulations, the representative of the Ukrainian Soviet Socialist Republic states that various provisions included in the Convention and Regulations weaken the effectiveness for the preservation and defence of cultural property in the event of armed conflict and are, for that reason, unsatisfactory.
PROTOCOL

The High Contracting Parties are agreed as follows:

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

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

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

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

II

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

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

<table>
<thead>
<tr>
<th>Country</th>
<th>Date of Deposit</th>
<th>Date of Entry into Force</th>
</tr>
</thead>
<tbody>
<tr>
<td>Egypt</td>
<td>17 August 1956</td>
<td>7 August 1956</td>
</tr>
<tr>
<td>San Marino</td>
<td>9 February 1956</td>
<td>7 August 1956</td>
</tr>
<tr>
<td>Burma</td>
<td>10 February 1956</td>
<td>7 August 1956</td>
</tr>
<tr>
<td>Yugoslavia</td>
<td>13 February 1956</td>
<td>7 August 1956</td>
</tr>
<tr>
<td>Mexico</td>
<td>7 May 1956</td>
<td>7 August 1956</td>
</tr>
<tr>
<td>Poland</td>
<td>6 August 1956</td>
<td>6 November 1956</td>
</tr>
<tr>
<td>Hungary (a)</td>
<td>16 August 1956</td>
<td>16 November 1956</td>
</tr>
</tbody>
</table>

⁸ See p. 240 of this volume.

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

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

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

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

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

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

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

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

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

(b) This period shall be six months from the date of deposit of the instruments of ratification or accession for any State which deposits its instrument of ratification or accession after the date of the entry into force of the Protocol.
12. Any High Contracting Party may, at the time of ratification or accession, or at any time thereafter, declare by notification addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization, that the present Protocol shall extend to all or any of the territories for whose international relations it is responsible. The said notification shall take effect three months after the date of its receipt.

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

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

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

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

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

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

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

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

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

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

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

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

I

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

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

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

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

II

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

III

6. The present Protocol shall bear the date of 14 May, 1954 and, until the date of 31 December, 1954, shall remain open for signature by all States invited to the Conference which met at The Hague from 21 April, 1954 to 14 May, 1954.
7. (a) The present Protocol shall be subject to ratification by signatory States in accordance with their respective constitutional procedures.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) The Director-General of the United Nations Educational, Scientific and Cultural Organization shall convene a Conference for this purpose.
(c) Amendments to the present Protocol shall enter into force only after they have been unanimously adopted by the High Contracting Parties represented at the Conference and accepted by each of the High Contracting Parties.

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

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

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

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

Done at The Hague, this fourteenth day of May, 1954, in English, French, Russian and Spanish, the four texts being equally authoritative, in a single copy which shall be deposited in the archives of the United Nations Educational, Scientific and Cultural Organization, and certified true copies of which shall be delivered to all the States referred to in paragraphs 6 and 8 as well as to the United Nations.
The Hague, 26 March 1999

The Parties,

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

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

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

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

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

Have agreed as follows:
Chapter 1  Introduction

Article 1  Definitions

For the purposes of this Protocol:

(a) "Party" means a State Party to this Protocol;

(b) "cultural property" means cultural property as defined in Article 1 of the Convention;

(c) "Convention" means the Convention for the Protection of Cultural Property in the Event of Armed Conflict, done at The Hague on 14 May 1954;

(d) "High Contracting Party" means a State Party to the Convention;

(e) "enhanced protection" means the system of enhanced protection established by Articles 10 and 11;

(f) "military objective" means an object which, by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage;

(g) "illicit" means under compulsion or otherwise in violation of the applicable rules of the domestic law of the occupied territory or of international law.

(h) "List" means the International List of Cultural Property under Enhanced Protection established in accordance with Article 27, sub-paragraph 1(b);

(i) "Director-General" means the Director-General of UNESCO;

(j) "UNESCO" means the United Nations Educational, Scientific and Cultural Organization;


Article 2  Relation to the Convention

This Protocol supplements the Convention in relations between the Parties.

Article 3  Scope of application

1. In addition to the provisions which shall apply in time of peace, this Protocol shall apply in situations referred to in Article 18 paragraphs 1 and 2 of the Convention and in Article 22 paragraph 1.

2. When one of the parties to an armed conflict is not bound by this Protocol, the Parties to this Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to a State party to the conflict which is not bound by it, if the latter accepts the provisions of this Protocol and so long as it applies them.

Article 4  Relationship between Chapter 3 and other provisions of the Convention and this Protocol

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

(a) the application of the provisions of Chapter I of the Convention and of Chapter 2 of this Protocol;

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

Chapter 2  General provisions regarding protection

Article 5  Safeguarding of cultural property

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

Article 6  Respect for cultural property

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

(a) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:

i. that cultural property has, by its function, been made into a military objective; and

ii. there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;

(b) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage;
(c) the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise;

(d) in case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given whenever circumstances permit.

**Article 7 Precautions in attack**

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

(a) do everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention;

(b) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental damage to cultural property protected under Article 4 of the Convention;

(c) refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated; and

(d) cancel or suspend an attack if it becomes apparent:

(i) that the objective is cultural property protected under Article 4 of the Convention;

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

**Article 8 Precautions against the effects of hostilities**

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

(a) remove movable cultural property from the vicinity of military objectives or provide for adequate in situ protection;

(b) avoid locating military objectives near cultural property.

**Article 9 Protection of cultural property in occupied territory**

1. Without prejudice to the provisions of Articles 4 and 5 of the Convention, a Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory:

(a) any illicit export, other removal or transfer of ownership of cultural property;

(b) any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property;

2. Any archaeological excavation of, alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence.

**Chapter 3 Enhanced Protection**

**Article 10 Enhanced protection**

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

(a) it is cultural heritage of the greatest importance for humanity;

(b) it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;

(c) it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.

**Article 11 The granting of enhanced protection**

1. Each Party should submit to the Committee a list of cultural property for which it intends to request the granting of enhanced protection.

2. The Party which has jurisdiction or control over the cultural property may request that it be included in the List to be established in accordance with Article 27 sub-paragraph 1(b). This request shall include all necessary information related to the criteria mentioned in Article 10. The Committee may invite a Party to request that cultural property be included in the List.

3. Other Parties, the International Committee of the Blue Shield and other non-governmental organisations with relevant expertise may recommend specific cultural property to the Committee. In such cases, the Committee may decide to invite a Party to request inclusion of that cultural property in the List.

4. Neither the request for inclusion of cultural property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State, nor its inclusion, shall in any way prejudice the rights of the parties to the dispute.

5. Upon receipt of a request for inclusion in the List, the Committee shall inform all Parties of the request. Parties may submit representations regarding such a request to the Committee within sixty days. These representations shall be made only on the basis of the criteria mentioned in Article 10. They shall be specific and related to facts. The Committee shall consider the representations, providing the Party requesting inclusion with a reasonable opportunity to respond before taking the decision. When such representations are before the Committee, decisions for inclusion in the List shall be taken, notwithstanding Article 26, by a majority of four-fifths of its members present and voting.
6. In deciding upon a request, the Committee should ask the advice of governmental and non-governmental organisations, as well as of individual experts.

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

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

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

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

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

Article 12 Immunity of cultural property under enhanced protection

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

Article 13 Loss of enhanced protection

1. Cultural property under enhanced protection shall only lose such protection:

(a) if such protection is suspended or cancelled in accordance with Article 14; or

(b) if, and for as long as, the property has, by its use, become a military objective.

2. In the circumstances of sub-paragraph 1(b), such property may only be the object of attack if:

(a) the attack is the only feasible means of terminating the use of the property referred to in sub-paragraph 1(b);

(b) all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to the cultural property,

(c) unless circumstances do not permit, due to requirements of immediate self-defence:

(i) the attack is ordered at the highest operational level of command;

(ii) effective advance warning is issued to the opposing forces requiring the termination of the use referred to in sub-paragraph 1(b); and

(iii) Reasonable time is given to the opposing forces to redress the situation.

Article 14 Suspension and cancellation of enhanced protection

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

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

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

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

Chapter 4 Criminal responsibility and jurisdiction

Article 15 Serious violations of this Protocol

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

(a) making cultural property under enhanced protection the object of attack;

(b) using cultural property under enhanced protection or its immediate surroundings in support of military action;

(c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;

(d) making cultural property protected under the Convention and this Protocol the object of attack;

(e) Theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences
punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

**Article 16  Jurisdiction**

1. Without prejudice to paragraph 2, each Party shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 in the following cases:
   
   (a) when such an offence is committed in the territory of that State;
   
   (b) when the alleged offender is a national of that State;
   
   (c) in the case of offences set forth in Article 15 sub-paragraphs (a) to (c), when the alleged offender is present in its territory.

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

   (a) this Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law;

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

**Article 17  Prosecution**

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

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

**Article 18  Extradition**

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

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

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

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

**Article 19  Mutual legal assistance**

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

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

**Article 20  Grounds for refusal**

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

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

**Article 21  Measures regarding other violations**

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

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

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

Article 22 Armed conflicts not of an international character

1. This Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.

3. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

4. Nothing in this Protocol shall prejudice the primary jurisdiction of a Party in whose territory an armed conflict not of an international character occurs over the violations set forth in Article 15.

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

6. The application of this Protocol to the situation referred to in paragraph 1 shall not affect the legal status of the parties to the conflict.

7. UNESCO may offer its services to the parties to the conflict.

Chapter 6 Institutional Issues

Article 23 Meeting of the Parties

1. The Meeting of the Parties shall be convened at the same time as the General Conference of UNESCO, and in co-ordination with the Meeting of the High Contracting Parties, if such a meeting has been called by the Director-General.

2. The Meeting of the Parties shall adopt its Rules of Procedure.

3. The Meeting of the Parties shall have the following functions:

(a) to elect the Members of the Committee, in accordance with Article 24 paragraph 1;

(b) to endorse the Guidelines developed by the Committee in accordance with Article 27 sub-paragraph 1(a);

(c) to provide guidelines for, and to supervise the use of the Fund by the Committee;

(d) to consider the report submitted by the Committee in accordance with Article 27 sub-
paragraph 1(d);

(e) to discuss any problem related to the application of this Protocol, and to make recommendations, as appropriate.

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

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

1. The Committee for the Protection of Cultural Property in the Event of Armed Conflict is hereby established. It shall be composed of twelve Parties which shall be elected by the Meeting of the Parties.

2. The Committee shall meet once a year in ordinary session and in extra-ordinary sessions whenever it deems necessary.

3. In determining membership of the Committee, Parties shall seek to ensure an equitable representation of the different regions and cultures of the world.

4. Parties members of the Committee shall choose as their representatives persons qualified in the fields of cultural heritage, defence or international law, and they shall endeavour, in consultation with one another, to ensure that the Committee as a whole contains adequate expertise in all these fields.

Article 25 Term of office

1. A Party shall be elected to the Committee for four years and shall be eligible for immediate re-election only once.

2. Notwithstanding the provisions of paragraph 1, the term of office of half of the members chosen at the time of the first election shall cease at the end of the first ordinary session of the Meeting of the Parties following that at which they were elected. These members shall be chosen by lot by the President of this Meeting after the first election.

Article 26 Rules of procedure

1. The Committee shall adopt its Rules of Procedure.

2. A majority of the members shall constitute a quorum. Decisions of the Committee shall be taken by a majority of two-thirds of its members voting.

3. Members shall not participate in the voting on any decisions relating to cultural property affected by an armed conflict to which they are parties.
1. The Committee shall have the following functions:

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

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

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

Article 28 Secretariat

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

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

1. A Fund is hereby established for the following purposes:

(a) to provide financial or other assistance in support of preparatory or other measures to be taken in peacetime in accordance with, inter alia, Article 5, Article 10 sub-paragraph (b) and Article 30; and
(b) to provide financial or other assistance in relation to emergency, provisional or other measures to be taken in order to protect cultural property during periods of armed conflict or of immediate recovery after the end of hostilities in accordance with, inter alia, Article 8 sub-paragraph (a).

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

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

4. The resources of the Fund shall consist of:

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

Chapter 7 Dissemination of Information and International Assistance

Article 30 Dissemination

1. The Parties shall endeavour by appropriate means, and in particular by educational and information programmes, to strengthen appreciation and respect for cultural property by their entire population.

2. The Parties shall disseminate this Protocol as widely as possible, both in time of peace and in time of armed conflict.

3. Any military or civilian authorities who, in time of armed conflict, assume responsibilities with respect to the application of this Protocol, shall be fully acquainted with the text thereof. To this end the Parties shall, as appropriate:

(a) incorporate guidelines and instructions on the protection of cultural property in their military regulations;
develop and implement, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime training and educational programmes;

(c) communicate to one another, through the Director General, information on the laws, administrative provisions and measures taken under sub-paragraphs (a) and (b);

(d) communicate to one another, as soon as possible, through the Director-General, the laws and administrative provisions which they may adopt to ensure the application of this Protocol.

Article 31 International cooperation

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

Article 32 International assistance

1. A Party may request from the Committee international assistance for cultural property under enhanced protection as well as assistance with respect to the preparation, development or implementation of the laws, administrative provisions and measures referred to in Article 10.

2. A party to the conflict, which is not a Party to this Protocol but which accepts and applies provisions in accordance with Article 3, paragraph 2, may request appropriate international assistance from the Committee.

3. The Committee shall adopt rules for the submission of requests for international assistance and shall define the forms the international assistance may take.

4. Parties are encouraged to give technical assistance of all kinds, through the Committee, to those Parties or parties to the conflict who request it.

Article 33 Assistance of UNESCO

1. A Party may call upon UNESCO for technical assistance in organizing the protection of its cultural property, such as preparatory action to safeguard cultural property, preventive and organizational measures for emergency situations and compilation of national inventories of cultural property, or in connection with any other problem arising out of the application of this Protocol. UNESCO shall accord such assistance within the limits fixed by its programme and by its resources.

2. Parties are encouraged to provide technical assistance at bilateral or multilateral level.

3. UNESCO is authorized to make, on its own initiative, proposals on these matters to the Parties.

Chapter 8 Execution of this Protocol

Article 34 Protecting Powers

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

Article 35 Conciliation procedure

1. The Protecting Powers shall lend their good offices in all cases where they may deem it useful in the interests of cultural property, particularly if there is disagreement between the Parties to the conflict as to the application or interpretation of the provisions of this Protocol.

2. For this purpose, each of the Protecting Powers may, either at the invitation of one Party, of the Director-General, or on its own initiative, propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for the protection of cultural property, if considered appropriate, on the territory of a State not party to the conflict. The Parties to the conflict shall be bound to give effect to the proposals for meeting made to them. The Protecting Powers shall propose for approval by the Parties to the conflict a person belonging to a State not party to the conflict or a person presented by the Director-General, which person shall be invited to take part in such a meeting in the capacity of Chairman.

Article 36 Conciliation in absence of Protecting Powers

1. In a conflict where no Protecting Powers are appointed the Director-General may lend good offices or act by any other form of conciliation or mediation, with a view to settling the disagreement.

2. At the invitation of one Party or of the Director-General, the Chairman of the Committee may propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for the protection of cultural property, if considered appropriate, on the territory of a State not party to the conflict.

Article 37 Translations and reports

1. The Parties shall translate this Protocol into their official languages and shall communicate these official translations to the Director-General.

2. The Parties shall submit to the Committee, every four years, a report on the implementation of this Protocol.

Article 38 State responsibility

No provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation.
Chapter 9  Final Clauses

Article 39  Languages

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

Article 40  Signature

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

Article 41  Ratification, acceptance or approval

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

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

Article 42  Accession

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

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

Article 43  Entry into force

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

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

Article 44  Entry into force in situations of armed conflict

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

Article 45  Denunciation

1. Each Party may denounced this Protocol.

2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General.

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

Article 46  Notifications

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

Article 47  Registration with the United Nations

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

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

DONE at The Hague, this twenty-sixth day of March 1999, in a single copy which shall be deposited in the archives of the UNESCO, and certified true copies of which shall be delivered to all the High Contracting Parties.
Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, 1980

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


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

Protocol on Blinding Laser Weapons (Protocol IV), 1995


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

Treaty Series

Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations

VOLUME 1342

Recueil des Traitées

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

No. 22495

MULTILATERAL

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

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

MULTILATÉRAL

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

CONVENTION\(^1\) ON PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCRIMINATE EFFECTS

The High Contracting Parties,

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

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

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

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

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

<table>
<thead>
<tr>
<th>State</th>
<th>Date of deposit of the instrument of ratification, acceptance, approval or accession of Protocols I, II and III</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>14 March 1983</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>15 October 1982</td>
</tr>
<tr>
<td>Byelorussian Soviet Socialist Republic</td>
<td>23 June 1982</td>
</tr>
<tr>
<td>China</td>
<td>7 April 1982</td>
</tr>
<tr>
<td>Czechoslovakia</td>
<td>31 August 1982</td>
</tr>
<tr>
<td>Denmark</td>
<td>7 July 1982</td>
</tr>
<tr>
<td>Ecuador</td>
<td>4 May 1983</td>
</tr>
<tr>
<td>Finland</td>
<td>8 April 1982</td>
</tr>
<tr>
<td>German Democratic Republic</td>
<td>20 July 1982</td>
</tr>
<tr>
<td>Hungary</td>
<td>14 June 1982</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>State</th>
<th>Date of deposit of the instrument of ratification, acceptance, approval or accession of Protocols I, II and III</th>
</tr>
</thead>
<tbody>
<tr>
<td>Norway</td>
<td>7 June 1983</td>
</tr>
</tbody>
</table>

Vol. 1342, 1-22495

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

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

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

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

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

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

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

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

Have agreed as follows:

**Article 1. Scope of Application**

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

**Article 2. Relations with Other International Agreements**

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

**Article 3. Signature**

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

**Article 4. Ratification, Acceptance, Approval or Accession**

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

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


\(2\) Ibid., vol. 1125, p. 3.

Vol. 1342, 1-22495
3. Expressions of consent to be bound by any of the Protocols annexed to this Convention shall be optional for each State, provided that at the time of the deposit of its instrument of ratification, acceptance or approval of this Convention or of accession thereto, that State shall notify the Depositary of its consent to be bound by any two or more of these Protocols.

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

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

Article 5. ENTRY INTO FORCE

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

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

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

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

Article 6. DISSEMINATION

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

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

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

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

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

4. This Convention, and the annexed Protocols by which a High Contracting Party is bound, shall apply with respect to an armed conflict against that High Contracting Party of the type referred to in Article 1, paragraph 4, of Additional Protocol I to the Geneva Convention of 12 August 1949 for the Protection of War Victims.
3. (a) If, after a period of ten years following the entry into force of this Convention, no conference has been convened in accordance with subparagraph 1 (a) or 2 (a) of this Article, any High Contracting Party may request the Depositary to convene a conference to which all High Contracting Parties shall be invited to review the scope and operation of this Convention and the Protocols annexed thereto and to consider any proposal for amendments of this Convention or of the existing Protocols. States not parties to this Convention shall be invited as observers to the conference. The conference may agree upon amendments which shall be adopted and enter into force in accordance with subparagraph 1 (b) above.

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

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

Article 9. DENUNCIATION

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

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

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

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

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

Article 10. DEPOSITORY

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

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

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

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

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

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

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

Article 11. AUTHENTIC TEXTS

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

PROTOCOL ON NON-DETECTABLE FRAGMENTS

(PROTOCOL I)

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

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

(PROTOCOL II)

Article 1. MATERIAL SCOPE OF APPLICATION

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

Article 2. DEFINITIONS

For the purpose of this Protocol:

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

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

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

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

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

6. “Recording” means a physical, administrative and technical operation designed to obtain, for the purpose of registration in the official records, all available information facilitating the location of minefields, mines and booby-traps.
Article 3. General restrictions on the use of mines, booby-traps and other devices

1. This Article applies to:
   (a) Mines;
   (b) Booby-traps; and
   (c) Other devices.

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

3. The indiscriminate use of weapons to which this Article applies is prohibited. Indiscriminate use is any placement of such weapons:
   (a) Which is not on, or directed against, a military objective; or
   (b) Which employs a method or means of delivery which cannot be directed at a specific military objective; or
   (c) Which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

4. All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

Article 4. Restrictions on the use of mines other than remotely delivered mines, booby-traps and other devices in populated areas

1. This Article applies to:
   (a) Mines other than remotely delivered mines;
   (b) Booby-traps; and
   (c) Other devices.

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

Article 5. Restrictions on the use of remotely delivered mines

1. The use of remotely delivered mines is prohibited unless such mines are only used within an area which is itself a military objective or which contains military objectives, and unless:
   (a) Their location can be accurately recorded in accordance with Article 7 (1) (a); or
   (b) An effective neutralizing mechanism is used on each such mine, that is to say, a self-actuating mechanism which is designed to render a mine harmless or cause it to destroy itself when it is anticipated that the mine will no longer serve the military purpose for which it was placed in position, or a remotely-controlled mechanism which is designed to render harmless or destroy a mine when the mine no longer serves the military purpose for which it was placed in position.

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

Article 6. Prohibition on the use of certain booby-traps

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

2. It is prohibited in all circumstances to use any booby-trap which is designed to cause superfluous injury or unnecessary suffering.

Article 7. Recording and publication of the location of minefields, mines and booby-traps

1. The parties to a conflict shall record the location of:
   (a) All pre-planned minefields laid by them; and
   (b) All areas in which they have made large-scale and pre-planned use of booby-traps.

2. The parties shall endeavour to ensure the recording of the location of all other minefields, mines and booby-traps which they have laid or placed in position.

3. All such records shall be retained by the parties who shall:
   (a) Immediately after the cessation of active hostilities:
      (i) Take all necessary and appropriate measures, including the use of such records, to protect civilians from the effects of minefields, mines and booby-traps; and either
      (ii) In cases where the forces of neither party are in the territory of the adverse party, make available to each other and to the Secretary-General of the United Nations all information in their possession concerning the location of minefields, mines and booby-traps in the territory of the adverse party; or
   (b) When a United Nations force or mission performs functions in any area, make available to the authority mentioned in Article 8 such information as is required by that Article;
   (c) Whenever possible, by mutual agreement, provide for the release of information concerning the location of minefields, mines and booby-traps, particularly in agreements governing the cessation of hostilities.
Article 8. Protection of United Nations Forces and Missions
From the Effects of Minefields, Mines and Booby-Traps
1. When a United Nations force or mission performs functions of peace-keeping, observation or similar functions in any area, each party to the conflict shall, if requested by the head of the United Nations force or mission in that area, as far as it is able:
   (a) Remove or render harmless all mines or booby-traps in that area;
   (b) Take such measures as may be necessary to protect the force or mission from the effects of minefields, mines and booby-traps while carrying out its duties; and
   (c) Make available to the head of the United Nations force or mission in that area, all information in the party’s possession concerning the location of minefields, mines and booby-traps in that area.

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

Article 9. International Co-operation in the Removal of Minefields, Mines and Booby-Traps
After the cessation of active hostilities, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of information and technical and maternal assistance — including, in appropriate circumstances, joint operations — necessary to remove or otherwise render ineffective minefields, mines and booby-traps placed in position during the conflict.

Technical Annex to the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II)

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

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

2. With regard to other minefields, mines and booby-traps laid or placed in position:
   In so far as possible, the relevant information specified in paragraph 1 above should be recorded so as to enable the areas containing minefields, mines and booby-traps to be identified.

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

Article 1. Definitions
For the purpose of this Protocol:
1. “Incendiary weapon” means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target.
   (a) Incendiary weapons can take the form of, for example, flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances.
   (b) Incendiary weapons do not include:
      (i) Munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems;
      (ii) Munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.
2. “Concentration of civilians” means any concentration of civilians, be it permanent or temporary, such as in inhabited parts of cities, or inhabited towns or villages, or in camps or columns of refugees or evacuees, or groups of nomads.
3. “Military objective” means, so far as objects are concerned, any object which by its nature location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
4. “Civilian objects” are all objects which are not military objectives as defined in paragraph 3.
5. “Feasible precautions” are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

Article 2. Protection of Civilians and Civilian Objects
1. It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons.
2. It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.
3. It is further prohibited to make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.
4. It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.
No. 22495. Multilateral
CONVENTION ON PROHIBITIONS OR
RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS WHICH MAY BE DEEMED TO BE EXCESSIVELY INJURIOUS OR TO HAVE INDISCERNIMATE EFFECTS (WITH PROTOCOLS I, II AND III). GENEVA, 10 OCTOBER 1980

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

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

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

Registration with the Secretariat of the United Nations: ex officio, 30 July 1998

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

No. 22495. Multilatéral
CONVENTION SUR L’INTERDICTION OU LA LIMITATION DE L’EMPLOI DE CERTAINES ARMES CLASSIQUES QUI PEUVENT ÊTRE CONSIDÉRÉES COMME PRODUISANT DES EFFETS TRAUMATIQUES EXCESSIFS OU COMME FRAPPANT SANS DISCRIMINATION (AVEC PROTOCOLES I, II ET III). GÉNEVE, 10 OCTOBRE 1980

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


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

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

Article 1.

ADDITIONAL PROTOCOL

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

"PROTOCOL ON BLINDING LASER WEAPONS

(PROTOCOL IV)

Article 1

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

Article 2.

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

Article 3.

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

Article 4.

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

Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations

VOLUME 2048

Recueil des Traités

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

United Nations • Nations Unies
New York, 2001
6. The application of the provisions of this Protocol to parties to a conflict, which are not High Contracting Parties that have accepted this Protocol, shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.

Article 2. Definitions

For the purpose of this Protocol:

1. "Mine" means a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle.

2. "Remotely-delivered mine" means a mine not directly emplaced but delivered by artillery, missile, rocket, mortar, or similar means, or dropped from an aircraft. Mines delivered from a land-based system from less than 500 metres are not considered to be "remotely delivered", provided that they are used in accordance with Article 5 and other relevant Articles of this Protocol.

3. "Anti-personnel mine" means a mine primarily designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.

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

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

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

7. "Civilian objects" are all objects which are not military objectives as defined in paragraph 6 of this Article.

8. "Minefield" is a defined area in which mines have been emplaced and "mined area" is an area which is dangerous due to the presence of mines. "Phoney minefield" means an area free of mines that simulates a minefield. The term "minefield" includes phoney minefields.

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

10. "Self-destruction mechanism" means an incorporated or externally attached automatically-functioning mechanism which secures the destruction of the munition into which it is incorporated or to which it is attached.

11. "Self-neutralization mechanism" means an incorporated automatically-functioning mechanism which renders inoperable the munition into which it is incorporated.
12. "Self-deactivating" means automatically rendering a munition inoperable by means of the irreversible exhaustion of a component, for example, a battery, that is essential to the operation of the munition.


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

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

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

1. This Article applies to:
   (a) Mines;
   (b) Booby-traps; and
   (c) Other devices.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

   (b) Such weapons are cleared before the area is abandoned, unless the area is turned over to the forces of another State which accept responsibility for the maintenance of the protections required by this Article and the subsequent clearance of those weapons.
3. A party to a conflict is relieved from further compliance with the provisions of sub-paragraphs 2 (a) and 2 (b) of this Article only if such compliance is not feasible due to forcible loss of control of the area as a result of enemy military action, including situations where direct enemy military action makes it impossible to comply. If that party regains control of the area, it shall resume compliance with the provisions of sub-paragraphs 2 (a) and 2 (b) of this Article.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 8. Transfers

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

(a) Undertakes not to transfer any mine the use of which is prohibited by this Protocol;
(b) Undertakes not to transfer any mine to any recipient other than a State or a State agency authorized to receive such transfers;
(c) Undertakes to exercise restraint in the transfer of any mine the use of which is restricted by this Protocol. In particular, each High Contracting Party undertakes not to transfer any anti-personnel mines to States which are not bound by this Protocol, unless the recipient State agrees to apply this Protocol; and
(d) Undertakes to ensure that any transfer in accordance with this Article takes place in full compliance, by both the transferring and the recipient State, with the relevant provisions of this Protocol and the applicable norms of international humanitarian law.

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

3. All High Contracting Parties, pending the entry into force of this Protocol, will refrain from any actions which would be inconsistent with sub-paragraph 1 (a) of this Article.
Article 9. Recording and use of information on minefields, mined areas, mines, booby-traps and other devices

1. All information concerning minefields, mined areas, mines, booby-traps and other devices shall be recorded in accordance with the provisions of the Technical Annex.

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

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

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

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

1. Without delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with Article 3 and paragraph 2 of Article 5 of this Protocol.

2. High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control.

3. With respect to minefields, mined areas, mines, booby-traps and other devices laid by a party in areas over which it no longer exercises control, such party shall provide to the party in control of the area pursuant to paragraph 2 of this Article, to the extent permitted by such party, technical and material assistance necessary to fulfill such responsibility.

4. At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfill such responsibilities.

Article 11. Technological cooperation and assistance

1. Each High Contracting Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information concerning the implementation of this Protocol and means of mine clearance. In particular, High Contracting Parties shall not impose undue restrictions on the provision of mine clearance equipment and related technological information for humanitarian purposes.

2. Each High Contracting Party undertakes to provide information to the database on mine clearance established within the United Nations System, especially information concerning various means and technologies of mine clearance, and lists of experts, expert agencies or national points of contact on mine clearance.

3. Each High Contracting Party in a position to do so shall provide assistance for mine clearance through the United Nations System, other international bodies or on a bilateral basis, or contribute to the United Nations Voluntary Trust Fund for Assistance in Mine Clearance.

4. Requests by High Contracting Parties for assistance, substantiated by relevant information, may be submitted to the United Nations, to other appropriate bodies or to other States. These requests may be submitted to the Secretary-General of the United Nations, who shall transmit them to all High Contracting Parties and to relevant international organizations.

5. In the case of requests to the United Nations, the Secretary-General of the United Nations, within the resources available to the Secretary-General of the United Nations, may take appropriate steps to assess the situation and, in cooperation with the requesting High Contracting Party, determine the appropriate provision of assistance in mine clearance or implementation of the Protocol. The Secretary-General may also report to High Contracting Parties on any such assessment as well as on the type and scope of assistance required.

6. Without prejudice to their constitutional and other legal provisions, the High Contracting Parties undertake to cooperate and transfer technology to facilitate the implementation of the relevant prohibitions and restrictions set out in this Protocol.

7. Each High Contracting Party has the right to seek and receive technical assistance, where appropriate, from another High Contracting Party on specific relevant technology, other than weapons technology, as necessary and feasible, with a view to reducing any period of deferral for which provision is made in the Technical Annex.

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

1. Application

(a) With the exception of the forces and missions referred to in sub-paragraph 2(a)(i) of this Article, this Article applies only to missions which are performing functions in an area with the consent of the High Contracting Party on whose territory the functions are performed.
(b) The application of the provisions of this Article to parties to a conflict which are not High Contracting Parties shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.

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

2. Peace-keeping and certain other forces and mission

(a) This paragraph applies to:

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Missions of the International Committee of the Red Cross

(a) This paragraph applies to any mission of the International Committee of the Red Cross performing functions with the consent of the host State or States as provided for by the Geneva Conventions of 12 August 1949 and, where applicable, their Additional Protocols.

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

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

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

5. Other humanitarian missions and missions of enquiry

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

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

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

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

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

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

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

6. Confidentiality

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

7. Respect for laws and regulations

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

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

Article 13. Consultations of High Contracting Parties

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

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

2. Participation in the annual conferences shall be determined by their agreed Rules of Procedure.
3. The work of the conference shall include:
   (a) Review of the operation and status of this Protocol;
   (b) Consideration of matters arising from reports by High Contracting Parties according to paragraph 4 of this Article;
   (c) Preparation for review conferences; and
   (d) Consideration of the development of technologies to protect civilians against indiscriminate effects of mines.

4. The High Contracting Parties shall provide annual reports to the Depositary, who shall circulate them to all High Contracting Parties in advance of the conference, on any of the following matters:
   (a) Dissemination of information on this Protocol to their armed forces and to the civilian population;
   (b) Mine clearance and rehabilitation programmes;
   (c) Steps taken to meet technical requirements of this Protocol and any other relevant information pertaining thereto;
   (d) Legislation related to this Protocol;
   (e) Measures taken on international technical information exchange, on international cooperation on mine clearance, and on technical cooperation and assistance; and
   (f) Other relevant matters.

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

Article 14. Compliance

1. Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction or control.

2. The measures envisaged in paragraph 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, wilfully kill or cause serious injury to civilians and to bring such persons to justice.

3. Each High Contracting Party shall also require that its armed forces issue relevant military instructions and operating procedures and that armed forces personnel receive training commensurate with their duties and responsibilities to comply with the provisions of this Protocol.

4. The High Contracting Parties undertake to consult each other and to cooperate with each other bilaterally, through the Secretary-General of the United Nations or through other appropriate international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol.

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

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

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

3. Specifications on self-destruction and self-deactivation

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

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

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

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

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

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

4. International signs for minefields and mined areas

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

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

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

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

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

(e) Spacing: signs should be placed around the minefield or mined area at a distance sufficient to ensure their visibility at any point by a civilian approaching the area."
This amended Protocol shall enter into force as provided for in paragraph 1 (b) of Article 8 of the Convention.
No. 22495. Multilateral


Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 21 December 2001

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

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

Registration with the Secretariat of the United Nations: ex officio, 18 May 2004

---

No. 22495. Multilateral

Convention sur l'interdiction ou la limitation de l’emploi de certaines armes classiques qui peuvent être considérées comme produisant des effets traumatiques excessifs ou comme frappant sans discrimination (avec protocoles I, II et III). Genève, 10 octobre 1980

Amendement à la Convention sur l’interdiction ou la limitation de l’emploi de certaines armes classiques qui peuvent être considérées comme produisant des effets traumatiques excessifs ou comme frappant sans discrimination. Genève, 21 décembre 2001

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

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


---

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

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

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

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

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

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

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

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

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

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

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

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

Registration with the Secretariat of the United Nations: ex officio, 12 November 2006
PROTOCOL ON EXPLOSIVE REMNANTS OF WAR

The High Contracting Parties,

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

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

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

Have agreed as follows:

Article 1. General provision and scope of application

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

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

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

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

Article 2. Definitions

For the purpose of this Protocol,

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

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

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

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

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

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

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

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

3. After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall take the following measures in affected territories under its control, to reduce the risks posed by explosive remnants of war:
   (a) survey and assess the threat posed by explosive remnants of war;
   (b) assess and prioritise needs and practicability in terms of marking and clearance, removal or destruction;
   (c) mark and clear, remove or destroy explosive remnants of war;
   (d) take steps to mobilise resources to carry out these activities.

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

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

Article 4. Recording, retaining and transmission of information

1. High Contracting Parties and parties to an armed conflict shall to the maximum extent possible and as far as practicable record and retain information on the use of explo-
Article 7: Assistance with respect to existing explosive remnants of war

1. Each High Contracting Party has the right to seek and receive assistance, where appropriate, from other High Contracting Parties, from states not party to this Protocol, and from relevant international organizations and institutions dealing with the problems posed by existing explosive remnants of war.

2. Each High Contracting Party may, in a position to do so, shall provide assistance for the marking, clearance, removal or destruction of explosive remnants of war, and for risk education to civilian populations and related activities inter alia through the United Nations system, other relevant international, regional or national organizations or institutions, the International Committee of the Red Cross, national Red Cross or Red Crescent societies, and their national and international Federation, non-governmental organizations, or on a bilateral basis.

3. Each High Contracting Party shall have the right to participate in the full possession of assistance under this Protocol, by means of experts, agencies or national authorities, on a bilateral basis.

4. Each High Contracting Party shall have the right to participate in the full possession of assistance under this Protocol, by means of experts, agencies or national authorities, on a bilateral basis.

Article 8: Cooperation and assistance

1. Each High Contracting Party in position to do so shall provide assistance for the education of civilian populations and related activities inter alia through the United Nations system, other relevant international, regional or national organizations or institutions, the International Committee of the Red Cross, national Red Cross or Red Crescent societies, and their national and international Federation, non-governmental organizations, or on a bilateral basis.

2. Each High Contracting Party shall have the right to participate in the full possession of assistance under this Protocol, by means of experts, agencies or national authorities, on a bilateral basis.
transmit them to all High Contracting Parties and to relevant international organisations and non-governmental organisations.

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

Article 9. Generic preventive measures

1. Bearing in mind the different situations and capacities, each High Contracting Party is encouraged to take generic preventive measures aimed at minimising the occurrence of explosive remnants of war, including, but not limited to, those referred to in part 3 of the Technical Annex.

2. Each High Contracting Party may, on a voluntary basis, exchange information related to efforts to promote and establish best practices in respect of paragraph 1 of this Article.

Article 10. Consultations of High Contracting Parties

1. The High Contracting Parties undertake to consult and co-operate with each other on all issues related to the operation of this Protocol. For this purpose, a Conference of High Contracting Parties shall be held as agreed to by a majority, but no less than eighteen High Contracting Parties.

2. The work of the conferences of High Contracting Parties shall include:
   (a) review of the status and operation of this Protocol;
   (b) consideration of matters pertaining to national implementation of this Protocol, including national reporting or updating on an annual basis.
   (c) preparation for review conferences.

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

Article 11. Compliance

1. Each High Contracting Party shall require that its armed forces and relevant agencies or departments issue appropriate instructions and operating procedures and that its personnel receive training consistent with the relevant provisions of this Protocol.

2. The High Contracting Parties undertake to consult each other and to co-operate with each other bilaterally, through the Secretary-General of the United Nations or through other appropriate international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol.
TECHNICAL ANNEX

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

1. Recording, storage and release of information for Unexploded Ordnance (UXO) and Abandoned Explosive Ordnance (AXO)
   (a) Recording of information: Regarding explosive ordnance which may have become UXO a State should endeavour to record the following information as accurately as possible:
      (i) the location of areas targeted using explosive ordnance;
      (ii) the approximate number of explosive ordnance used in the areas under (i);
      (iii) the type and nature of explosive ordnance used in areas under (i);
      (iv) the general location of known and probable UXO;

   Where a State has been obliged to abandon explosive ordnance in the course of operations, it should endeavour to leave AXO in a safe and secure manner and record information on this ordnance as follows:
      (v) the location of AXO;
      (vi) the approximate amount of AXO at each specific site;
      (vii) the types of AXO at each specific site.

   (b) Storage of information: Where a State has recorded information in accordance with paragraph (a), it should be stored in such a manner as to allow for its retrieval and subsequent release in accordance with paragraph (c).

   (c) Release of information: Information recorded and stored by a State in accordance with paragraphs (a) and (b) should, taking into account the security interests and other obligations of the State providing the information, be released in accordance with the following provisions:
      (i) Content:
          On UXO the released information should contain details on:
          (1) the general location of known and probable UXO;
          (2) the types and approximate number of explosive ordnance used in the targeted areas;
          (3) the method of identifying the explosive ordnance including colour, size and shape and other relevant markings;
          (4) the method for safe disposal of the explosive ordnance.
      On AXO the released information should contain details on:
      (5) the location of the AXO;
      (6) the approximate number of AXO at each specific site;
      (7) the types of AXO at each specific site;

     (8) the method of identifying the AXO, including colour, size and shape;
     (9) information on type and methods of packing for AXO;
     (10) state of readiness;
     (11) the location and nature of any booby traps known to be present in the area of AXO.

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

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

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

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

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

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

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

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

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

      (f) Parties to a conflict should employ third parties such as international organisations and non-governmental organisations when they do not have the resources and skills to deliver effective risk education.
(g) Parties to a conflict should, if possible, provide additional resources for warnings and risk education. Such items might include: provision of logistical support, production of risk education materials, financial support and general cartographic information.

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

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

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

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

3. Generic preventive measures

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

(a) Munitions manufacturing management

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

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

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

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

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

(b) Munitions management

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

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

(ii) A State should transport explosive ordnance to and from production facilities, storage facilities and the field in a manner that minimises damage to the explosive ordnance.

(iii) Appropriate containers and controlled environments, where necessary, should be used by a State when stockpiling and transporting explosive ordnance.

(iv) The risk of explosions in stockpiles should be minimised by the use of appropriate stockpile arrangements.

(v) States should apply appropriate explosive ordnance logging, tracking and testing procedures, which should include information on the date of manufacture of each number, lot or batch of explosive ordnance, and information on where the explosive ordnance has been, under what conditions it has been stored, and to what environmental factors it has been exposed.

(vi) Periodically, stockpiled explosive ordnance should undergo, where appropriate, live-firing testing to ensure that munitions function as desired.

(vii) Sub-assemblies of stockpiled explosive ordnance should, where appropriate, undergo laboratory testing to ensure that munitions function as desired.

(viii) Where necessary, appropriate action, including adjustment to the expected shelf-life of ordnance, should be taken as a result of information acquired by logging, tracking and testing procedures, in order to maintain the reliability of stockpiled explosive ordnance.

(c) Training

The proper training of all personnel involved in the handling, transporting and use of explosive ordnance is an important factor in seeking to ensure its reliable operation as intended. States should therefore adopt and maintain suitable training programmes to ensure that personnel are properly trained with regard to the munitions with which they will be required to deal.

(d) Transfer

A State planning to transfer explosive ordnance to another State that did not previously possess that type of explosive ordnance should endeavour to ensure that the receiving State has the capability to store, maintain and use that explosive ordnance correctly.

(e) Future production

A State should examine ways and means of improving the reliability of explosive ordnance that it intends to produce or procure, with a view to achieving the highest possible reliability.
San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 1994
PART I: GENERAL PROVISIONS

SECTION I: SCOPE OF APPLICATION OF THE LAW

1. The parties to an armed conflict at sea are bound by the principles and rules of international humanitarian law from the moment armed force is used.

2. In cases not covered by this document or by international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of the public conscience.

SECTION II: ARMED CONFLICTS AND THE LAW OF SELF-DEFENCE

3. The exercise of the right of individual or collective self-defence recognized in Article 51 of the Charter of the United Nations is subject to the conditions and limitations laid down in the Charter, and arising from general international law, including in particular the principles of necessity and proportionality.

4. The principles of necessity and proportionality apply equally to armed conflict at sea and require that the conduct of hostilities by a State should not exceed the degree and kind of force, not otherwise prohibited by the law of armed conflict, required to repel an armed attack against it and to restore its security.

5. How far a State is justified in its military actions against the enemy will depend upon the intensity and scale of the armed attack for which the enemy is responsible and the gravity of the threat posed.

6. The rules set out in this document and any other rules of international humanitarian law shall apply equally to all parties to the conflict. The equal application of these rules to all parties to the conflict shall not be affected by the international responsibility that may have been incurred by any of them for the outbreak of the conflict.

SECTION III: ARMED CONFLICTS IN WHICH THE SECURITY COUNCIL HAS TAKEN ACTION

7. Notwithstanding any rule in this document or elsewhere on the law of neutrality, where the Security Council, acting in accordance with its powers under Chapter VII of the Charter of the United Nations, has identified one or more of the parties to an armed conflict as responsible for resorting to force in violation of international law, neutral States:

(a) are bound not to lend assistance other than humanitarian assistance to that State; and
(b) may lend assistance to any State which has been the victim of a breach of the peace or an act of aggression by that State.

8. Where, in the course of an international armed conflict, the Security Council has taken preventive or enforcement action involving the application of economic measures under Chapter VII of the Charter, Member States of the United Nations may not rely upon the law of neutrality to justify conduct which would be incompatible with their obligations under the Charter or under decisions of the Security Council.

9. Subject to paragraph 7, where the Security Council has taken a decision to use force, or to authorize the use of force by a particular State or States, the rules set out in this document and any other rules of international humanitarian law applicable to armed conflicts at sea shall apply to all parties to any such conflict which may ensue.

SECTION IV: AREAS OF NAVAL WARFARE

10. Subject to other applicable rules of the law of armed conflict at sea contained in this document or elsewhere, hostile actions by naval forces may be conducted in, on or over.
(a) the territorial sea and internal waters, the land territories, the exclusive economic zone and continental shelf and, where applicable, the archipelagic waters, of belligerent States;

(b) the high seas; and

(c) subject to paragraphs 34 and 35, the exclusive economic zone and the continental shelf of neutral States.

11. The parties to the conflict are encouraged to agree that no hostile actions will be conducted in marine areas containing:

(a) rare or fragile ecosystems; or

(b) the habitat of depleted, threatened or endangered species or other forms of marine life.

12. In carrying out operations in areas where neutral States enjoy sovereign rights, jurisdiction, or other rights under general international law, belligerents shall have due regard for the legitimate rights and duties of those neutral States.

SECTION V: DEFINITIONS

13. For the purposes of this document:

(a) international humanitarian law means international rules, established by treaties or custom, which limit the right of parties to a conflict to use the methods or means of warfare of their choice, or which protect States not party to the conflict or persons and objects that are, or may be, affected by the conflict;

(b) attack means an act of violence, whether in offence or in defence;

(c) collateral casualties or collateral damage means the loss of life of, or injury to, civilians or other protected persons, and damage to or the destruction of the natural environment or objects that are not in themselves military objectives;

(d) neutral means any State not party to the conflict;

(e) hospital ships, coastal rescue craft and other medical transports means vessels that are protected under the Second Geneva Convention of 1949 and Additional Protocol I of 1977;

(f) medical aircraft means an aircraft that is protected under the Geneva Conventions of 1949 and Additional Protocol I of 1977;

(g) warship means a ship belonging to the armed forces of a State bearing the external marks distinguishing the character and nationality of such a ship, under the command of an officer duly commissioned by the government of that State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline;

(h) auxiliary vessel means a vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service;

(i) merchant vessel means a vessel, other than a warship, an auxiliary vessel, or a State vessel such as a customs or police vessel, that is engaged in commercial or private service;

(j) military aircraft means an aircraft operated by commissioned units of the armed forces of a State having the military marks of that State, commanded by a member of the armed forces and manned by a crew subject to regular armed forces discipline;

(k) auxiliary aircraft means an aircraft, other than a military aircraft, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service;

(l) civil aircraft means an aircraft other than a military, auxiliary, or State aircraft such as a customs or police aircraft, that is engaged in commercial or private service;

(m) civil airliner means a civil aircraft that is clearly marked and engaged in carrying civilian passengers in scheduled or non-scheduled services along Air Traffic Service routes.

PART II: REGIONS OF OPERATIONS

SECTION I: INTERNAL WATERS, TERRITORIAL SEA AND ARCHIPELAGIC WATERS

14. Neutral waters consist of the internal waters, territorial sea, and, where applicable, the archipelagic waters, of neutral States. Neutral airspace consists of the airspace over neutral waters and the land territory of neutral States.

15. Within and over neutral waters, including neutral waters comprising an international strait and waters in which the right of archipelagic sea lanes passage may be exercised, hostile actions by belligerent forces are forbidden. A neutral State must take such measures as are consistent with Section II of this Part, including the exercise of surveillance, as the means at its disposal allow, to prevent the violation of its neutrality by belligerent forces.
16. Hostile actions within the meaning of paragraph 15 include, inter alia:

(a) attack on or capture of persons or objects located in, on or over neutral waters or territory;
(b) use as a base of operations, including attack on or capture of persons or objects located outside neutral waters, if the attack or seizure is conducted by belligerent forces located in, on or over neutral waters;
(c) laying of mines; or
(d) visit, search, diversion or capture.

17. Belligerent forces may not use neutral waters as a sanctuary.

18. Belligerent military and auxiliary aircraft may not enter neutral airspace. Should they do so, the neutral State shall use the means at its disposal to require the aircraft to land within its territory and shall intern the aircraft and its crew for the duration of the armed conflict. Should the aircraft fail to follow the instructions to land, it may be attacked, subject to the special rules relating to medical aircraft as specified in paragraphs 181-183.

19. Subject to paragraphs 29 and 33, a neutral State may, on a non-discriminatory basis, condition, restrict or prohibit the entrance to or passage through its neutral waters by belligerent warships and auxiliary vessels.

20. Subject to the duty of impartiality, and to paragraphs 21 and 23-33, and under such regulations as it may establish, a neutral State may, without jeopardizing its neutrality, permit the following acts within its neutral waters:

(a) passage through its territorial sea, and where applicable its archipelagic waters, by warships, auxiliary vessels and prizes of belligerent States; warships, auxiliary vessels and prizes may employ pilots of the neutral State during passage;
(b) replenishment by a belligerent warship or auxiliary vessel of its food, water and fuel sufficient to reach a port in its own territory; and
(c) repairs of belligerent warships or auxiliary vessels found necessary by the neutral State to make them seaworthy; such repairs may not restore or increase their fighting strength.

21. A belligerent warship or auxiliary vessel may not extend the duration of its passage through neutral waters, or its presence in those waters for replenishment or repair, for longer than 24 hours unless unavoidable on account of damage or the stress of weather. The foregoing rule does not apply in international straits and waters in which the right of archipelagic sea lanes passage is exercised.

22. Should a belligerent State be in violation of the regime of neutral waters, as set out in this document, the neutral State is under an obligation to take the measures necessary to terminate the violation. If the neutral State fails to terminate the violation of its neutral waters by a belligerent, the opposing belligerent must so notify the neutral State and give that neutral State a reasonable time to terminate the violation by the belligerent. If the violation of the neutrality of the State by the belligerent constitutes a serious and immediate threat to the security of the opposing belligerent and the violation is not terminated, then that belligerent may, in the absence of any feasible and timely alternative, use such force as is strictly necessary to respond to the threat posed by the violation.

SECTION II: INTERNATIONAL STRAITS AND ARCHIPELAGIC SEA Lanes

General rules

23. Belligerent warships and auxiliary vessels and military and auxiliary aircraft may exercise the rights of passage through, under or over neutral international straits and of archipelagic sea lanes passage provided by general international law.

24. The neutrality of a State bordering an international strait is not jeopardized by the transit passage of belligerent warships, auxiliary vessels, or military or auxiliary aircraft, nor by the innocent passage of belligerent warships or auxiliary vessels through that strait.

25. The neutrality of an archipelagic State is not jeopardized by the exercise of archipelagic sea lanes passage by belligerent warships, auxiliary vessels, or military or auxiliary aircraft.

26. Neutral warships, auxiliary vessels, and military and auxiliary aircraft may exercise the rights of passage provided by general international law through, under and over belligerent international straits and archipelagic waters. The neutral State should, as a precautionary measure, give timely notice of its exercise of the rights of
passage to the belligerent State.

Transit passage and archipelagic sea lanes passage

27. The rights of transit passage and archipelagic sea lanes passage applicable to international straits and archipelagic waters in peacetime continue to apply in times of armed conflict. The laws and regulations of States bordering straits and archipelagic States relating to transit passage and archipelagic sea lanes passage adopted in accordance with general international law remain applicable.

28. Belligerent and neutral surface ships, submarines and aircraft have the rights of transit passage and archipelagic sea lanes passage through, under, and over all straits and archipelagic waters to which these rights generally apply.

29. Neutral States may not suspend, hamper, or otherwise impede the right of transit passage nor the right of archipelagic sea lanes passage.

30. A belligerent in transit passage through, under and over a neutral international strait, or in archipelagic sea lanes passage through, under and over neutral archipelagic waters, is required to proceed without delay, to refrain from the threat or use of force against the territorial integrity or political independence of the neutral littoral or archipelagic State, or in any other manner inconsistent with the purposes of the Charter of the United Nations, and otherwise to refrain from any hostile actions or other activities not incident to their transit. Belligerents passing through, under and over neutral straits or waters in which the right of archipelagic sea lanes passage applies are permitted to take defensive measures consistent with their security, including launching and recovery of aircraft, screen formation steering, and acoustic and electronic surveillance. Belligerents in transit or archipelagic sea lanes passage may not, however, conduct offensive operations against enemy forces, nor use such neutral waters as a place of sanctuary nor as a base of operations.

Innocent passage

31. In addition to the exercise of the rights of transit and archipelagic sea lanes passage, belligerent warships and auxiliary vessels may, subject to paragraphs 19 and 21, exercise the right of innocent passage through neutral international straits and archipelagic waters in accordance with general international law.

32. Neutral vessels may likewise exercise the right of innocent passage through belligerent international straits and archipelagic waters.

33. The right of non-suspendable innocent passage ascribed to certain international straits by international law may not be suspended in time of armed conflict.

SECTION III: EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF

34. If hostile actions are conducted within the exclusive economic zone or on the continental shelf of a neutral State, belligerent States shall, in addition to observing the other applicable rules of the law of armed conflict at sea, have due regard for the rights and duties of the coastal State, inter alia, for the exploration and exploitation of the economic resources of the exclusive economic zone and the continental shelf and the protection and preservation of the marine environment. They shall, in particular, have due regard for artificial islands, installations, structures and safety zones established by neutral States in the exclusive economic zone and on the continental shelf.

35. If a belligerent considers it necessary to lay mines in the exclusive economic zone or the continental shelf of a neutral State, the belligerent shall notify that State, and shall ensure, inter alia, that the size of the minefield and the type of mines used do not endanger artificial islands, installations and structures, nor interfere with access thereto, and shall avoid so far as practicable interference with the exploration or exploitation of the zone by the neutral State. Due regard shall also be given to the protection and preservation of the marine environment.

SECTION IV: HIGH SEAS AND SEA-BED BEYOND NATIONAL JURISDICTION

36. Hostile actions on the high seas shall be conducted with due regard for the exercise by neutral States of rights of exploration and exploitation of the natural resources of the sea-bed, and ocean floor, and the subsoil thereof, beyond national jurisdiction.

37. Belligerents shall take care to avoid damage to cables and pipelines laid on the sea-bed which do not
exclusively serve the belligerents.

PART III: BASIC RULES AND TARGET DISCRIMINATION

SECTION I: BASIC RULES

38. In any armed conflict the right of the parties to the conflict to choose methods or means of warfare is not unlimited.

39. Parties to the conflict shall at all times distinguish between civilians or other protected persons and combatants and between civilian or exempt objects and military objectives.

40. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

41. Attacks shall be limited strictly to military objectives. Merchant vessels and civil aircraft are civilian objects unless they are military objectives in accordance with the principles and rules set forth in this document.

42. In addition to any specific prohibitions binding upon the parties to a conflict, it is forbidden to employ methods or means of warfare which:

(a) are of a nature to cause superfluous injury or unnecessary suffering; or
(b) are indiscriminate, in that:
(i) they are not, or cannot be, directed against a specific military objective; or
(ii) their effects cannot be limited as required by international law as reflected in this document.

43. It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

44. Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited.

45. Surface ships, submarines and aircraft are bound by the same principles and rules.

SECTION II: PRECAUTIONS IN ATTACK

46. With respect to attacks, the following precautions shall be taken:

(a) those who plan, decide upon or execute an attack must take all feasible measures to gather information which will assist in determining whether or not objects which are not military objectives are present in an area of attack;
(b) in the light of the information available to them, those who plan, decide upon or execute an attack shall do everything feasible to ensure that attacks are limited to military objectives;
(c) they shall furthermore take all feasible precautions in the choice of methods and means in order to avoid or minimize collateral casualties or damage; and
(d) an attack shall not be launched if it may be expected to cause collateral casualties or damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole, an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive.

Section VI of this Part provides additional precautions regarding civil aircraft.

SECTION III: ENEMY VESSELS AND AIRCRAFT EXEMPT FROM ATTACK

Classes of vessels exempt from attack

47. The following classes of enemy vessels are exempt from attack:

(a) hospital ships;
(b) small craft used for coastal rescue operations and other medical transports;
(c) vessels granted safe conduct by agreement between the belligerent parties including:
(i) cartel vessels, e.g., vessels designated for and engaged in the transport of prisoners of war;
(ii) vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations;
(d) vessels engaged in transporting cultural property under special protection;
(e) passenger vessels when engaged only in carrying civilian passengers;
(f) vessels charged with religious, non-military scientific or philanthropic missions, vessels collecting scientific data of likely military applications are not protected;
(g) small coastal fishing vessels and small boats engaged in local coastal trade, but they are subject to the regulations of a belligerent naval commander operating in the area and to inspection;
(h) vessels designated or adapted exclusively for responding to pollution incidents in the marine environment;
(i) vessels which have surrendered;
(j) life rafts and life boats.

Conditions of exemption

48. Vessels listed in paragraph 47 are exempt from attack only if they:

(a) are innocently employed in their normal role;
(b) submit to identification and inspection when required; and
(c) do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required.

Loss of exemption

Hospital ships

49. The exemption from attack of a hospital ship may cease only by reason of a breach of a condition of exemption in paragraph 48 and, in such a case, only after due warning has been given naming in all appropriate cases a reasonable time limit to discharge itself of the cause endangering its exemption, and after such warning has remained unheeded.

50. If after due warning a hospital ship persists in breaking a condition of its exemption, it renders itself liable to capture or other necessary measures to enforce compliance.

51. A hospital ship may only be attacked as a last resort if:

(a) diversion or capture is not feasible;
(b) no other method is available for exercising military control;
(c) the circumstances of non-compliance are sufficiently grave that the hospital ship has become, or may be reasonably assumed to be, a military objective; and
(d) the collateral casualties or damage will not be disproportionate to the military advantage gained or expected.

All other categories of vessels exempt from attack

52. If any other class of vessel exempt from attack breaches any of the conditions of its exemption in paragraph 48, it may be attacked only if:

(a) diversion or capture is not feasible;
(b) no other method is available for exercising military control;
(c) the circumstances of non-compliance are sufficiently grave that the vessel has become, or may be reasonably assumed to be, a military objective; and
(d) the collateral casualties or damage will not be disproportionate to the military advantage gained or expected.

Classes of aircraft exempt from attack

53. The following classes of enemy aircraft are exempt from attack:

(a) medical aircraft;
(b) aircraft granted safe conduct by agreement between the parties to the conflicts; and
(c) civil airliners.

Conditions of exemption for medical aircraft

54. Medical aircraft are exempt from attack only if they:
(a) have been recognized as such;
(b) are acting in compliance with an agreement as specified in paragraph 177;
(c) fly in areas under the control of own or friendly forces; or
(d) fly outside the area of armed conflict.

In other instances, medical aircraft operate at their own risk.

Conditions of exemption for aircraft granted safe conduct

55. Aircraft granted safe conduct are exempt from attack only if they:

(a) are innocently employed in their agreed role;
(b) do not intentionally hamper the movements of combatants; and
(c) comply with the details of the agreement, including availability for inspection.

Conditions of exemption for civil airliners

56. Civil airliners are exempt from attack only if they:

(a) are innocently employed in their normal role; and
(b) do not intentionally hamper the movements of combatants.

Loss of exemption

57. If aircraft exempt from attack breach any of the applicable conditions of their exemption as set forth in paragraphs 54-56, they may be attacked only if:

(a) diversion for landing, visit and search, and possible capture, is not feasible;
(b) no other method is available for exercising military control;
(c) the circumstances of non-compliance are sufficiently grave that the aircraft has become, or may be reasonably assumed to be, a military objective; and
(d) the collateral casualties or damage will not be disproportionate to the military advantage gained or anticipated.

58. In case of doubt whether a vessel or aircraft exempt from attack is being used to make an effective contribution to military action, it shall be presumed not to be so used.

SECTION IV : OTHER ENEMY VESSELS AND AIRCRAFT

Enemy merchant vessels

59. Enemy merchant vessels may only be attacked if they meet the definition of a military objective in paragraph 40.

60. The following activities may render enemy merchant vessels military objectives:

(a) engaging in belligerent acts on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;
(b) acting as an auxiliary to an enemy s armed forces, e.g., carrying troops or replenishing warships;
(c) being incorporated into or assisting the enemy s intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
(d) sailing under convoy of enemy warships or military aircraft;
(e) refusing an order to stop or actively resisting visit, search or capture;
(f) being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defence of personnel, e.g., against pirates, and purely defective systems such as chaff; or
(g) otherwise making an effective contribution to military action, e.g., carrying military materials.

61. Any attacks on these vessels is subject to the basic rules set out in paragraphs 38-46.

Enemy civil aircraft
62. Enemy civil aircraft may only be attacked if they meet the definition of a military objective in paragraph 40.

63. The following activities may render enemy civil aircraft military objectives:

(a) engaging in acts of war on behalf of the enemy, e.g., laying mines, minesweeping, laying or monitoring acoustic sensors, engaging in electronic warfare, intercepting or attacking other civil aircraft, or providing targeting information to enemy forces;
(b) acting as an auxiliary aircraft to an enemy’s armed forces, e.g., transporting troops or military cargo, or refuelling military aircraft;
(c) being incorporated into or assisting the enemy’s intelligence-gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
(d) flying under the protection of accompanying enemy warships or military aircraft;
(e) refusing an order to identify itself, divert from its track, or proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible, or operating fire control equipment that could reasonably be construed to be part of an aircraft weapon system, or on being intercepted clearly manoeuvring to attack the intercepting belligerent military aircraft;
(f) being armed with air-to-air or air-to-surface weapons; or
(g) otherwise making an effective contribution to military action.

64. Any attack on these aircraft is subject to the basic rules set out in paragraphs 38-46.

**Enemy warships and military aircraft**

65. Unless they are exempt from attack under paragraphs 47 or 53, enemy warships and military aircraft and enemy auxiliary vessels and aircraft are military objectives within the meaning of paragraph 40.

66. They may be attacked, subject to the basic rules in paragraphs 38-46.

**SECTION V : NEUTRAL MERCHANT VESSELS AND CIVIL AIRCRAFT**

Neutral merchant vessels

67. Merchant vessels flying the flag of neutral States may not be attacked unless they:

(a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;
(b) engage in belligerent acts on behalf of the enemy;
(c) act as auxiliaries to the enemy’s armed forces;
(d) are incorporated into or assist the enemy’s intelligence system;
(e) sail under convoy of enemy warships or military aircraft; or
(f) otherwise make an effective contribution to the enemy’s military action, e.g., by carrying military materials, and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.

68. Any attack on these vessels is subject to the basic rules in paragraphs 38-46.

69. The mere fact that a neutral merchant vessel is armed provides no grounds for attacking it.

Neutral civil aircraft

70. Civil aircraft bearing the marks of neutral States may not be attacked unless they:

(a) are believed on reasonable grounds to be carrying contraband, and, after prior warning or interception, they intentionally and clearly refuse to divert from their destination, or intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible;
(b) engage in belligerent acts on behalf of the enemy;
(c) act as auxiliaries to the enemy’s armed forces;
(d) are incorporated into or assist the enemy’s intelligence system; or
(e) otherwise make an effective contribution to the enemy’s military action, e.g., by carrying military materials, and, after prior warning or interception, they intentionally and clearly refuse to divert from their destination, or
intentionally and clearly refuse to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible.

71. Any attack on these aircraft is subject to the basic rules in paragraphs 38-46.

SECTION VI : PRECAUTIONS REGARDING CIVIL AIRCRAFT

72. Civil aircraft should avoid areas of potentially hazardous military activity.

73. In the immediate vicinity of naval operations, civil aircraft shall comply with instructions from the belligerents regarding their heading and altitude.

74. Belligerent and neutral States concerned, and authorities providing air traffic services, should establish procedures whereby commanders of warships and military aircraft are aware on a continuous basis of designated routes assigned to or flight plans filed by civil aircraft in the area of military operations, including information on communication channels, identification modes and codes, destination, passengers and cargo.

75. Belligerent and neutral States should ensure that a Notice to Airmen (NOTAM) is issued providing information on military activities in areas potentially hazardous to civil aircraft, including activation of danger areas or temporary airspace restrictions. This NOTAM should include information on:

(a) frequencies upon which the aircraft should maintain a continuous listening watch;
(b) continuous operation of civil weather-avoidance radar and identification modes and codes;
(c) altitude, course and speed restrictions;
(d) procedures to respond to radio contact by the military forces and to establish two-way communications; and
(e) possible action by the military forces if the NOTAM is not complied with and the civil aircraft is perceived by those military forces to be a threat.

76. Civil aircraft should file the required flight plan with the cognizant Air Traffic Service, complete with information as to registration, destination, passengers, cargo, emergency communication channels, identification modes and codes, updates on route and carry certificates as to registration, airworthiness, passengers and cargo. They should not deviate from a designated Air Traffic Service route or flight plan without Air Traffic Control clearance unless unforeseen conditions arise, e.g., safety or distress, in which case appropriate notification should be made immediately.

77. If a civil aircraft enters an area of potentially hazardous military activity, it should comply with relevant NOTAMs. Military forces should use all available means to identify and warn the civil aircraft, by using, inter alia, secondary surveillance radar modes and codes, communications, correlation with flight plan information, interception by military aircraft, and, when possible, contacting the appropriate Air Traffic Control facility.

PART IV : METHODS AND MEANS OF WARFARE AT SEA

SECTION I : MEANS OF WARFARE

Missiles and other projectiles

78. Missiles and projectiles, including those with over-the-horizon capabilities, shall be used in conformity with the principles of target discrimination as set out in paragraphs 38-46.

Torpedoes

79. It is prohibited to use torpedoes which do not sink or otherwise become harmless when they have completed their run.

Mines

80. Mines may only be used for legitimate military purposes including the denial of sea areas to the enemy.

81. Without prejudice to the rules set out in paragraph 82, the parties to the conflict shall not lay mines unless effective neutralization occurs when they have become detached or control over them is otherwise lost.

82. It is forbidden to use free-floating mines unless:
(a) they are directed against a military objective; and
(b) they become harmless within an hour after loss of control over them.

83. The laying of armed mines or the arming of pre-laid mines must be notified unless the mines can only detonate against vessels which are military objectives.

84. Belligerents shall record the locations where they have laid mines.

85. Mining operations in the internal waters, territorial sea or archipelagic waters of a belligerent State should provide, when the mining is first executed, for free exit of shipping of neutral States.

86. Mining of neutral waters by a belligerent is prohibited.

87. Mining shall not have the practical effect of preventing passage between neutral waters and international waters.

88. The minelaying States shall pay due regard to the legitimate uses of the high seas by, inter alia, providing safe alternative routes for shipping of neutral States.

89. Transit passage through international straits and passage through waters subject to the right of archipelagic sea lanes passage shall not be impeded unless safe and convenient alternative routes are provided.

90. After the cessation of active hostilities, parties to the conflict shall do their utmost to remove or render harmless the mines they have laid, each party removing its own mines. With regard to mines laid in the territorial seas of the enemy, each party shall notify their position and shall proceed with the least possible delay to remove the mines in its territorial sea or otherwise render the territorial sea safe for navigation.

91. In addition to their obligations under paragraph 90, parties to the conflict shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of information and technical and material assistance, including in appropriate circumstances joint operations, necessary to remove minefields or otherwise render them harmless.

92. Neutral States do not commit an act inconsistent with the laws of neutrality by clearing mines laid in violation of international law.

SECTION II: METHODS OF WARFARE

Blockade

93. A blockade shall be declared and notified to all belligerents and neutral States.

94. The declaration shall specify the commencement, duration, location, and extent of the blockade and the period within which vessels of neutral States may leave the blockaded coastline.

95. A blockade must be effective. The question whether a blockade is effective is a question of fact.

96. The force maintaining the blockade may be stationed at a distance determined by military requirements.

97. A blockade may be enforced and maintained by a combination of legitimate methods and means of warfare provided this combination does not result in acts inconsistent with the rules set out in this document.

98. Merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist capture may be attacked.

99. A blockade must not bar access to the ports and coasts of neutral States.

100. A blockade must be applied impartially to the vessels of all States.

101. The cessation, temporary lifting, re-establishment, extension or other alteration of a blockade must be declared and notified as in paragraphs 93 and 94.
102. The declaration or establishment of a blockade is prohibited if:

(a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or
(b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.

103. If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:

(a) the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
(b) the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organization which offers guarantees of impartiality, such as the International Committee of the Red Cross.

104. The blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including search, under which such passage is permitted.

Zones

105. A belligerent cannot be absolved of its duties under international humanitarian law by establishing zones which might adversely affect the legitimate uses of defined areas of the sea.

106. Should a belligerent, as an exceptional measure, establish such a zone:

(a) the same body of law applies both inside and outside the zone;
(b) the extent, location and duration of the zone and the measures imposed shall not exceed what is strictly required by military necessity and the principles of proportionality;
(c) due regard shall be given to the rights of neutral States to legitimate uses of the seas;
(d) necessary safe passage through the zone for neutral vessels and aircraft shall be provided:
   (i) where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral State;
   (ii) in other cases where normal navigation routes are affected, except where military requirements do not permit; and
   (e) the commencement, duration, location and extent of the zone, as well as the restrictions imposed, shall be publicly declared and appropriately notified.

107. Compliance with the measures taken by one belligerent in the zone shall not be construed as an act harmful to the opposing belligerent.

108. Nothing in this Section should be deemed to derogate from the customary belligerent right to control neutral vessels and aircraft in the immediate vicinity of naval operations.

SECTION III: DECEPTION, RUSES OF WAR AND PERFIDY

109. Military and auxiliary aircraft are prohibited at all times from feigning exempt, civilian or neutral status.

110. Ruses of war are permitted. Warships and auxiliary vessels, however, are prohibited from launching an attack whilst flying a false flag, and at all times from actively simulating the status of:

(a) hospital ships, small coastal rescue craft or medical transports;
(b) vessels on humanitarian missions;
(c) passenger vessels carrying civilian passengers;
(d) vessels protected by the United Nations flag;
(e) vessels guaranteed safe conduct by prior agreement between the parties, including cartel vessels;
(f) vessels entitled to be identified by the emblem of the red cross or red crescent; or
(g) vessels engaged in transporting cultural property under special protection.

111. Perfidy is prohibited. Acts inviting the confidence of an adversary to lead it to believe that it is entitled to, or
is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, constitute perfidy. Perfidious acts include the launching of an attack while feigning:

(a) exempt, civilian, neutral or protected United Nations status;
(b) surrender or distress by, e.g., sending a distress signal or by the crew taking to life rafts.

PART V : MEASURES SHORT OF ATTACK: INTERCEPTION, VISIT, SEARCH, DIVERSION AND CAPTURE

SECTION I : DETERMINATION OF ENEMY CHARACTER OF VESSELS AND AIRCRAFT

112. The fact that a merchant vessel is flying the flag of an enemy State or that a civil aircraft bears the marks of an enemy State is conclusive evidence of its enemy character.

113. The fact that a merchant vessel is flying the flag of a neutral State or a civil aircraft bears the marks of a neutral State is prima facie evidence of its neutral character.

114. If the commander of a warship suspects that a merchant vessel flying a neutral flag in fact has enemy character, the commander is entitled to exercise the right of visit and search, including the right of diversion for search under paragraph 121.

115. If the commander of a military aircraft suspects that a civil aircraft with neutral marks in fact has enemy character, the commander is entitled to exercise the right of interception and, if circumstances require, the right to divert for the purpose of visit and search.

116. If, after visit and search, there is reasonable ground for suspicion that the merchant vessel flying a neutral flag or a civil aircraft with neutral marks has enemy character, the vessel or aircraft may be captured as prize subject to adjudication.

117. Enemy character can be determined by registration, ownership, charter or other criteria.

SECTION II : VISIT AND SEARCH OF MERCHANT VESSELS

Basic rules

118. In exercising their legal rights in an international armed conflict at sea, belligerent warships and military aircraft have a right to visit and search merchant vessels outside neutral waters where there are reasonable grounds for suspecting that they are subject to capture.

119. As an alternative to visit and search, a neutral merchant vessel may, with its consent, be diverted from its declared destination.

Merchant vessels under convoy of accompanying neutral warships

120. A neutral merchant vessel is exempt from the exercise of the right of visit and search if it meets the following conditions:

(a) it is bound for a neutral port;
(b) it is under the convoy of an accompanying neutral warship of the same nationality or a neutral warship of a State with which the flag State of the merchant vessel has concluded an agreement providing for such convoy;
(c) the flag State of the neutral warship warrants that the neutral merchant vessel is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status; and
(d) the commander of the neutral warship provides, if requested by the commander of an intercepting belligerent warship or military aircraft, all information as to the character of the merchant vessel and its cargo as could otherwise be obtained by visit and search.

Diversion for the purpose of visit and search

121. If visit and search at sea is impossible or unsafe, a belligerent warship or military aircraft may divert a merchant vessel to an appropriate area or port in order to exercise the right of visit and search.

Measures of supervision
122. In order to avoid the necessity of visit and search, belligerent States may establish reasonable measures for the inspection of cargo of neutral merchant vessels and certification that a vessel is not carrying contraband.

123. The fact that a neutral merchant vessel has submitted to such measures of supervision as the inspection of its cargo and grant of certificates of non-contraband cargo by one belligerent is not an act of unneutral service with regard to an opposing belligerent.

124. In order to obviate the necessity for visit and search, neutral States are encouraged to enforce reasonable control measures and certification procedures to ensure that their merchant vessels are not carrying contraband.

SECTION III : INTERCEPTION, VISIT AND SEARCH OF CIVIL AIRCRAFT

Basic rules

125. In exercising their legal rights in an international armed conflict at sea, belligerent military aircraft have a right to intercept civil aircraft outside neutral airspace where there are reasonable grounds for suspecting they are subject to capture. If, after interception, reasonable grounds for suspecting that a civil aircraft is subject to capture still exist, belligerent military aircraft have the right to order the civil aircraft to proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible.

If there is no belligerent airfield that is safe and reasonably accessible for visit and search, a civil aircraft may be diverted from its declared destination.

126. As an alternative to visit and search:

(a) an enemy civil aircraft may be diverted from its declared destination;
(b) a neutral civil aircraft may be diverted from its declared destination with its consent.

Civil aircraft under the operational control of an accompanying neutral military aircraft or warship

127. A neutral civil aircraft is exempt from the exercise of the right of visit and search if it meets the following conditions:

(a) it is bound for a neutral airfield;
(b) it is under the operational control of an accompanying:
   (i) neutral military aircraft or warship of the same nationality; or
   (ii) neutral military aircraft or warship of a State with which the flag State of the civil aircraft has concluded an agreement providing for such control;
(c) the flag State of the neutral military aircraft or warship warrants that the neutral civil aircraft is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status; and
(d) the commander of the neutral military aircraft or warship provides, if requested by the commander of an intercepting belligerent military aircraft, all information as to the character of the civil aircraft and its cargo as could otherwise be obtained by visit and search.

Measures of interception and supervision

128. Belligerent States should promulgate and adhere to safe procedures for intercepting civil aircraft as issued by the competent international organization.

129. Civil aircraft should file the required flight plan with the cognizant Air Traffic Service, complete with information as to registration, destination, passengers, cargo, emergency communication channels, identification modes and codes, updates en route and carry certificates as to registration, airworthiness, passengers and cargo. They should not deviate from a designated Air Traffic Service route or flight plan without Air Traffic Control clearance unless unforeseen conditions arise, e.g., safety or distress, in which case appropriate notification should be made immediately.

130. Belligerents and neutrals concerned, and authorities providing air traffic services, should establish procedures whereby commanders of warships and military aircraft are continuously aware of designated routes assigned to and flight plans filed by civil aircraft in the area of military operations, including information on communication channels, identification modes and codes, destination, passengers and cargo.
131. In the immediate vicinity of naval operations, civil aircraft shall comply with instructions from the combatants regarding their heading and altitude.

132. In order to avoid the necessity of visit and search, belligerent States may establish reasonable measures for the inspection of the cargo of neutral civil aircraft and certification that an aircraft is not carrying contraband.

133. The fact that a neutral civil aircraft has submitted to such measures of supervision as the inspection of its cargo and grant of certificates of non-contraband cargo by one belligerent is not an act of unneutral service with regard to an opposing belligerent.

134. In order to obviate the necessity for visit and search, neutral States are encouraged to enforce reasonable control measures and certification procedures to ensure that their civil aircraft are not carrying contraband.

SECTION IV : CAPTURE OF ENEMY VESSELS AND GOODS

135. Subject to the provisions of paragraph 136, enemy vessels, whether merchant or otherwise, and goods on board such vessels may be captured outside neutral waters. Prior exercise of visit and search is not required.

136. The following vessels are exempt from capture:

(a) hospital ships and small craft used for coastal rescue operations;
(b) other medical transports, so long as they are needed for the wounded, sick and shipwrecked on board;
(c) vessels granted safe conduct by agreement between the belligerent parties including:
(i) cartel vessels, e.g., vessels designated for and engaged in the transport of prisoners of war; and
(ii) vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations;
(d) vessels engaged in transporting cultural property under special protection;
(e) vessels charged with religious, non-military scientific or philanthropic missions; vessels collecting scientific data of likely military applications are not protected;
(f) small coastal fishing vessels and small boats engaged in local coastal trade, but they are subject to the regulations of a belligerent naval commander operating in the area and to inspection, and
(g) vessels designed or adapted exclusively for responding to pollution incidents in the marine environment when actually engaged in such activities.

137. Vessels listed in paragraph 136 are exempt from capture only if they:

(a) are innocently employed in their normal role;
(b) do not commit acts harmful to the enemy;
(c) immediately submit to identification and inspection when required; and
(d) do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required.

138. Capture of a merchant vessel is exercised by taking such vessel as prize for adjudication. If military circumstances preclude taking such a vessel as prize at sea, it may be diverted to an appropriate area or port in order to complete capture. As an alternative to capture, an enemy merchant vessel may be diverted from its declared destination.

139. Subject to paragraph 140, a captured enemy merchant vessel may, as an exceptional measure, be destroyed when military circumstances preclude taking or sending such a vessel for adjudication as an enemy prize, only if the following criteria are met beforehand:

(a) the safety of passengers and crew is provided for; for this purpose, the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured in the prevailing sea and weather conditions by the proximity of land or the presence of another vessel which is in a position to take them on board;
(b) documents and papers relating to the prize are safeguarded; and
(c) if feasible, personal effects of the passengers and crew are saved.

140. The destruction of enemy passenger vessels carrying only civilian passengers is prohibited at sea. For the safety of the passengers, such vessels shall be diverted to an appropriate area or port in order to complete capture.

SECTION V : CAPTURE OF ENEMY CIVIL AIRCRAFT AND GOODS
141. Subject to the provisions of paragraph 142, enemy civil aircraft and goods on board such aircraft may be captured outside neutral airspace. Prior exercise of visit and search is not required.

142. The following aircraft are exempt from capture:

(a) medical aircraft; and
(b) aircraft granted safe conduct by agreement between the parties to the conflict.

143. Aircraft listed in paragraph 142 are exempt from capture only if they:

(a) are innocently employed in their normal role;
(b) do not commit acts harmful to the enemy;
(c) immediately submit to interception and identification when required;
(d) do not intentionally hamper the movement of combatants and obey orders to divert from their track when required; and
(e) are not in breach of a prior agreement.

144. Capture is exercised by intercepting the enemy civil aircraft, ordering it to proceed to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible and, on landing, taking the aircraft as a prize for adjudication. As an alternative to capture, an enemy civil aircraft may be diverted from its declared destination.

145. If capture is exercised, the safety of passengers and crew and their personal effects must be provided for. The documents and papers relating to the prize must be safeguarded.

SECTION VI: CAPTURE OF NEUTRAL MERCHANT VESSELS AND GOODS

146. Neutral merchant vessels are subject to capture outside neutral waters if they are engaged in any of the activities referred to in paragraph 67 or if it is determined as a result of visit and search or by other means, that they:

(a) are carrying contraband;
(b) are on a voyage especially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy;
(c) are operating directly under enemy control, orders, charter, employment or direction;
(d) present irregular or fraudulent documents, lack necessary documents, or destroy, deface or conceal documents;
(e) are violating regulations established by a belligerent within the immediate area of naval operations; or
(f) are breaching or attempting to breach a blockade.

Capture of a neutral merchant vessel is exercised by taking such vessel as prize for adjudication.

147. Goods on board neutral merchant vessels are subject to capture only if they are contraband.

148. Contraband is defined as goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict.

149. In order to exercise the right of capture referred to in paragraphs 146(a) and 147, the belligerent must have published contraband lists. The precise nature of a belligerent's contraband list may vary according to the particular circumstances of the armed conflict. Contraband lists shall be reasonably specific.

150. Goods not on the belligerent's contraband list are 'free goods', that is, not subject to capture. As a minimum, 'free goods' shall include the following:

(a) religious objects;
(b) articles intended exclusively for the treatment of the wounded and sick and for the prevention of disease;
(c) clothing, bedding, essential foodstuffs, and means of shelter for the civilian population in general, and women and children in particular, provided there is not serious reason to believe that such goods will be diverted to other purpose, or that a definite military advantage would accrue to the enemy by their substitution for enemy goods that would thereby become available for military purposes;
(d) items destined for prisoners of war, including individual parcels and collective relief shipments containing
food, clothing, educational, cultural, and recreational articles;
(e) goods otherwise specifically exempted from capture by international treaty or by special arrangement between belligerents; and
(f) other goods not susceptible for use in armed conflict,

151. Subject to paragraph 152, a neutral vessel captured in accordance with paragraph 146 may, as an exceptional measure, be destroyed when military circumstances preclude taking or sending such a vessel for adjudication as an enemy prize, only if the following criteria are met beforehand:

(a) the safety of passengers and crew is provided for; for this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured in the prevailing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board;
(b) documents and papers relating to the captured vessel are safeguarded; and
(c) if feasible, personal effects of the passengers and crew are saved.

Every effort should be made to avoid destruction of a captured neutral vessel. Therefore, such destruction shall not be ordered without there being entire satisfaction that the captured vessel can neither be sent into a belligerent port, nor diverted, nor properly released. A vessel may not be destroyed under this paragraph for carrying contraband unless the contraband, reckoned either by value, weight, volume or freight, forms more than half the cargo. Destruction shall be subject to adjudication.

152. The destruction of captured neutral passenger vessels carrying civilian passengers is prohibited at sea. For the safety of the passengers, such vessels shall be diverted to an appropriate port in order to complete capture provided for in paragraph 146.

SECTION VII : CAPTURE OF NEUTRAL CIVIL AIRCRAFT AND GOODS

153. Neutral civil aircraft are subject to capture outside neutral airspace if they are engaged in any of the activities in paragraph 70 or if it is determined as a result of visit and search or by any other means, that they:

(a) are carrying contraband;
(b) are on a flight especially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy;
(c) are operating directly under enemy control, orders, charter, employment or direction;
(d) present irregular or fraudulent documents, lack necessary documents, or destroy, deface or conceal documents;
(e) are violating regulations established by a belligerent within the immediate area of naval operations; or
(f) are engaged in a breach of blockade.

154. Goods on board neutral civil aircraft are subject to capture only if they are contraband.

155. The rules regarding contraband as prescribed in paragraphs 148-150 shall also apply to goods on board neutral civil aircraft.

156. Capture is exercised by intercepting the neutral civil aircraft, ordering it to proceed to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible and, on landing and after visit and search, taking it as prize for adjudication. If there is no belligerent airfield that is safe and reasonably accessible, a neutral civil aircraft may be diverted from its declared destination.

157. As an alternative to capture, a neutral civil aircraft may, with its consent, be diverted from its declared destination.

158. If capture is exercised, the safety of passengers and crew and their personal effects must be provided for. The documents and papers relating to the prize must be safeguarded.

PART VI : PROTECTED PERSONS, MEDICAL TRANSPORTS AND MEDICAL AIRCRAFT
GENERAL RULES

159. Except as provided for in paragraph 171, the provisions of this Part are not to be construed in any way departing from the provisions of the Second Geneva Convention of 1949 and Additional Protocol I of 1977 which
contain detailed rules for the treatment of the wounded, sick and shipwrecked and for medical transports.

160. The parties to the conflict may agree, for humanitarian purposes, to create a zone in a defined area of the sea in which only activities consistent with those humanitarian purposes are permitted.

SECTION I: PROTECTED PERSONS

161. Persons on board vessels and aircraft having fallen into the power of a belligerent or neutral shall be respected and protected. While at sea and thereafter until determination of their status, they shall be subject to the jurisdiction of the State exercising power over them.

162. Members of the crews of hospital ships may not be captured during the time they are in the service of these vessels. Members of the crews of rescue craft may not be captured while engaging in rescue operations.

163. Persons on board other vessels or aircraft exempt from capture listed in paragraphs 136 and 142 may not be captured.

164. Religious and medical personnel assigned to the spiritual and medical care of the wounded, sick and shipwrecked shall not be considered prisoners of war. They may, however, be retained as long as their services for the medical or spiritual needs of prisoners of war are needed.

165. Nationals of an enemy State, other than those specified in paragraphs 162-164, are entitled to prisoner-of-war status and may be made prisoners of war if they are:

(a) members of the enemy's armed forces;
(b) persons accompanying the enemy's armed forces;
(c) crew members of auxiliary vessels or auxiliary aircraft;
(d) crew members of enemy merchant vessels or civil aircraft not exempt from capture, unless they benefit from more favourable treatment under other provisions of international law; or
(e) crew members of neutral merchant vessels or civil aircraft that have taken a direct part in the hostilities on the side of the enemy, or served as an auxiliary for the enemy.

166. Nationals of a neutral State:

(a) who are passengers on board enemy or neutral vessels or aircraft are to be released and may not be made prisoners of war unless they are members of the enemy's armed forces or have personally committed acts of hostility against the captor;
(b) who are members of the crew of enemy warships or auxiliary vessels or military aircraft or auxiliary aircraft are entitled to prisoner-of-war status and may be made prisoners of war;
(c) who are members of the crew of enemy or neutral merchant vessels or civil aircraft are to be released and may not be made prisoners of war unless the vessel or aircraft has committed an act covered by paragraphs 60, 63, 67 or 70, or the member of the crew has personally committed an act of hostility against the captor.

167. Civilian persons other than those specified in paragraphs 162-166 are to be treated in accordance with the Fourth Geneva Convention of 1949.

168. Persons having fallen into the power of a neutral State are to be treated in accordance with Hague Conventions V and XII of 1907 and the Second Geneva Convention of 1949.

SECTION II: MEDICAL TRANSPORTS

169. In order to provide maximum protection for hospital ships from the moment of the outbreak of hostilities, States may beforehand make general notification of the characteristics of their hospital ships as specified in Article 22 of the Second Geneva Convention of 1949. Such notification should include all available information on the means whereby the ship may be identified.

170. Hospital ships may be equipped with purely defective means of defence, such as chaff and flares. The presence of such equipment should be notified.

171. In order to fulfill most effectively their humanitarian mission, hospital ships should be permitted to use cryptographic equipment. The equipment shall not be used in any circumstances to transmit intelligence data nor in any other way to acquire any military advantage.
172. Hospital ships, small craft used for coastal rescue operations and other medical transports are encouraged to implement the means of identification set out in Annex I of Additional Protocol I of 1977.

173. These means of identification are intended only to facilitate identification and do not, of themselves, confer protected status.

SECTION III: MEDICAL AIRCRAFT

174. Medical aircraft shall be protected and respected as specified in the provisions of this document.

175. Medical aircraft shall be clearly marked with the emblem of the red cross or red crescent, together with their national colours, on their lower, upper and lateral surfaces. Medical aircraft are encouraged to implement the other means of identification set out in Annex I of Additional Protocol I of 1977 at all times. Aircraft chartered by the International Committee of the Red Cross may use the same means of identification as medical aircraft. Temporary medical aircraft which cannot, either for lack of time or because of their characteristics, be marked with the distinctive emblem should use the most effective means of identification available.

176. Means of identification are intended only to facilitate identification and do not, of themselves, confer protected status.

177. Parties to the conflict are encouraged to notify medical flights and conclude agreements at all times, especially in areas where control by any party to the conflict is not clearly established. When such an agreement is concluded, it shall specify the altitudes, times and routes for safe operation and should include means of identification and communications.

178. Medical aircraft shall not be used to commit acts harmful to the enemy. They shall not carry any equipment intended for the collection or transmission of intelligence data. They shall not be armed, except for small arms for self-defence, and shall only carry medical personnel and equipment.

179. Other aircraft, military or civilian, belligerent or neutral, that are employed in the search for, rescue or transport of the wounded, sick and shipwrecked, operate at their own risk, unless pursuant to prior agreement between the parties to the conflict.

180. Medical aircraft flying over areas which are physically controlled by the opposing belligerent, or over areas the physical control of which is not clearly established, may be ordered to land to permit inspection. Medical aircraft shall obey any such order.

181. Belligerent medical aircraft shall not enter neutral airspace except by prior agreement. When within neutral airspace pursuant to agreement, medical aircraft shall comply with the terms of the agreement. The terms of the agreement may require the aircraft to land for inspection at a designated airport within the neutral State. Should the agreement so require, the inspection and follow-on action shall be conducted in accordance with paragraphs 182-183.

182. Should a medical aircraft, in the absence of an agreement or in deviation from the terms of an agreement, enter neutral airspace, either through navigational error or because of an emergency affecting the safety of the flight, it shall make every effort to give notice and to identify itself. Once the aircraft is recognized as a medical aircraft by the neutral State, it shall not be attacked but may be required to land for inspection. Once it has been inspected, and if it is determined in fact to be a medical aircraft, it shall be allowed to resume its flight.

183. If the inspection reveals that the aircraft is not a medical aircraft, it may be captured, and the occupants shall, unless agreed otherwise between the neutral State and the parties to the conflict, be detained in the neutral State where so required by the rules of international law applicable in armed conflict, in such a manner that they cannot again take part in the hostilities.
Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction, 1972
CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION AND STOCKPILING OF BACTERIOLOGICAL (BIOLOGICAL) AND TOXIN WEAPONS AND ON THEIR DESTRUCTION

The States Parties to this Convention,
Determined to act with a view to achieving effective progress towards general and complete disarmament, including the prohibition and elimination of all types of weapons of mass destruction, and convinced that the prohibition of the development, production and stockpiling of chemical and bacteriological (biological) weapons and their elimina-

1 Came into force in respect of the following States on 26 March 1975, i.e., when twenty-two Governments, including the Governments designated as depositaries (the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America), had deposited their instruments of ratification, in accordance with article XIV (3). Instruments of ratification were deposited as follows:

<table>
<thead>
<tr>
<th>State</th>
<th>Date of deposit of the instrument of ratification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Afghanistan</td>
<td>26 March 1975 (L)</td>
</tr>
<tr>
<td>Austria*</td>
<td>10 August 1973 (L,M,W)</td>
</tr>
<tr>
<td>Barbados</td>
<td>16 February 1973 (W)</td>
</tr>
<tr>
<td>Brazil</td>
<td>27 February 1973 (L,M,W)</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>2 August 1972 (L)</td>
</tr>
<tr>
<td>Byelorussian Soviet Socialist Republic</td>
<td>13 September 1972 (W)</td>
</tr>
<tr>
<td>Canada</td>
<td>19 September 1972 (M)</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>26 March 1975 (M)</td>
</tr>
<tr>
<td>Cyprus</td>
<td>18 September 1972 (L,M,W)</td>
</tr>
<tr>
<td>Czechoslovakia</td>
<td>17 December 1973 (W)</td>
</tr>
<tr>
<td>Denmark</td>
<td>17 December 1973 (L,M,W)</td>
</tr>
<tr>
<td>Dominican Republic</td>
<td>6 November 1973 (L)</td>
</tr>
<tr>
<td>Ecuador</td>
<td>13 November 1973 (W)</td>
</tr>
<tr>
<td>Fiji</td>
<td>21 November 1973 (M)</td>
</tr>
<tr>
<td>Finland</td>
<td>30 April 1973 (L,M,W)</td>
</tr>
<tr>
<td>German Democratic Republic</td>
<td>1 March 1973 (L,M,W)</td>
</tr>
<tr>
<td>Guatemala</td>
<td>23 February 1973 (W)</td>
</tr>
<tr>
<td>Hungary</td>
<td>12 March 1973 (W)</td>
</tr>
<tr>
<td>Iceland</td>
<td>4 September 1973 (W)</td>
</tr>
<tr>
<td>Iran</td>
<td>1 October 1973 (L)</td>
</tr>
<tr>
<td>Ireland</td>
<td>4 February 1974 (L,M,W)</td>
</tr>
<tr>
<td>Iran*</td>
<td>28 November 1972 (M)</td>
</tr>
<tr>
<td>Irish Republic</td>
<td>15 April 1973 (L,M,W)</td>
</tr>
<tr>
<td>Kuwait*</td>
<td>19 September 1973 (W)</td>
</tr>
<tr>
<td>Lao People's Democratic Republic</td>
<td>27 August 1973 (M)</td>
</tr>
<tr>
<td>Lebanon</td>
<td>27 October 1972 (L,W)</td>
</tr>
<tr>
<td>Mauritius</td>
<td>18 July 1972 (W)</td>
</tr>
<tr>
<td>Mexico</td>
<td>26 July 1972 (L)</td>
</tr>
<tr>
<td>Mongolia</td>
<td>1 August 1972 (M)</td>
</tr>
<tr>
<td>New Zealand</td>
<td>20 March 1973 (M)</td>
</tr>
<tr>
<td>Nigeria</td>
<td>22 March 1973 (W)</td>
</tr>
<tr>
<td>Lebanon</td>
<td>25 April 1973 (L)</td>
</tr>
<tr>
<td>Mauritius</td>
<td>13 June 1973 (W)</td>
</tr>
<tr>
<td>Mexico</td>
<td>1 January 1973 (M)</td>
</tr>
<tr>
<td>Mongola</td>
<td>8 April 1973 (L,M,W)</td>
</tr>
<tr>
<td>New Zealand</td>
<td>2 December 1972 (W)</td>
</tr>
<tr>
<td>Nigeria</td>
<td>14 September 1972 (L)</td>
</tr>
<tr>
<td>Iran</td>
<td>20 October 1972 (M)</td>
</tr>
<tr>
<td>Iran</td>
<td>13 December 1972 (W)</td>
</tr>
<tr>
<td>Lao People's Democratic Republic</td>
<td>15 December 1972 (L)</td>
</tr>
</tbody>
</table>

(Continued on page 165)

MULTILATERAL

Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction. Opened for signature at London, Moscow and Washington on 10 April 1972

Multilatéral

Convention sur l'interdiction de la mise au point, de la fabrication et du stockage des armes bactériologiques (biologiques) ou à toxines et sur leur destruction. Ouverte à la signature à Londres, Moscou et Washington le 10 avril 1972

Textes authentiques : anglais, russe, français, espagnol et chinois.

tion, through effective measures, will facilitate the achievement of general and complete disarmament under strict and effective international control,

Recognising the important significance of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of

(Footnote 1 continued from page 164)

### Date of deposit of the instrument of ratification or accession (a) in London (L), Moscow (M), or Washington (W)

<table>
<thead>
<tr>
<th>State</th>
<th>Date of deposit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Niger</td>
<td>23 June 1972 (W)</td>
</tr>
<tr>
<td>Nigeria</td>
<td>3 July 1975 (W)</td>
</tr>
<tr>
<td>Norway</td>
<td>9 July 1973 (L)</td>
</tr>
<tr>
<td>Panama</td>
<td>20 July 1973 (M)</td>
</tr>
<tr>
<td>Philippines</td>
<td>21 March 1975 (W)</td>
</tr>
<tr>
<td>Poland</td>
<td>25 January 1973 (L, M, W)</td>
</tr>
<tr>
<td>Republic of China*</td>
<td>9 February 1975 (W)</td>
</tr>
<tr>
<td>San Marino</td>
<td>17 March 1975 (L)</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>17 March 1975 (W)</td>
</tr>
<tr>
<td>Senegal</td>
<td>27 March 1975 (M)</td>
</tr>
<tr>
<td>Sierra Leone</td>
<td>24 May 1972 (W)</td>
</tr>
<tr>
<td>Turkey</td>
<td>11 March 1975 (L)</td>
</tr>
<tr>
<td>Ukrainian Soviet Socialist Republic</td>
<td>26 March 1975 (L, M, W)</td>
</tr>
<tr>
<td>Union of Soviet Socialist Republic*</td>
<td>25 October 1974 (M)</td>
</tr>
<tr>
<td>United Kingdom of Great Britain and Northern Ireland*</td>
<td>26 March 1975 (M)</td>
</tr>
<tr>
<td>United States of America</td>
<td>25 October 1974 (M)</td>
</tr>
<tr>
<td>Yugoslavia</td>
<td>26 March 1975 (L, M, W)</td>
</tr>
<tr>
<td></td>
<td>25 October 1974 (M)</td>
</tr>
<tr>
<td></td>
<td>26 March 1975 (L, M, W)</td>
</tr>
<tr>
<td></td>
<td>26 March 1975 (L, M, W)</td>
</tr>
</tbody>
</table>

Subsequently, the Convention entered into force for the following States on the date of the deposit of their instrument of ratification or accession, in accordance with article XIV (4):

<table>
<thead>
<tr>
<th>State</th>
<th>Date of deposit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Malta</td>
<td>7 April 1975 (L)</td>
</tr>
<tr>
<td>Qatar</td>
<td>17 April 1975 (L)</td>
</tr>
<tr>
<td>Benin.</td>
<td>25 April 1975 (L)</td>
</tr>
<tr>
<td>Portuguese</td>
<td>15 May 1975 (L, M, W)</td>
</tr>
<tr>
<td>Rwanda</td>
<td>20 May 1975 (L, M, W)</td>
</tr>
<tr>
<td>thyroid</td>
<td>26 May 1975 (L, M)</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>26 June 1975 (W)</td>
</tr>
<tr>
<td>Italy</td>
<td>28 May 1975 (W)</td>
</tr>
<tr>
<td>Jordan</td>
<td>30 May 1975 (L, M, W)</td>
</tr>
<tr>
<td>Ghana</td>
<td>30 May 1975 (M)</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>2 June 1975 (M)</td>
</tr>
<tr>
<td>Jamaica</td>
<td>6 June 1975 (L)</td>
</tr>
<tr>
<td>Zaire</td>
<td>7 August 1975 (W)</td>
</tr>
<tr>
<td>Bolivia</td>
<td>13 August 1975 (L)</td>
</tr>
<tr>
<td>South Africa</td>
<td>16 September 1975 (L)</td>
</tr>
<tr>
<td>Singapore</td>
<td>30 October 1975 (W)</td>
</tr>
<tr>
<td></td>
<td>2 December 1975 (L, M, W)</td>
</tr>
</tbody>
</table>

(Warfare, signed at Geneva on 17 June 1925,1 and conscious also of the contribution which the said Protocol has already made, and continues to make, to mitigating the horrors of war,

Reaffirming their adherence to the principles and objectives of that Protocol and calling upon all States to comply strictly with them,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Geneva Protocol of 17 June 1925,

Desiring to contribute to the strengthening of confidence between peoples and the general improvement of the international atmosphere,

Desiring also to contribute to the realisation of the purposes and principles of the Charter of the United Nations,

Convinced of the importance and urgency of eliminating from the arsenals of States, through effective measures, such dangerous weapons of mass destruction as those using chemical or bacteriological (biological) agents,

Recognising that an agreement on the prohibition of bacteriological (biological) and toxin weapons represents a first possible step towards the achievement of agreement on effective measures also for the prohibition of the development, production and stockpiling of chemical weapons, and determined to continue negotiations to that end,

Determined, for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons,

Convinced that such use would be repugnant to the conscience of mankind and that no effort should be spared to minimise this risk,

Have agreed as follows:

**Article I.** Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

1. microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;

2. weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

**Article II.** Each State Party to this Convention undertakes to destroy, or to divert to peaceful purposes, as soon as possible but not later than nine months after the entry into force of the Convention, all agents, toxins, weapons, equipment and means of delivery

(Footnote 1 continued from page 165)
specified in Article I of the Convention, which are in its possession or under its jurisdiction or control. In implementing the provisions of this Article all necessary safety precautions shall be observed to protect populations and the environment.

Article III. Each State Party to this Convention undertakes not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organisations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in Article I of the Convention.

Article IV. Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.

Article V. The States Parties to this Convention undertake to consult one another and to co-operate in solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention. Consultation and co-operation pursuant to this Article may also be undertaken through appropriate international procedures within the framework of the United Nations and in accordance with its Charter.

Article VI. (1) Any State Party to this Convention which finds that any other State Party is acting in breach of obligations deriving from the provisions of the Convention may lodge a complaint with the Security Council of the United Nations. Such a complaint should include all possible evidence confirming its validity, as well as a request for its consideration by the Security Council.

(2) Each State Party to this Convention undertakes to co-operate in carrying out any investigation which the Security Council may initiate, in accordance with the provisions of the Charter of the United Nations, on the basis of the complaint received by the Council. The Security Council shall inform the States Parties to the Convention of the results of the investigation.

Article VII. Each State Party to this Convention undertakes to provide or support assistance, in accordance with the United Nations Charter, to any Party to the Convention which so requests, if the Security Council decides that such Party has been exposed to danger as a result of violation of the Convention.

Article VIII. Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925.

Article IX. Each State Party to this Convention affirms the recognised objective of effective prohibition of chemical weapons and, to this end, undertakes to continue negotiations in good faith with a view to reaching early agreement on effective measures for the prohibition of their development, production and stockpiling and for their destruction, and on appropriate measures concerning equipment and means of delivery specifically designed for the production or use of chemical agents for weapons purposes.

Article X. (1) The States Parties to this Convention undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the use of bacteriological (biological) agents and toxins for peaceful purposes. Parties to the Convention in a position to do so shall also co-operate in contributing individually or together with other States or international organisations to the further development and application of scientific discoveries in the field of bacteriology (biology) for the prevention of disease, or for other peaceful purposes.

(2) This Convention shall be implemented in a manner designed to avoid hampering the economic or technological development of States Parties to the Convention or international co-operation in the field of peaceful bacteriological (biological) activities, including the international exchange of bacteriological (biological) agents and toxins and equipment for the processing, use or production of bacteriological (biological) agents and toxins for peaceful purposes in accordance with the provisions of the Convention.

Article XI. Any State Party may propose amendments to this Convention. Amendments shall enter into force for each State Party accepting the amendments upon their acceptance by a majority of the States Parties to the Convention and thereafter for each remaining State Party on the date of acceptance by it.

Article XII. Five years after the entry into force of this Convention, or earlier if it is requested by a majority of Parties to the Convention by submitting a proposal to this effect to the Depository Governments, a conference of States Parties to the Convention shall be held at Geneva, Switzerland, to review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention, including the provisions concerning negotiations on chemical weapons, are being realised. Such review shall take into account any new scientific and technological developments relevant to the Convention.

Article XIII. (1) This Convention shall be of unlimited duration.

(2) Each State Party to this Convention shall in exercising its national sovereignty have the right to withdraw from the Convention if it decides that extraordinary events, related to the subject matter of the Convention, have jeopardised the supreme interests of its country. It shall give notice of such withdrawal to all other States Parties to the Convention and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardised its supreme interests.

Article XIV. (1) This Convention shall be open to all States for signature. Any State which does not sign the Convention before its entry into force in accordance with paragraph 3 of this Article may accede to it at any time.

(2) This Convention shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the United Kingdom of Great Britain and Northern Ireland, the Soviet Union, the Republic of China and the United States of America, which are hereby designated the Depository Governments.

(3) This Convention shall enter into force after the deposit of instruments of ratification by twenty-two Governments, including the Governments designated as Depositaries of the Convention.

(4) For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

(5) The Depository Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or of accession and the date of the entry into force of this Convention, and of the receipt of other notices.

(6) This Convention shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations.
Article XV. This Convention, the English, Russian, French, Spanish and Chinese texts of which are equally authentic, shall be deposited in the archives of the Depositary Governments. Duly certified copies of the Convention shall be transmitted by the Depositary Governments to the Governments of the signatory and acceding States.
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993
CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION, STOCKPILING AND USE OF CHEMICAL WEAPONS AND ON THEIR DESTRUCTION

PREAMBLE

The States Parties to this Convention,

Determined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction,

Desiring to contribute to the realization of the purposes and principles of the Charter of the United Nations,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and

---

Footnote 1: Came into force on 29 April 1997, in accordance with article XXI:

<table>
<thead>
<tr>
<th>Participant</th>
<th>Date of deposit of the instrument of ratification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania</td>
<td>23 July 1996</td>
</tr>
<tr>
<td>Lesotho</td>
<td>7 December 1994</td>
</tr>
<tr>
<td>Maldives</td>
<td>31 May 1994</td>
</tr>
<tr>
<td>Mauritius</td>
<td>9 February 1993</td>
</tr>
<tr>
<td>Morocco</td>
<td>28 December 1994</td>
</tr>
<tr>
<td>Namibia</td>
<td>24 November 1995</td>
</tr>
<tr>
<td>Netherlands</td>
<td>30 June 1995</td>
</tr>
<tr>
<td>(For the Kingdom in Europe.) New Zealand</td>
<td>15 July 1996</td>
</tr>
<tr>
<td>Norway</td>
<td>15 July 1994</td>
</tr>
<tr>
<td>Oman</td>
<td>8 February 1995</td>
</tr>
<tr>
<td>Papua New Guinea</td>
<td>17 April 1996</td>
</tr>
<tr>
<td>Paraguay</td>
<td>1 December 1994</td>
</tr>
<tr>
<td>Peru</td>
<td>20 July 1995</td>
</tr>
<tr>
<td>Portugal</td>
<td>10 September 1996</td>
</tr>
<tr>
<td>(Confirming the declaration made upon signature)*</td>
<td></td>
</tr>
</tbody>
</table>

---

Footnote 2: Subsequently, and prior to the entry into force of the Convention, the following States also deposited instruments of ratification on the dates indicated hereafter to take effect on 29 April 1997, i.e., the date of entry into force of the Convention:

<table>
<thead>
<tr>
<th>Participant</th>
<th>Date of deposit of the instrument of ratification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>27 January 1997</td>
</tr>
<tr>
<td>Bosnia and Herzegovina</td>
<td>25 February 1997</td>
</tr>
<tr>
<td>China</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Equatorial Guinea</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Egypt</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>France</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Germany</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Hungary</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>India</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Ireland</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Japan</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Netherlands</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Pakistan</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Peru</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Portugal</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Romania</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Seychelles</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Slovakia</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>South Africa</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Spain</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Sweden</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Switzerland</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Tajikistan</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Turkmenistan</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>United Kingdom of Great Britain and Northern Ireland</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Uruguay</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>Uzbekistan</td>
<td>25 April 1997</td>
</tr>
<tr>
<td>(Confirming the declaration made upon signature)*</td>
<td></td>
</tr>
</tbody>
</table>

---

Footnote 3: See p. 470 of volume 1975 for the texts of the declarations made upon signature.

---

Footnote 4: See p. 473 of volume 1975 for the texts of the declarations made upon ratification.

---


---


---

Vol. 1974, I-33757

Vol. 1975, I-33757
Convinced that the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of these common objectives, have agreed as follows:

ARTICLE I
GENERAL OBLIGATIONS

1. Each State Party to this Convention undertakes never under any circumstances:

(a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;

(b) To use chemical weapons;

(c) To engage in any military preparations to use chemical weapons;

(d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party, in accordance with the provisions of this Convention.

4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.


ARTICLE II
DEFINITIONS AND CRITERIA

For the purposes of this Convention:

1. "Chemical Weapons" means the following, together or separately:

(a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;

(b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;

(c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

2. "Toxic Chemical" means:

Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

(For the purpose of implementing this Convention, toxic chemicals which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

3. "Precursor" means:

Any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.

(For the purpose of implementing this Convention, precursors which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

4. "Key Component of Binary or Multicomponent Chemical Systems" (hereinafter referred to as "key component") means:

The precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.

5. "Old Chemical Weapons" means:

(a) Chemical weapons which were produced before 1925; or

(b) Chemical weapons produced in the period between 1925 and 1946 that have deteriorated to such extent that they can no longer be used as chemical weapons.

6. "Abandoned Chemical Weapons" means:

Chemical weapons, including old chemical weapons, abandoned by a State after 1 January 1925 on the territory of another State without the consent of the latter.
7. "Riot Control Agent" means:

Any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.

8. "Chemical Weapons Production Facility":

(a) Means any equipment, as well as any building housing such equipment, that was designed, constructed or used at any time since 1 January 1946:

(i) As part of the stage in the production of chemicals ("final technological stage") where the material flows would contain, when the equipment is in operation:

(1) Any chemical listed in Schedule 1 in the Annex on Chemicals; or

(2) Any other chemical that has no use, above 1 tonne per year on the territory of a State Party or in any other place under the jurisdiction or control of a State Party, for purposes not prohibited under this Convention, but can be used for chemical weapons purposes;

or

(ii) For filling chemical weapons, including, inter alia, the filling of chemicals listed in Schedule 1 into munitions, devices or bulk storage containers; the filling of chemicals into containers that form part of assembled binary munitions and devices or into chemical submunitions that form part of assembled unitary munitions and devices, and the loading of the containers and chemical submunitions into the respective munitions and devices;

(b) Does not mean:

(i) Any facility having a production capacity for synthesis of chemicals specified in subparagraph (a) (i) that is less than 1 tonne;

(ii) Any facility in which a chemical specified in subparagraph (a) (i) is or was produced as an unavoidable by-product of activities for purposes not prohibited under this Convention, provided that the chemical does not exceed 3 per cent of the total product and that the facility is subject to declaration and inspection under the Annex on Implementation and Verification (hereinafter referred to as "Verification Annex"); or

(iii) The single small-scale facility for production of chemicals listed in Schedule 1 for purposes not prohibited under this Convention as referred to in Part VI of the Verification Annex.

9. "Purposes Not Prohibited Under this Convention" means:

(a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;

(b) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;

(c) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;

(d) Law enforcement including domestic riot control purposes.

10. "Production Capacity" means:

The annual quantitative potential for manufacturing a specific chemical based on the technological process actually used or, if the process is not yet operational, planned to be used at the relevant facility. It shall be deemed to be equal to the nameplate capacity or, if the nameplate capacity is not available, to the design capacity. The nameplate capacity is the product output under conditions optimized for maximum quantity for the production facility, as demonstrated by one or more test-runs. The design capacity is the corresponding theoretically calculated product output.

11. "Organization" means the Organization for the Prohibition of Chemical Weapons established pursuant to Article VIII of this Convention.

12. For the purposes of Article VI:

(a) "Production" of a chemical means its formation through chemical reaction;

(b) "Processing" of a chemical means a physical process, such as formulation, extraction and purification, in which a chemical is not converted into another chemical;

(c) "Consumption" of a chemical means its conversion into another chemical via a chemical reaction.

ARTICLE III

DECLARATIONS

1. Each State Party shall submit to the Organization, not later than 30 days after this Convention enters into force for it, the following declarations, in which it shall:
(a) With respect to chemical weapons:

(i) Declare whether it owns or possesses any chemical weapons, or whether there are any chemical weapons located in any place under its jurisdiction or control;

(ii) Specify the precise location, aggregate quantity and detailed inventory of chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with Part IV (A), paragraphs 1 to 3, of the Verification Annex, except for those chemical weapons referred to in sub-subparagraph (iii);

(iii) Report any chemical weapons on its territory that are owned and possessed by another State and located in any place under the jurisdiction or control of another State, in accordance with Part IV (A), paragraph 4, of the Verification Annex;

(iv) Declare whether it has transferred or received, directly or indirectly, any chemical weapons since 1 January 1946 and specify the transfer or receipt of such weapons, in accordance with Part IV (A), paragraph 5, of the Verification Annex;

(v) Provide its general plan for destruction of chemical weapons that it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with Part IV (A), paragraph 6, of the Verification Annex;

(b) With respect to old chemical weapons and abandoned chemical weapons:

(i) Declare whether it has on its territory old chemical weapons and provide all available information in accordance with Part IV (B), paragraph 3, of the Verification Annex;

(ii) Declare whether there are abandoned chemical weapons on its territory and provide all available information in accordance with Part IV (B), paragraph 8, of the Verification Annex;

(iii) Declare whether it has abandoned chemical weapons on the territory of other States and provide all available information in accordance with Part IV (B), paragraph 10, of the Verification Annex;

(c) With respect to chemical weapons production facilities:

(i) Declare whether it has or has had any chemical weapons production facility under its ownership or possession, or that is or has been located in any place under its jurisdiction or control at any time since 1 January 1946;

(ii) Specify any chemical weapons production facility it has or has had under its ownership or possession or that is or has been located in any place under its jurisdiction or control at any time since 1 January 1946, in accordance with Part V, paragraph 1, of the Verification Annex, except for those facilities referred to in sub-subparagraph (iii);

(iii) Report any chemical weapons production facility on its territory that another State has or has had under its ownership and possession and that is or has been located in any place under the jurisdiction or control of another State at any time since 1 January 1946, in accordance with Part V, paragraph 2, of the Verification Annex;

(iv) Declare whether it has transferred or received, directly or indirectly, any equipment for the production of chemical weapons since 1 January 1946 and specify the transfer or receipt of such equipment, in accordance with Part V, paragraphs 3 to 5, of the Verification Annex;

(v) Provide its general plan for destruction of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, in accordance with Part V, paragraph 6, of the Verification Annex;

(vi) Specify actions to be taken for closure of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, in accordance with Part V, paragraph 7, of the Verification Annex;

(d) With respect to other facilities:

Specify the precise location, nature and general scope of activities of any facility or establishment under its ownership or possession, or located in any place under its jurisdiction or control, and that has been designed, constructed or used since 1 January 1946 primarily for development of chemical weapons. Such declaration shall include, inter alia, laboratories and test and evaluation sites;
(e) With respect to riot control agents: Specify the chemical name, structural formula and Chemical Abstracts Service (CAS) registry number, if assigned, of each chemical it holds for riot control purposes. This declaration shall be updated not later than 30 days after any change becomes effective.

2. The provisions of this Article and the relevant provisions of Part IV of the Verification Annex shall not, at the discretion of a State Party, apply to chemical weapons buried on its territory before 1 January 1977 and which remain buried, or which had been dumped at sea before 1 January 1985.

ARTICLE IV
CHEMICAL WEAPONS

1. The provisions of this Article and the detailed procedures for its implementation shall apply to all chemical weapons owned or possessed by a State Party, or that are located in any place under its jurisdiction or control, except old chemical weapons and abandoned chemical weapons to which Part IV (B) of the Verification Annex applies.

2. Detailed procedures for the implementation of this Article are set forth in the Verification Annex.

3. All locations at which chemical weapons specified in paragraph 1 are stored or destroyed shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments, in accordance with Part IV (A) of the Verification Annex.

4. Each State Party shall, immediately after the declaration under Article III, paragraph 1 (a), has been submitted, provide access to chemical weapons specified in paragraph 1 for the purpose of systematic verification of the declaration through on-site inspection. Thereafter, each State Party shall not remove any of these chemical weapons, except to a chemical weapons destruction facility. It shall provide access to such chemical weapons, for the purpose of systematic on-site verification.

5. Each State Party shall provide access to any chemical weapons destruction facilities and their storage areas, that it owns or possesses, or that are located in any place under its jurisdiction or control, for the purpose of systematic verification through on-site inspection and monitoring with on-site instruments.

6. Each State Party shall destroy all chemical weapons specified in paragraph 1 pursuant to the Verification Annex and in accordance with the agreed rate and sequence of destruction (hereinafter referred to as "order of destruction"). Such destruction shall begin not later than two years after this Convention enters into force for it and shall finish not later than 10 years after entry into force of this Convention. A State Party is not precluded from destroying such chemical weapons at a faster rate.

7. Each State Party shall:

(a) Submit detailed plans for the destruction of chemical weapons specified in paragraph 1 not later than 60 days before each annual destruction period begins, in accordance with Part IV (A), paragraph 29, of the Verification Annex; the detailed plans shall encompass all stocks to be destroyed during the next annual destruction period;

(b) Submit declarations annually regarding the implementation of its plans for destruction of chemical weapons specified in paragraph 1, not later than 60 days after the end of each annual destruction period; and

(c) Certify, not later than 30 days after the destruction process has been completed, that all chemical weapons specified in paragraph 1 have been destroyed.

8. If a State ratifies or accedes to this Convention after the 10-year period for destruction set forth in paragraph 6, it shall destroy chemical weapons specified in paragraph 1 as soon as possible. The order of destruction and procedures for stringent verification for such a State Party shall be determined by the Executive Council.

9. Any chemical weapons discovered by a State Party after the initial declaration of chemical weapons shall be reported, secured and destroyed in accordance with Part IV (A) of the Verification Annex.

10. Each State Party, during transportation, sampling, storage and destruction of chemical weapons, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall transport, sample, store and destroy chemical weapons in accordance with its national standards for safety and emissions.

11. Any State Party which has on its territory chemical weapons that are owned or possessed by another State, or that are located in any place under the jurisdiction or control of another State, shall make the fullest efforts to ensure that these chemical weapons are removed from its territory not later than one year after this Convention enters into force for it. If they are not removed within one year, the State Party may request the Organization and other States Parties to provide assistance in the destruction of these chemical weapons.

12. Each State Party undertakes to cooperate with other States Parties that request information or assistance on a bilateral basis or through the Technical Secretariat regarding methods and technologies for the safe and efficient destruction of chemical weapons.

13. In carrying out verification activities pursuant to this Article and Part IV (A) of the Verification Annex, the Organization shall consider measures to avoid unnecessary duplication of bilateral or multilateral agreements on verification of chemical weapons storage and their destruction among States Parties.
To this end, the Executive Council shall decide to limit verification to measures complementary to those undertaken pursuant to such a bilateral or multilateral agreement, if it considers that:

(a) Verification provisions of such an agreement are consistent with the verification provisions of this Article and Part IV (A) of the Verification Annex;

(b) Implementation of such an agreement provides for sufficient assurance of compliance with the relevant provisions of this Convention; and

(c) Parties to the bilateral or multilateral agreement keep the Organization fully informed about their verification activities.

14. If the Executive Council takes a decision pursuant to paragraph 13, the Organization shall have the right to monitor the implementation of the bilateral or multilateral agreement.

15. Nothing in paragraphs 13 and 14 shall affect the obligation of a State Party to provide declarations pursuant to Article III, this Article and Part IV (A) of the Verification Annex.

16. Each State Party shall meet the costs of destruction of chemical weapons it is obliged to destroy. It shall also meet the costs of verification of storage and destruction of these chemical weapons unless the Executive Council decides otherwise. If the Executive Council decides to limit verification measures of the Organization pursuant to paragraph 13, the costs of complementary verification and monitoring by the Organization shall be paid in accordance with the United Nations scale of assessment, as specified in Article VIII, paragraph 7.

17. The provisions of this Article and the relevant provisions of Part IV of the Verification Annex shall not, at the discretion of a State Party, apply to chemical weapons buried on its territory before 1 January 1977 and which remain buried, or which had been dumped at sea before 1 January 1985.

ARTICLE V

CHEMICAL WEAPONS PRODUCTION FACILITIES

1. The provisions of this Article and the detailed procedures for its implementation shall apply to any and all chemical weapons production facilities owned or possessed by a State Party, or that are located in any place under its jurisdiction or control.

2. Detailed procedures for the implementation of this Article are set forth in the Verification Annex.

3. All chemical weapons production facilities specified in paragraph 1 shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with Part V of the Verification Annex.

4. Each State Party shall cease immediately all activity at chemical weapons production facilities specified in paragraph 1, except activity required for closure.

5. No State Party shall construct any new chemical weapons production facilities or modify any existing facilities for the purpose of chemical weapons production or for any other activity prohibited under this Convention.

6. Each State Party shall, immediately after the declaration under Article III, paragraph 1 (c), has been submitted, provide access to chemical weapons production facilities specified in paragraph 1, for the purpose of systematic verification of the declaration through on-site inspection.

7. Each State Party shall:

(a) Close, not later than 90 days after this Convention enters into force for it, all chemical weapons production facilities specified in paragraph 1, in accordance with Part V of the Verification Annex, and give notice thereof; and

(b) Provide access to chemical weapons production facilities specified in paragraph 1, subsequent to closure, for the purpose of systematic verification through on-site inspection and monitoring with on-site instruments in order to ensure that the facility remains closed and is subsequently destroyed.

8. Each State Party shall destroy all chemical weapons production facilities specified in paragraph 1 and related facilities and equipment, pursuant to the Verification Annex and in accordance with an agreed rate and sequence of destruction (hereinafter referred to as "order of destruction"). Such destruction shall begin not later than one year after this Convention enters into force for it, and shall finish not later than 10 years after entry into force of this Convention. A State Party is not precluded from destroying such facilities at a faster rate.

9. Each State Party shall:

(a) Submit detailed plans for destruction of chemical weapons production facilities specified in paragraph 1, not later than 180 days before the destruction of each facility begins;

(b) Submit declarations annually regarding the implementation of its plans for the destruction of all chemical weapons production facilities specified in paragraph 1, not later than 90 days after the end of each annual destruction period; and

(c) Certify, not later than 30 days after the destruction process has been completed, that all chemical weapons production facilities specified in paragraph 1 have been destroyed.
10. If a State ratifies or accedes to this Convention after the 10-year period for destruction set forth in paragraph 8, it shall destroy chemical weapons production facilities specified in paragraph 1 as soon as possible. The order of destruction and procedures for stringent verification for such a State Party shall be determined by the Executive Council.

11. Each State Party, during the destruction of chemical weapons production facilities, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall destroy chemical weapons production facilities in accordance with its national standards for safety and emissions.

12. Chemical weapons production facilities specified in paragraph 1 may be temporarily converted for destruction of chemical weapons in accordance with Part V, paragraphs 18 to 25, of the Verification Annex. Such a converted facility must be destroyed as soon as it is no longer in use for destruction of chemical weapons but, in any case, not later than 10 years after entry into force of this Convention.

13. A State Party may request, in exceptional cases of compelling need, permission to use a chemical weapons production facility specified in paragraph 1 for purposes not prohibited under this Convention. Upon the recommendation of the Executive Council, the Conference of the States Parties shall decide whether or not to approve the request and shall establish the conditions upon which approval is contingent in accordance with Part V, Section D, of the Verification Annex.

14. The chemical weapons production facility shall be converted in such a manner that the converted facility is not more capable of being reconverted into a chemical weapons production facility than any other facility used for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes not involving chemicals listed in Schedule 1.

15. All converted facilities shall be subject to systematic verification on-site inspection and monitoring with on-site instruments in accordance with Part V, Section D, of the Verification Annex.

16. In carrying out verification activities pursuant to this Article and Part V of the Verification Annex, the Organization shall consider measures to avoid unnecessary duplication of bilateral or multilateral agreements on verification of chemical weapons production facilities and their destruction among States Parties.

To this end, the Executive Council shall decide to limit the verification to measures complementary to those undertaken pursuant to such a bilateral or multilateral agreement, if it considers that:

(a) Verification provisions of such an agreement are consistent with the verification provisions of this Article and Part V of the Verification Annex;

(b) Implementation of the agreement provides for sufficient assurance of compliance with the relevant provisions of this Convention; and

(c) Parties to the bilateral or multilateral agreement keep the Organization fully informed about their verification activities.

17. If the Executive Council takes a decision pursuant to paragraph 16, the Organization shall have the right to monitor the implementation of the bilateral or multilateral agreement.

18. Nothing in paragraphs 16 and 17 shall affect the obligation of a State Party to make declarations pursuant to Article III, this Article and Part V of the Verification Annex.

19. Each State Party shall meet the costs of destruction of chemical weapons production facilities it is obliged to destroy. It shall also meet the costs of verification under this Article unless the Executive Council decides otherwise. If the Executive Council decides to limit verification measures of the Organization pursuant to paragraph 16, the costs of complementary verification and monitoring by the Organization shall be paid in accordance with the United Nations scale of assessment, as specified in Article VIII, paragraph 7.

ARTICLE VI

ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION

1. Each State Party has the right, subject to the provisions of this Convention, to develop, produce, otherwise acquire, retain, transfer and use toxic chemicals and their precursors for purposes not prohibited under this Convention.

2. Each State Party shall adopt the necessary measures to ensure that toxic chemicals and their precursors are only developed, produced, otherwise acquired, retained, transferred, or used within its territory or in any other place under its jurisdiction or control for purposes not prohibited under this Convention. To this end, and in order to verify that activities are in accordance with obligations under this Convention, each State Party shall subject toxic chemicals and their precursors listed in Schedules 1, 2 and 3 of the Annex on Chemicals, facilities related to such chemicals, and other facilities as specified in the Verification Annex, that are located on its territory or in any other place under its jurisdiction or control, to verification measures as provided in the Verification Annex.

3. Each State Party shall subject chemicals listed in Schedule 1 (hereinafter referred to as "Schedule 1 chemicals") to the prohibitions on production, acquisition, retention, transfer and use as specified in Part VI of the Verification Annex. It shall subject Schedule 1 chemicals and facilities specified in Part VI of the Verification Annex to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with that Part of the Verification Annex.
4. Each State Party shall subject chemicals listed in Schedule 2 (hereinafter referred to as "Schedule 2 chemicals") and facilities specified in Part VII of the Verification Annex to data monitoring and on-site verification in accordance with that Part of the Verification Annex.

5. Each State Party shall subject chemicals listed in Schedule 3 (hereinafter referred to as "Schedule 3 chemicals") and facilities specified in Part VIII of the Verification Annex to data monitoring and on-site verification in accordance with that Part of the Verification Annex.

6. Each State Party shall subject facilities specified in Part IX of the Verification Annex to data monitoring and eventual on-site verification in accordance with that Part of the Verification Annex unless decided otherwise by the Conference of the States Parties pursuant to Part IX, paragraph 22, of the Verification Annex.

7. Not later than 30 days after this Convention enters into force for it, each State Party shall make an initial declaration on relevant chemicals and facilities in accordance with the Verification Annex.

8. Each State Party shall make annual declarations regarding the relevant chemicals and facilities in accordance with the Verification Annex.

9. For the purpose of on-site verification, each State Party shall grant to the inspectors access to facilities as required in the Verification Annex.

10. In conducting verification activities, the Technical Secretariat shall avoid undue intrusion into the State Party's chemical activities for purposes not prohibited under this Convention and, in particular, abide by the provisions set forth in the Annex on the Protection of Confidential Information (hereinafter referred to as "Confidentiality Annex").

11. The provisions of this Article shall be implemented in a manner which avoids hampering the economic or technological development of States Parties, and international cooperation in the field of chemical activities for purposes not prohibited under this Convention including the international exchange of scientific and technical information and chemicals and equipment for the production, processing or use of chemicals for purposes not prohibited under this Convention.

ARTICLE VII
NATIONAL IMPLEMENTATION MEASURES

General undertakings

1. Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:

(a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;

(b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and

(c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

2. Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.

3. Each State Party, during the implementation of its obligations under this Convention, shall assign the highest priority to ensuring the safety of people and to protecting the environment, and shall cooperate as appropriate with other States Parties in this regard.

Relations between the State Party and the Organization

4. In order to fulfil its obligations under this Convention, each State Party shall designate or establish a National Authority to serve as the national focal point for effective liaison with the Organization and other States Parties. Each State Party shall notify the Organization of its National Authority at the time that this Convention enters into force for it.

5. Each State Party shall inform the Organization of the legislative and administrative measures taken to implement this Convention.

6. Each State Party shall treat as confidential and afford special handling to information and data that it receives in confidence from the Organization in connection with the implementation of this Convention. It shall treat such information and data exclusively in connection with its rights and obligations under this Convention and in accordance with the provisions set forth in the Confidentiality Annex.

7. Each State Party undertakes to cooperate with the Organization in the exercise of all its functions and in particular to provide assistance to the Technical Secretariat.

ARTICLE VIII
THE ORGANIZATION

A. GENERAL PROVISIONS

1. The States Parties to this Convention hereby establish the Organization for the Prohibition of Chemical Weapons to achieve the
object and purpose of this Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties.

2. All States Parties to this Convention shall be members of the Organization. A State Party shall not be deprived of its membership in the Organization.

3. The seat of the Headquarters of the Organization shall be The Hague, Kingdom of the Netherlands.

4. There are hereby established as the organs of the Organization: the Conference of the States Parties, the Executive Council, and the Technical Secretariat.

5. The Organization shall conduct its verification activities provided for under this Convention in the least intrusive manner possible consistent with the timely and efficient accomplishment of their objectives. It shall request only the information and data necessary to fulfill its responsibilities under this Convention. It shall take every precaution to protect the confidentiality of information on civil and military activities and facilities coming to its knowledge in the implementation of this Convention and, in particular, shall abide by the provisions set forth in the Confidentiality Annex.

6. In undertaking its verification activities the Organization shall consider measures to make use of advances in science and technology.

7. The costs of the Organization's activities shall be paid by States Parties in accordance with the United Nations scale of assessment adjusted to take into account differences in membership between the United Nations and this Organization, and subject to the provisions of Articles IV and V. Financial contributions of States Parties to the Preparatory Commission shall be deducted in an appropriate way from their contributions to the regular budget. The budget of the Organization shall comprise two separate chapters, one relating to administrative and other costs, and one relating to verification costs.

8. A member of the Organization which is in arrears in the payment of its financial contribution to the Organization shall have no vote in the Organization if the amount of its arrears equals or exceeds the amount of the contribution due from it for the preceding two full years. The Conference of the States Parties may, nevertheless, permit such a member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the member.

B. THE CONFERENCE OF THE STATES PARTIES

Composition, procedures and decision-making

9. The Conference of the States Parties (hereinafter referred to as "the Conference") shall be composed of all members of this Organization. Each member shall have one representative in the Conference, who may be accompanied by alternates and advisers.

10. The first session of the Conference shall be convened by the depositary not later than 30 days after the entry into force of this Convention.

11. The Conference shall meet in regular sessions which shall be held annually unless it decides otherwise.

12. Special sessions of the Conference shall be convened:

(a) When decided by the Conference;

(b) When requested by the Executive Council;

(c) When requested by any member and supported by one third of the members; or

(d) In accordance with paragraph 22 to undertake reviews of the operation of this Convention.

Except in the case of subparagraph (d), the special session shall be convened not later than 30 days after receipt of the request by the Director-General of the Technical Secretariat, unless specified otherwise in the request.

13. The Conference shall also be convened in the form of an Amendment Conference in accordance with Article XV, paragraph 2.

14. Sessions of the Conference shall take place at the seat of the Organization unless the Conference decides otherwise.

15. The Conference shall adopt its rules of procedure. At the beginning of each regular session, it shall elect its Chairman and such other officers as may be required. They shall hold office until a new Chairman and other officers are elected at the next regular session.

16. A majority of the members of the Organization shall constitute a quorum for the Conference.

17. Each member of the Organization shall have one vote in the Conference.

18. The Conference shall take decisions on questions of procedure by a simple majority of the members present and voting. Decisions on matters of substance should be taken as far as possible by consensus. If consensus is not attainable when an issue comes up for decision, the Chairman shall defer any vote for 24 hours and during this period of deferment shall make every effort to facilitate achievement of consensus, and shall report to the Conference before the end of this period. If consensus is not possible at the end of 24 hours, the Conference shall take the decision by a two-thirds majority of members present and voting unless specified otherwise in this Convention.
the issue arises as to whether the question is one of substance or not, that question shall be treated as a matter of substance unless otherwise decided by the Conference by the majority required for decisions on matters of substance.

Powers and functions

19. The Conference shall be the principal organ of the Organization. It shall consider any questions, matters or issues within the scope of this Convention, including those relating to the powers and functions of the Executive Council and the Technical Secretariat. It may make recommendations and take decisions on any questions, matters or issues related to this Convention raised by a State Party or brought to its attention by the Executive Council.

20. The Conference shall oversee the implementation of this Convention, and act in order to promote its object and purpose. The Conference shall review compliance with this Convention. It shall also oversee the activities of the Executive Council and the Technical Secretariat and may issue guidelines in accordance with this Convention to either of them in the exercise of their functions.

21. The Conference shall:

(a) Consider and adopt at its regular sessions the report, programme and budget of the Organization, submitted by the Executive Council, as well as consider other reports;

(b) Decide on the scale of financial contributions to be paid by States Parties in accordance with paragraph 7;

(c) Elect the members of the Executive Council;

(d) Appoint the Director-General of the Technical Secretariat (hereinafter referred to as “the Director-General”);

(e) Approve the rules of procedure of the Executive Council submitted by the latter;

(f) Establish such subsidiary organs as it finds necessary for the exercise of its functions in accordance with this Convention;

(g) Foster international cooperation for peaceful purposes in the field of chemical activities;

(h) Review scientific and technological developments that could affect the operation of this Convention and, in this context, direct the Director-General to establish a Scientific Advisory Board to enable him, in the performance of his functions, to render specialized advice in areas of science and technology relevant to this Convention, to the Conference, the Executive Council or States Parties. The Scientific Advisory Board shall be composed of independent experts appointed in accordance with terms of reference adopted by the Conference;

(i) Consider and approve at its first session any draft agreements, provisions and guidelines developed by the Preparatory Commission;

(j) Establish at its first session the voluntary fund for assistance in accordance with Article X;

(k) Take the necessary measures to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of this Convention, in accordance with Article XII.

22. The Conference shall not later than one year after the expiry of the fifth and the tenth year after the entry into force of this Convention, and at such other times within that time period as may be decided upon, convene in special sessions to undertake reviews of the operation of this Convention. Such reviews shall take into account any relevant scientific and technological developments. At intervals of five years thereafter, unless otherwise decided upon, further sessions of the Conference shall be convened with the same objective.

C. THE EXECUTIVE COUNCIL

Composition, procedure and decision-making

23. The Executive Council shall consist of 41 members. Each State Party shall have the right, in accordance with the principle of rotation, to serve on the Executive Council. The members of the Executive Council shall be elected by the Conference for a term of two years. In order to ensure the effective functioning of this Convention, due regard being specially paid to equitable geographical distribution, to the importance of chemical industry, as well as to political and security interests, the Executive Council shall be composed as follows:

(a) Nine States Parties from Africa to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these nine States Parties, three members shall, as a rule, be the States Parties with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these three members;

(b) Nine States Parties from Asia to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these nine States Parties, four members shall, as a rule, be the States Parties with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these four members;

(c) Five States Parties from Eastern Europe to be designated by States Parties located in this region. As a basis for this designation
it is understood that, out of these five States Parties, one member
shall, as a rule, be the State Party with the most significant national
chemical industry in the region as determined by internationally
reported and published data; in addition, the regional group shall agree
also to take into account other regional factors in designating this one
member;

(d) Seven States Parties from Latin America and the Caribbean to
be designated by States Parties located in this region. As a basis for
this designation it is understood that, out of these seven States
 Parties, three members shall, as a rule, be the States Parties with the
most significant national chemical industry in the region as determined
by internationally reported and published data; in addition, the
regional group shall agree also to take into account other regional
factors in designating these three members;

(e) Ten States Parties from among Western European and other
States to be designated by States Parties located in this region. As a
basis for this designation it is understood that, out of these 10 States
Parties, 5 members shall, as a rule, be the States Parties with the most
significant national chemical industry in the region as determined by
internationally reported and published data; in addition, the regional
group shall agree also to take into account other regional factors in
designating these five members;

(f) One further State Party to be designated consecutively by
States Parties located in the regions of Asia and Latin America and the
Caribbean. As a basis for this designation it is understood that this
State Party shall be a rotating member from these regions.

24. For the first election of the Executive Council 20 members shall
be elected for a term of one year, due regard being paid to the established
numerical proportions as described in paragraph 23.

25. After the full implementation of Articles IV and V the Conference
may, upon the request of a majority of the members of the Executive
Council, review the composition of the Executive Council taking into
account developments related to the principles specified in paragraph 23
that are governing its composition.

26. The Executive Council shall elaborate its rules of procedure and
submit them to the Conference for approval.

27. The Executive Council shall elect its Chairman from among its
members.

28. The Executive Council shall meet for regular sessions. Between
regular sessions it shall meet as often as may be required for the
fulfilment of its powers and functions.

29. Each member of the Executive Council shall have one vote. Unless
otherwise specified in this Convention, the Executive Council shall take
decisions on matters of substance by a two-thirds majority of all its
members. The Executive Council shall take decisions on questions of

procedure by a simple majority of all its members. When the issue
arises as to whether the question is one of substance or not, that
question shall be treated as a matter of substance unless otherwise
decided by the Executive Council by the majority required for decisions
on matters of substance.

Powers and functions

30. The Executive Council shall be the executive organ of the
Organization. It shall be responsible to the Conference. The Executive
Council shall carry out the powers and functions entrusted to it under
this Convention, as well as those functions delegated to it by the
Conference. In so doing, it shall act in conformity with the
recommendations, decisions and guidelines of the Conference and assure
their proper and continuous implementation.

31. The Executive Council shall promote the effective implementation
of, and compliance with, this Convention. It shall supervise the
activities of the Technical Secretariat, cooperate with the National
Authority of each State Party and facilitate consultations and
cooperation among States Parties at their request.

32. The Executive Council shall:

(a) Consider and submit to the Conference the draft programme and
budget of the Organization;

(b) Consider and submit to the Conference the draft report of the
Organization on the implementation of this Convention, the report on the
performance of its own activities and such special reports as it deems
necessary or which the Conference may request;

(c) Make arrangements for the sessions of the Conference including
the preparation of the draft agenda.

33. The Executive Council may request the convening of a special
session of the Conference.

34. The Executive Council shall:

(a) Conclude agreements or arrangements with States and
international organizations on behalf of the Organization, subject to
prior approval by the Conference;

(b) Conclude agreements with States Parties on behalf of the
Organization in connection with Article X and supervise the voluntary
fund referred to in Article X;

(c) Approve or conclude agreements or arrangements relating to the
implementation of verification activities, negotiated by the Technical
Secretariat with States Parties.

35. The Executive Council shall consider any issue or matter within its
competence affecting this Convention and its implementation, including
concerns regarding compliance, and cases of non-compliance, and, as appropriate, inform States Parties and bring the issue or matter to the attention of the Conference.

36. In its consideration of doubts or concerns regarding compliance and cases of non-compliance, including, inter alia, abuse of the rights provided for under this Convention, the Executive Council shall consult with the States Parties involved and, as appropriate, request the State Party to take measures to redress the situation within a specified time. To the extent that the Executive Council considers further action to be necessary, it shall take, inter alia, one or more of the following measures:

(a) Inform all States Parties of the issue or matter;

(b) Bring the issue or matter to the attention of the Conference;

(c) Make recommendations to the Conference regarding measures to redress the situation and to ensure compliance.

The Executive Council shall, in cases of particular gravity and urgency, bring the issue or matter, including relevant information and conclusions, directly to the attention of the United Nations General Assembly and the United Nations Security Council. It shall at the same time inform all States Parties of this step.

D. THE TECHNICAL SECRETARIAT

37. The Technical Secretariat shall assist the Conference and the Executive Council in the performance of their functions. The Technical Secretariat shall carry out the verification measures provided for in this Convention. It shall carry out the other functions entrusted to it under this Convention as well as those functions delegated to it by the Conference and the Executive Council.

38. The Technical Secretariat shall:

(a) Prepare and submit to the Executive Council the draft programme and budget of the Organization;

(b) Prepare and submit to the Executive Council the draft report of the Organization on the implementation of this Convention and such other reports as the Conference or the Executive Council may request;

(c) Provide administrative and technical support to the Conference, the Executive Council and subsidiary organs;

(d) Address and receive communications on behalf of the Organization to and from States Parties on matters pertaining to the implementation of this Convention;

(e) Provide technical assistance and technical evaluation to States Parties in the implementation of the provisions of this Convention, including evaluation of scheduled and unscheduled chemicals.

39. The Technical Secretariat shall:

(a) Negotiate agreements or arrangements relating to the implementation of verification activities with States Parties, subject to approval by the Executive Council;

(b) Not later than 180 days after entry into force of this Convention, coordinate the establishment and maintenance of permanent stockpiles of emergency and humanitarian assistance by States Parties in accordance with Article X, paragraphs 7 (b) and (c). The Technical Secretariat may inspect the items maintained for serviceability. Lists of items to be stockpiled shall be considered and approved by the Conference pursuant to paragraph 21 (i) above;

(c) Administer the voluntary fund referred to in Article X, compile declarations made by the States Parties and register, when requested, bilateral agreements concluded between States Parties of between a State Party and the Organization for the purposes of Article X.

40. The Technical Secretariat shall inform the Executive Council of any problem that has arisen with regard to the discharge of its functions, including doubts, ambiguities or uncertainties about compliance with this Convention that have come to its notice in the performance of its verification activities and that it has been unable to resolve or clarify through its consultations with the State Party concerned.

41. The Technical Secretariat shall comprise a Director-General, who shall be its head and chief administrative officer, inspectors and such scientific, technical and other personnel as may be required.

42. The Inspectorate shall be a unit of the Technical Secretariat and shall act under the supervision of the Director-General.

43. The Director-General shall be appointed by the Conference upon the recommendation of the Executive Council for a term of four years, renewable for one further term, but not thereafter.

44. The Director-General shall be responsible to the Conference and the Executive Council for the appointment of the staff and the organization and functioning of the Technical Secretariat. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Only citizens of States Parties shall serve as the Director-General, as inspectors or as other members of the professional and clerical staff. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible. Recruitment shall be guided by the principle that the staff shall be kept to a minimum necessary for the proper discharge of the responsibilities of the Technical Secretariat.

45. The Director-General shall be responsible for the organization and functioning of the Scientific Advisory Board referred to in paragraph 21 (h). The Director-General shall, in consultation with States Parties, appoint members of the Scientific Advisory Board, who
shall serve in their individual capacity. The members of the Board shall be appointed on the basis of their expertise in the particular scientific fields relevant to the implementation of this Convention. The Director-General may also, as appropriate, in consultation with members of the Board, establish temporary working groups of scientific experts to provide recommendations on specific issues. In regard to the above, States Parties may submit lists of experts to the Director-General.

46. In the performance of their duties, the Director-General, the inspectors and the other members of the staff shall not seek or receive instructions from any Government or from any other source external to the Organization. They shall refrain from any action that might reflect on their positions as international officers responsible only to the Conference and the Executive Council.

47. Each State Party shall respect the exclusively international character of the responsibilities of the Director-General, the inspectors and the other members of the staff and not seek to influence them in the discharge of their responsibilities.

E. PRIVILEGES AND IMMUNITIES

48. The Organization shall enjoy on the territory and in any other place under the jurisdiction or control of a State Party such legal capacity and such privileges and immunities as are necessary for the exercise of its functions.

49. Delegates of States Parties, together with their alternates and advisers, representatives appointed to the Executive Council together with their alternates and advisers, the Director-General and the staff of the Organization shall enjoy such privileges and immunities as are necessary in the independent exercise of their functions in connection with the Organization.

50. The legal capacity, privileges, and immunities referred to in this Article shall be defined in agreements between the Organization and the States Parties as well as in an agreement between the Organization and the State in which the headquarters of the Organization is seated. These agreements shall be considered and approved by the Conference pursuant to paragraph 21 (1).

51. Notwithstanding paragraphs 48 and 49, the privileges and immunities enjoyed by the Director-General and the staff of the Technical Secretariat during the conduct of verification activities shall be those set forth in Part II, Section B, of the Verification Annex.

ARTICLE IX
CONSULTATIONS, COOPERATION AND FACT-FINDING

1. States Parties shall consult and cooperate, directly among themselves, or through the Organization or other appropriate international procedures, including procedures within the framework of the United Nations and in accordance with its Charter, on any matter which may be raised relating to the object and purpose, or the implementation of the provisions, of this Convention.

2. Without prejudice to the right of any State Party to request a challenge inspection, States Parties should, whenever possible, first make every effort to clarify and resolve, through exchange of information and consultations among themselves, any matter which may cause doubt about compliance with this Convention, or which gives rise to concerns about a related matter which may be considered ambiguous. A State Party which receives a request from another State Party for clarification of any matter which the requesting State Party believes causes such a doubt or concern shall provide the requesting State Party as soon as possible, but in any case not later than 10 days after the request, with information sufficient to answer the doubt or concern raised along with an explanation of how the information provided resolves the matter. Nothing in this Convention shall affect the right of any two or more States Parties to arrange by mutual consent for inspections or any other procedures among themselves to clarify and resolve any matter which may cause doubt about compliance or gives rise to a concern about a related matter which may be considered ambiguous. Such arrangements shall not affect the rights and obligations of any State Party under other provisions of this Convention.

Procedure for requesting clarification

3. A State Party shall have the right to request the Executive Council to assist in clarifying any situation which may be considered ambiguous or which gives rise to a concern about the possible non-compliance of another State Party with this Convention. The Executive Council shall provide appropriate information in its possession relevant to such a concern.

4. A State Party shall have the right to request the Executive Council to obtain clarification from another State Party on any situation which may be considered ambiguous or which gives rise to a concern about its possible non-compliance with this Convention. In such a case, the following shall apply:

(a) The Executive Council shall forward the request for clarification to the State Party concerned through the Director-General not later than 24 hours after its receipt;

(b) The requested State Party shall provide the clarification to the Executive Council as soon as possible, but in any case not later than 10 days after the receipt of the request;

(c) The Executive Council shall take note of the clarification and forward it to the requesting State Party not later than 24 hours after its receipt;

(d) If the requesting State Party deems the clarification to be inadequate, it shall have the right to request the Executive Council to obtain from the requested State Party further clarification;
10. For the purpose of verifying compliance with the provisions of this Convention, each State Party shall permit the Technical Secretariat to conduct the on-site challenge inspection pursuant to paragraph 8.

11. Pursuant to a request for a challenge inspection of a facility or location, and in accordance with the procedures provided for in the Verification Annex, the inspected State Party shall have:

(a) The right and the obligation to make every reasonable effort to demonstrate its compliance with this Convention and, to this end, to enable the inspection team to fulfill its mandate;

(b) The obligation to provide access within the requested site for the sole purpose of establishing facts relevant to the concern regarding possible non-compliance; and

(c) The right to take measures to protect sensitive installations, and to prevent disclosure of confidential information and data, not related to this Convention.

12. With regard to an observer, the following shall apply:

(a) The requesting State Party may, subject to the agreement of the inspected State Party, send a representative who may be a national of the requesting State Party or of a third State Party, to observe the conduct of the challenge inspection.

(b) The inspected State Party shall then grant access to the observer in accordance with the Verification Annex.

(c) The inspected State Party shall, as a rule, accept the proposed observer, but if the inspected State Party exercises a refusal, that fact shall be recorded in the final report.

13. The requesting State Party shall present an inspection request for an on-site challenge inspection to the Executive Council and at the same time to the Director-General for immediate processing.

14. The Director-General shall immediately ascertain that the inspection request meets the requirements specified in Part X, paragraph 4, of the Verification Annex, and, if necessary, assist the requesting State Party in filing the inspection request accordingly. When the inspection request fulfills the requirements, preparations for the challenge inspection shall begin.

15. The Director-General shall transmit the inspection request to the inspected State Party not less than 12 hours before the planned arrival of the inspection team at the point of entry.

16. After having received the inspection request, the Executive Council shall take cognizance of the Director-General's actions on the request and shall keep the case under its consideration throughout the inspection procedure. However, its deliberations shall not delay the inspection process.
17. The Executive Council may, not later than 12 hours after having received the inspection request, decide by a three-quarter majority of all its members against carrying out the challenge inspection, if it considers the inspection request to be frivolous, abusive or clearly beyond the scope of this Convention as described in paragraph 6. Neither the requesting nor the inspected State Party shall participate in such a decision. If the Executive Council decides against the challenge inspection, preparations shall be stopped, no further action on the inspection request shall be taken, and the States Parties concerned shall be informed accordingly.

18. The Director-General shall issue an inspection mandate for the conduct of the challenge inspection. The inspection mandate shall be the inspection request referred to in paragraphs 8 and 9 put into operational terms, and shall conform with the inspection request.

19. The challenge inspection shall be conducted in accordance with Part X or, in the case of alleged use, in accordance with Part XI of the Verification Annex. The inspection team shall be guided by the principle of conducting the challenge inspection in the least intrusive manner possible, consistent with the effective and timely accomplishment of its mission.

20. The inspected State Party shall assist the inspection team throughout the challenge inspection and facilitate its task. If the inspected State Party proposes, pursuant to Part X, Section C, of the Verification Annex, arrangements to demonstrate compliance with this Convention, alternative to full and comprehensive access, it shall make every reasonable effort, through consultations with the inspection team, to reach agreement on the modalities for establishing the facts with the aim of demonstrating its compliance.

21. The final report shall contain the factual findings as well as an assessment by the inspection team of the degree and nature of access and cooperation granted for the satisfactory implementation of the challenge inspection. The Director-General shall promptly transmit the final report of the inspection team to the requesting State Party, to the inspected State Party, to the Executive Council and to all other States Parties. The Director-General shall further transmit promptly to the Executive Council the assessments of the requesting and of the inspected States Parties, as well as the views of other States Parties which may be conveyed to the Director-General for that purpose, and then provide them to all States Parties.

22. The Executive Council shall, in accordance with its powers and functions, review the final report of the inspection team as soon as it is presented, and address any concerns as to:

(a) Whether any non-compliance has occurred;

(b) Whether the request had been within the scope of this Convention; and

(c) Whether the right to request a challenge inspection had been abused.

23. If the Executive Council reaches the conclusion, in keeping with its powers and functions, that further action may be necessary with regard to paragraph 22, it shall take the appropriate measures to redress the situation and to ensure compliance with this Convention, including specific recommendations to the Conference. In the case of abuse, the Executive Council shall examine whether the requesting State Party should bear any of the financial implications of the challenge inspection.

24. The requesting State Party and the inspected State Party shall have the right to participate in the review process. The Executive Council shall inform the States Parties and the next session of the Conference of the outcome of the process.

25. If the Executive Council has made specific recommendations to the Conference, the Conference shall consider action in accordance with Article XII.

ARTICLE X

ASSISTANCE AND PROTECTION AGAINST CHEMICAL WEAPONS

1. For the purposes of this Article, "Assistance" means the coordination and delivery to States Parties of protection against chemical weapons, including, inter alia, the following: detection equipment and alarm systems; protective equipment; decontamination equipment and decontaminants; medical antidotes and treatments; and advice on any of these protective measures.

2. Nothing in this Convention shall be interpreted as impeding the right of any State Party to conduct research into, develop, produce, acquire, transfer or use means of protection against chemical weapons, for purposes not prohibited under this Convention.

3. Each State Party undertakes to facilitate, and shall have the right to participate in, the fullest possible exchange of equipment, material and scientific and technological information concerning means of protection against chemical weapons.

4. For the purposes of increasing the transparency of national programmes related to protective purposes, each State Party shall provide annually to the Technical Secretariat information on its programme, in accordance with procedures to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (1).

5. The Technical Secretariat shall establish, not later than 180 days after entry into force of this Convention and maintain, for the use of any requesting State Party, a data bank containing freely available information concerning various means of protection against chemical weapons as well as such information as may be provided by States Parties.
The Technical Secretariat shall also, within the resources available to it, and at the request of a State Party, provide expert advice and assist the State Party in identifying how its programmes for the development and improvement of a protective capacity against chemical weapons could be implemented.

6. Nothing in this Convention shall be interpreted as impeding the right of States Parties to request and provide assistance bilaterally and to conclude individual agreements with other States Parties concerning the emergency procurement of assistance.

7. Each State Party undertakes to provide assistance through the Organization and to this end to elect to take one or more of the following measures:

(a) To contribute to the voluntary fund for assistance to be established by the Conference at its first session;

(b) To conclude, if possible not later than 180 days after this Convention enters into force for it, agreements with the Organization concerning the procurement, upon demand, of assistance;

(c) To declare, not later than 180 days after this Convention enters into force for it, the kind of assistance it might provide in response to an appeal by the Organization. If, however, a State Party subsequently is unable to provide the assistance envisaged in its declaration, it is still under the obligation to provide assistance in accordance with this paragraph.

8. Each State Party has the right to request and, subject to the procedures set forth in paragraphs 9, 10 and 11, to receive assistance and protection against the use or threat of use of chemical weapons if it considers that:

(a) Chemical weapons have been used against it;

(b) Riot control agents have been used against it as a method of warfare; or

(c) It is threatened by actions or activities of any State that are prohibited for States Parties by Article I.

9. The request, substantiated by relevant information, shall be submitted to the Director-General, who shall transmit it immediately to the Executive Council and to all States Parties. The Director-General shall immediately forward the request to States Parties which have volunteered, in accordance with paragraphs 7 (b) and (c), to dispatch emergency assistance in case of use of chemical weapons or use of riot control agents as a method of warfare, or humanitarian assistance in case of serious threat of use of chemical weapons or serious threat of use of riot control agents as a method of warfare to the State Party concerned not later than 12 hours after receipt of the request. The Director-General shall initiate, not later than 24 hours after receipt of the request, an investigation in order to provide foundation for further action. He shall complete the investigation within 72 hours and forward a report to the Executive Council. If additional time is required for completion of the investigation, an interim report shall be submitted within the same time-frame. The additional time required for investigation shall not exceed 72 hours. It may, however, be further extended by similar periods. Reports at the end of each additional period shall be submitted to the Executive Council. The investigation shall, as appropriate and in conformity with the request and the information accompanying the request, establish relevant facts related to the request as well as the type and scope of supplementary assistance and protection needed.

10. The Executive Council shall meet not later than 24 hours after receiving an investigation report to consider the situation and shall take a decision by simple majority within the following 24 hours on whether to instruct the Technical Secretariat to provide supplementary assistance. The Technical Secretariat shall immediately transmit to all States Parties and relevant international organizations the investigation report and the decision taken by the Executive Council. When so decided by the Executive Council, the Director-General shall provide assistance immediately. For this purpose, the Director-General may cooperate with the requesting State Party, other States Parties and relevant international organizations. The States Parties shall make the fullest possible efforts to provide assistance.

11. If the information available from the ongoing investigation or other reliable sources would give sufficient proof that there are victims of use of chemical weapons and immediate action is indispensable, the Director-General shall notify all States Parties and shall take emergency measures of assistance, using the resources the Conference has placed at his disposal for such contingencies. The Director-General shall keep the Executive Council informed of actions undertaken pursuant to this paragraph.

ARTICLE XI

ECONOMIC AND TECHNOLOGICAL DEVELOPMENT

1. The provisions of this Convention shall be implemented in a manner which avoids hampering the economic or technological development of States Parties, and international cooperation in the field of chemical activities for purposes not prohibited under this Convention including the international exchange of scientific and technical information and chemicals and equipment for the production, processing or use of chemicals for purposes not prohibited under this Convention.

2. Subject to the provisions of this Convention and without prejudice to the principles and applicable rules of international law, the States Parties shall:

(a) Have the right, individually or collectively, to conduct research with, to develop, produce, acquire, retain, transfer, and use chemicals;
(b) Undertake to facilitate, and have the right to participate in, the fullest possible exchange of chemicals, equipment and scientific and technical information relating to the development and application of chemistry for purposes not prohibited under this Convention;

(c) Not maintain among themselves any restrictions, including those in any international agreements, incompatible with the obligations undertaken under this Convention, which would restrict or impede trade and the development and promotion of scientific and technological knowledge in the field of chemistry for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;

(d) Not use this Convention as grounds for applying any measures other than those provided for, or permitted, under this Convention nor use any other international agreement for pursuing an objective inconsistent with this Convention;

(e) Undertake to review their existing national regulations in the field of trade in chemicals in order to render them consistent with the object and purpose of this Convention.

ARTICLE XII

MEASURES TO REDRESS A SITUATION AND TO ENSURE COMPLIANCE, INCLUDING SANCTIONS

1. The Conference shall take the necessary measures, as set forth in paragraphs 2, 3 and 4, to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of this Convention. In considering action pursuant to this paragraph, the Conference shall take into account all information and recommendations on the issues submitted by the Executive Council.

2. In cases where a State Party has been requested by the Executive Council to take measures to redress a situation raising problems with regard to its compliance, and where the State Party fails to fulfill the request within the specified time, the Conference may, inter alia, upon the recommendation of the Executive Council, restrict or suspend the State Party’s rights and privileges under this Convention until it undertakes the necessary action to conform with its obligations under this Convention.

3. In cases where serious damage to the object and purpose of this Convention may result from activities prohibited under this Convention, in particular by Article I, the Conference may recommend collective measures to States Parties in conformity with international law.

4. The Conference shall, in cases of particular gravity, bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the United Nations Security Council.

ARTICLE XIII

RELATION TO OTHER INTERNATIONAL AGREEMENTS

Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and under the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction, signed at London, Moscow and Washington on 10 April 1972.

ARTICLE XIV

SETTLEMENT OF DISPUTES

1. Disputes that may arise concerning the application or the interpretation of this Convention shall be settled in accordance with the relevant provisions of this Convention and in conformity with the provisions of the Charter of the United Nations.

2. When a dispute arises between two or more States Parties, or between one or more States Parties and the Organization, relating to the interpretation or application of this Convention, the parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of the parties' choice, including recourse to appropriate organs of this Convention and, by mutual consent, referral to the International Court of Justice in conformity with the Statute of the Court. The States Parties involved shall keep the Executive Council informed of actions being taken.

3. The Executive Council may contribute to the settlement of a dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties to a dispute to start the settlement process of their choice and recommending a time-limit for any agreed procedure.

4. The Conference shall consider questions related to disputes raised by States Parties or brought to its attention by the Executive Council. The Conference shall, as it finds necessary, establish or entrust organs with tasks related to the settlement of these disputes in conformity with Article VIII, paragraph 21 (f).

5. The Conference and the Executive Council are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the Organization. An agreement between the Organization and the United Nations shall be concluded for this purpose in accordance with Article VIII, paragraph 34 (a).
6. This Article is without prejudice to Article IX or to the provisions on measures to redress a situation and to ensure compliance, including sanctions.

ARTICLE XV

AMENDMENTS

1. Any State Party may propose amendments to this Convention. Any State Party may also propose changes, as specified in paragraph 4, to the Annexes of this Convention. Proposals for amendments shall be subject to the procedures in paragraphs 2 and 3. Proposals for changes, as specified in paragraph 4, shall be subject to the procedures in paragraph 5.

2. The text of a proposed amendment shall be submitted to the Director-General for circulation to all States Parties and to the Depositary. The proposed amendment shall be considered only by an Amendment Conference. Such an Amendment Conference shall be convened if one third or more of the States Parties notify the Director-General not later than 30 days after its circulation that they support further consideration of the proposal. The Amendment Conference shall be held immediately following a regular session of the Conference unless the requesting States Parties ask for an earlier meeting. In no case shall an Amendment Conference be held less than 60 days after the circulation of the proposed amendment.

3. Amendments shall enter into force for all States Parties 30 days after deposit of the instruments of ratification or acceptance by all the States Parties referred to under subparagraph (b) below:

(a) When adopted by the Amendment Conference by a positive vote of a majority of all States Parties with no State Party casting a negative vote; and

(b) Ratified or accepted by all those States Parties casting a positive vote at the Amendment Conference.

4. In order to ensure the viability and the effectiveness of this Convention, provisions in the Annexes shall be subject to changes in accordance with paragraph 5, if proposed changes are related only to matters of an administrative or technical nature. All changes to the Annex on Chemicals shall be made in accordance with paragraph 5, Sections A and C of the Confidentiality Annex, Part X of the Verification Annex, and those definitions in Part I of the Verification Annex which relate exclusively to challenge inspections, shall not be subject to changes in accordance with paragraph 5.

5. Proposed changes referred to in paragraph 4 shall be made in accordance with the following procedures:

(a) The text of the proposed changes shall be transmitted together with the necessary information to the Director-General. Additional information for the evaluation of the proposal may be provided by any State Party and the Director-General. The Director-General shall promptly communicate any such proposals and information to all States Parties, the Executive Council and the Depositary;

(b) Not later than 60 days after its receipt, the Director-General shall evaluate the proposal to determine all its possible consequences for the provisions of this Convention and its implementation and shall communicate any such information to all States Parties and the Executive Council;

(c) The Executive Council shall examine the proposal in the light of all information available to it, including whether the proposal fulfills the requirements of paragraph 4. Not later than 90 days after its receipt, the Executive Council shall notify its recommendation, with appropriate explanations, to all States Parties for consideration. States Parties shall acknowledge receipt within 10 days;

(d) If the Executive Council recommends to all States Parties that the proposal be adopted, it shall be considered approved if no State Party objects to it within 90 days after receipt of the recommendation. If the Executive Council recommends that the proposal be rejected, it shall be considered rejected if no State Party objects to the rejection within 90 days after receipt of the recommendation;

(e) If a recommendation of the Executive Council does not meet with the acceptance required under subparagraph (d), a decision on the proposal, including whether it fulfills the requirements of paragraph 4, shall be taken as a matter of substance by the Conference at its next session;

(f) The Director-General shall notify all States Parties and the Depositary of any decision under this paragraph;

(g) Changes approved under this procedure shall enter into force for all States Parties 180 days after the date of notification by the Director-General of their approval unless another time period is recommended by the Executive Council or decided by the Conference.

ARTICLE XVI

DURATION AND WITHDRAWAL

1. This Convention shall be of unlimited duration.

2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention if it decides that extraordinary events, related to the subject-matter of this Convention, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal 90 days in advance to all other States Parties, the Executive Council, the Depositary and the United Nations Security Council. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.
3. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law, particularly the Geneva Protocol of 1925.

ARTICLE XVII

STATUS OF THE ANNEXES

The Annexes form an integral part of this Convention. Any reference to this Convention includes the Annexes.

ARTICLE XVIII

SIGNATURE

This Convention shall be open for signature for all States before its entry into force.

ARTICLE XIX

RATIFICATION

This Convention shall be subject to ratification by States Signatories according to their respective constitutional processes.

ARTICLE XX

ACCESSION

Any State which does not sign this Convention before its entry into force may accede to it at any time thereafter.

ARTICLE XXI

ENTRY INTO FORCE

1. This Convention shall enter into force 180 days after the date of the deposit of the 65th instrument of ratification, but in no case earlier than two years after its opening for signature.

2. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention, it shall enter into force on the 30th day following the date of deposit of their instrument of ratification or accession.

ARTICLE XXII

RESERVATIONS

The Articles of this Convention shall not be subject to reservations. The Annexes of this Convention shall not be subject to reservations incompatible with its object and purpose.

ARTICLE XXIII

DEPOSITARY

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention and shall, inter alia:

(a) Promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession and the date of the entry into force of this Convention, and of the receipt of other notices;

(b) Transmit duly certified copies of this Convention to the Governments of all signatory and acceding States; and

(c) Register this Convention pursuant to Article 102 of the Charter of the United Nations.

ARTICLE XXIV

AUTHENTIC TEXTS

This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Convention.

Done at Paris on the thirteenth day of January, one thousand nine hundred and ninety-three.

[For the signatures, see p. 422 of volume 1975.]
A. GUIDELINES FOR SCHEDULES OF CHEMICALS

Guidelines for Schedule 1

1. The following criteria shall be taken into account in considering whether a toxic chemical or precursor should be included in Schedule 1:

(a) It has been developed, produced, stockpiled or used as a chemical weapon as defined in Article II;

(b) It poses otherwise a high risk to the object and purpose of this Convention by virtue of its high potential for use in activities prohibited under this Convention because one or more of the following conditions are met:

(i) It possesses a chemical structure closely related to that of other toxic chemicals listed in Schedule 1, and has, or can be expected to have, comparable properties;

(ii) It possesses such lethal or incapacitating toxicity as well as other properties that would enable it to be used as a chemical weapon;

(iii) It may be used as a precursor in the final single technological stage of production of a toxic chemical listed in Schedule 1, regardless of whether this stage takes place in facilities, in munitions or elsewhere;

(c) It has little or no use for purposes not prohibited under this Convention.

Guidelines for Schedule 2

2. The following criteria shall be taken into account in considering whether a toxic chemical not listed in Schedule 1 or a precursor to a Schedule 1 chemical or to a chemical listed in Schedule 2, part A, should be included in Schedule 2:

(a) It poses a significant risk to the object and purpose of this Convention because it possesses such lethal or incapacitating toxicity as well as other properties that could enable it to be used as a chemical weapon;

(b) It may be used as a precursor in one of the chemical reactions at the final stage of formation of a chemical listed in Schedule 1 or Schedule 2, part A;

(c) It poses a significant risk to the object and purpose of this Convention by virtue of its importance in the production of a chemical listed in Schedule 1 or Schedule 2, part A;

(d) It is not produced in large commercial quantities for purposes not prohibited under this Convention.
Guidelines for Schedule 3

3. The following criteria shall be taken into account in considering whether a toxic chemical or precursor, not listed in other Schedules, should be included in Schedule 3:

(a) It has been produced, stockpiled or used as a chemical weapon;

(b) It poses otherwise a risk to the object and purpose of this Convention because it possesses such lethal or incapacitating toxicity as well as other properties that might enable it to be used as a chemical weapon;

(c) It poses a risk to the object and purpose of this Convention by virtue of its importance in the production of one or more chemicals listed in Schedule 1 or Schedule 2, part B;

(d) It may be produced in large commercial quantities for purposes not prohibited under this Convention.

B. SCHEDULES OF CHEMICALS

The following Schedules list toxic chemicals and their precursors. For the purpose of implementing this Convention, these Schedules identify chemicals for the application of verification measures according to the provisions of the Verification Annex. Pursuant to Article II, subparagraph 1 [a], these Schedules do not constitute a definition of chemical weapons.

(Whenever reference is made to groups of dialkylated chemicals, followed by a list of alkyl groups in parentheses, all chemicals possible by all possible combinations of alkyl groups listed in the parentheses are considered as listed in the respective Schedule as long as they are not explicitly exempted. A chemical marked ** on Schedule 2, part A, is subject to special thresholds for declaration and verification, as specified in Part VII of the Verification Annex.)

Schedule 1

<table>
<thead>
<tr>
<th>CAS registry number</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) O-Alkyl (H or (_\text{C}_1)0, incl. cycloalkyl) alkyl (Me, Et, n-Pr or i-Pr)-phosphonofluoridates</td>
</tr>
<tr>
<td>e.g. Sarin: O-Isopropyl methylphosphonofluoridate (107-44-8)</td>
</tr>
<tr>
<td>Soman: O-Pinacolyl methylphosphonofluoridate (96-64-9)</td>
</tr>
<tr>
<td>(b) O-Alkyl (H or (_\text{C}_1)0, incl. cycloalkyl) N,N-dialkyl (Me, Et, n-Pr or i-Pr)-phosphorimidocyanidates</td>
</tr>
<tr>
<td>e.g. Tabun: O-Ethyl N,N-dimethyl phosphorimidocyanidate (77-81-6)</td>
</tr>
<tr>
<td>(c) O-Alkyl (H or (_\text{C}_1)0, incl. cycloalkyl) S-2-dialkyl (Me, Et, n-Pr or i-Pr)-aminoethyl alkyl (Me, Et, n-Pr or i-Pr) phosphonothioates and corresponding alkylated or protonated salts</td>
</tr>
<tr>
<td>e.g. VX: O-Ethyl S-2-diisopropylaminoethyl methyl phosphonothioate (507d2-69-9)</td>
</tr>
<tr>
<td>(d) Sulfur mustards:</td>
</tr>
<tr>
<td>2-Chloroethylchloromethylsulfide (2625-76-5)</td>
</tr>
<tr>
<td>Mustard gas: Bis(2-chloroethyl)sulfide (505-60-2)</td>
</tr>
<tr>
<td>Bis(2-chloroethylthio)methane (63869-13-6)</td>
</tr>
<tr>
<td>Sesquimustard: 1,2-Bis(2-chloroethylthio)ethane (3563-36-8)</td>
</tr>
<tr>
<td>1,2-Bis(2-chloroethylthio)-n-propane (63905-10-2)</td>
</tr>
<tr>
<td>1,4-Bis(2-chloroethylthio)-n-butane (142868-93-7)</td>
</tr>
<tr>
<td>1,5-Bis(2-chloroethylthio)-n-pentane (142868-94-8)</td>
</tr>
<tr>
<td>Bis(2-chloroethylthio)methyl ether (63918-90-1)</td>
</tr>
<tr>
<td>O-Mustard: Bis(2-chloroethylthio)methyl ether (63918-89-8)</td>
</tr>
<tr>
<td>(e) Lewisites:</td>
</tr>
<tr>
<td>Lewisite 1: 2-Chlorovinyldichloroarsine (541-25-3)</td>
</tr>
<tr>
<td>Lewisite 2: Bis(2-chlorovinyl)chloroarsine (40334-69-8)</td>
</tr>
<tr>
<td>Lewisite 3: Tris(2-chlorovinyl)arsine (40334-70-1)</td>
</tr>
<tr>
<td>(f) Nitrogen mustards:</td>
</tr>
<tr>
<td>HN1: Bis(2-chloroethyl)ethylamine (538-07-8)</td>
</tr>
<tr>
<td>HN2: Bis(2-chloroethyl)methylamine (51-75-2)</td>
</tr>
<tr>
<td>HN3: Tris(2-chloroethyl)amine (555-77-1)</td>
</tr>
<tr>
<td>(g) Saxitoxin (35523-89-8)</td>
</tr>
<tr>
<td>(h) Ricin (9009-86-3)</td>
</tr>
<tr>
<td>(i) Precursors:</td>
</tr>
<tr>
<td>(j) Alkyl (Me, Et, n-Pr or i-Pr)-phosphonyldifluorides</td>
</tr>
<tr>
<td>e.g. DP: Methylphosphonyldifluoride (676-99-3)</td>
</tr>
<tr>
<td>(k) O-Alkyl (H or (_\text{C}_1)0, incl. cycloalkyl) O-2-dialkyl (Me, Et, n-Pr or i-Pr)-aminoethyl alkyl (Me, Et, n-Pr or i-Pr) phosphonates and corresponding alkylated or protonated salts</td>
</tr>
<tr>
<td>e.g. QL: O-Ethyl O-2-diisopropylaminoethyl methylphosphone (57856-11-8)</td>
</tr>
<tr>
<td>(l) Chlorosarin: O-Isopropyl methylphosphonochloridate (1445-76-7)</td>
</tr>
<tr>
<td>(m) Chlorosoman: O-Pinacolyl methylphosphonochloridate (7040-57-5)</td>
</tr>
</tbody>
</table>
Schedule 2

A. Toxic chemicals:

(1) Amiton: O,O-Diethyl S-[2-(diethylamino)ethyl] phosphorothiolate (78-53-5)
and corresponding alkylated or protonated salts

(2) PFIB: 1,1,3,1,3-Pentafluoro-2-(trifluoromethyl)-1-propene (382-21-8)

(3) BZ: 3-Quinuclidinyl benzilate (*) (6581-06-2)

B. Precursors:

(4) Chemicals, except for those listed in Schedule 1, containing a phosphorus atom to which is bonded one methyl, ethyl or propyl (normal or iso) group but not further carbon atoms,

\[ \text{e.g. Methylphosphonyl dichloride} \]
\[ \text{Dimethyl methylphosphonate} (676-97-1) \]
Exemption: Fonofon: O-Ethyl S-phenyl ethylphosphonothiolothionate (944-22-9)

(5) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) phosphoramic dinalides

(6) Dialkyl (Me, Et, n-Pr or i-Pr) N,N-dialkyl (Me, Et, n-Pr or i-Pr)-phosphorimidates

(7) Arsenic trichloride (7784-34-1)

(8) 2,2-Diphenyl-2-hydroxyacetic acid (76-93-7)

(9) Quinuclidine-3-ol (1619-34-7)

(10) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethyl-2-chlorides and corresponding protonated salts

(11) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-ols and corresponding protonated salts

Exemptions: N,N-Dimethylaminoethanol and corresponding protonated salts (108-01-0)
N,N-Diethylaminoethanol and corresponding protonated salts (100-37-8)

(12) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-thiols and corresponding protonated salts

(13) Thiodiglycol: Bis(2-hydroxyethyl)sulfide (111-48-8)

(14) Pinacolyl alcohol: 3,3-Dimethylbutane-2-ol (464-07-3)

Schedule 3

A. Toxic chemicals:

(1) Phosgene: Carbonyl dichloride (75-44-5)

(2) Cyanogen chloride (506-77-4)

(3) Hydrogen cyanide (74-90-8)

(4) Chloropicrin: Trichloronitromethane (76-06-2)

B. Precursors:

(5) Phosphorus oxychloride (10025-87-3)

(6) Phosphorus trichloride (7719-12-2)

(7) Phosphorus pentachloride (10026-13-8)

(8) Trimethyl phosphite (121-45-9)

(9) Triethyl phosphite (122-32-1)

(10) Dimethyl phosphite (868-85-9)

(11) Diethyl phosphite (762-04-9)

(12) Sulfur monochloride (10025-67-9)

(13) Sulfur dichloride (10545-99-0)

(14) Thionyl chloride (7719-09-7)

(15) Ethyldiethanolamine (139-87-7)

(16) Methyl diethanolamine (105-59-9)

(17) Triethanolamine (102-71-6)
ANNEX ON IMPLEMENTATION AND VERIFICATION
("VERIFICATION ANNEX")

CONTENTS

PART I: DEFINITIONS .............................................. 61

PART II: GENERAL RULES OF VERIFICATION

A. DESIGNATION OF INSPECTORS AND INSPECTION ASSISTANTS ... 66
B. PRIVILEGES AND IMMUNITIES ................................... 67
C. STANDING ARRANGEMENTS ...................................... 69
  Points of entry .............................................. 69
  Arrangements for use of non-scheduled aircraft .......... 70
  Administrative arrangements ............................... 71
  Approved equipment ........................................ 71
D. PRE-INSPECTION ACTIVITIES .................................. 72
  Notification .................................................. 72
  Entry into the territory of the inspected State Party or
  Host State and transfer to the inspection site .......... 73
  Pre-inspection briefing ..................................... 73
E. CONDUCT OF INSPECTIONS .................................... 73
  General rules ............................................... 73
  Safety ...................................................... 74
  Communications ............................................ 74
  Inspection team and inspected State Party rights .... 74
  Collection, handling and analysis of samples .......... 75
  Extension of inspection duration ........................ 77
  Debriefing .................................................. 77
F. DEPARTURE ................................................... 77
G. REPORTS ..................................................... 77
H. APPLICATION OF GENERAL PROVISIONS .................... 78

PART III: GENERAL PROVISIONS FOR VERIFICATION MEASURES PURSUANT TO
ARTICLES IV, V AND VI, PARAGRAPH 3

A. INITIAL INSPECTIONS AND FACILITY AGREEMENTS ........ 79
B. STANDING ARRANGEMENTS .................................... 80
C. PRE-INSPECTION ACTIVITIES ................................ 81

CONTENTS (continued)

PART IV (A): DESTRUCTION OF CHEMICAL WEAPONS AND ITS VERIFICATION
PURSUANT TO ARTICLE IV

A. DECLARATIONS .................................................. 82
  Chemical weapons .......................................... 82
  Declarations of chemical weapons pursuant to
  Article III, paragraph 1 (a) (iii) ....................... 84
  Declarations of past transfers and receipts .......... 84
  Submission of the general plan for destruction of
  chemical weapons ........................................... 85
B. MEASURES TO SECURE THE STORAGE FACILITY AND STORAGE
  FACILITY PREPARATION ..................................... 85
C. DESTRUCTION .................................................. 86
  Principles and methods for destruction of chemical
  weapons .................................................... 86
  Order of destruction ...................................... 86
  Modification of intermediate destruction deadlines .. 88
  Extension of the deadline for completion of
  destruction ................................................ 89
  Detailed annual plans for destruction .................. 90
  Annual reports on destruction ............................ 92
D. VERIFICATION .................................................. 92
  Verification of declarations of chemical weapons
  through on-site inspection ................................ 92
  Systematic verification of storage facilities ........ 92
  Inspections and visits .................................... 93
  Systematic verification of the destruction of
  chemical weapons ........................................... 94
  Chemical weapons storage facilities at chemical
  weapons destruction facilities .......................... 97
  Systematic on-site verification measures at chemical
  weapons destruction facilities .......................... 97

PART IV (B): OLD CHEMICAL WEAPONS AND ABANDONED CHEMICAL WEAPONS

A. GENERAL ...................................................... 99
B. REGIME FOR OLD CHEMICAL WEAPONS ...................... 99
C. REGIME FOR ABANDONED CHEMICAL WEAPONS .............. 100
CONTENTS (continued)

PART V: DESTRUCTION OF CHEMICAL WEAPONS PRODUCTION FACILITIES AND ITS VERIFICATION PURSUANT TO ARTICLE V

A. DECLARATIONS ...................................................... 103

Declarations of chemical weapons production facilities ........................................ 103
Declarations of chemical weapons production facilities pursuant to Article III, paragraph 1 (g) (iii) ................................................................. 105
Declarations of past transfers and receipts ......................................................... 105
Submission of general plans for destruction ...................................................... 106
Submission of annual plans for destruction and annual reports on destruction ................. 106

B. DESTRUCTION .......................................................... 107

General principles for destruction of chemical weapons production facilities .......... 107
Principles and methods for closure of a chemical weapons production facility ............ 107
Technical maintenance of chemical weapons production facilities prior to their destruction ................................................................. 108
Principles and methods for temporary conversion of chemical weapons production facilities into chemical weapons destruction facilities .............................................. 108
Principles and methods related to destruction of a chemical weapons production facility ................................................................. 110
Order of destruction .................................................................................. 110
Detailed plans for destruction .................................................................... 111
Review of detailed plans ........................................................................ 113

C. VERIFICATION ............................................................. 114

Verification of declarations of chemical weapons production facilities through on-site inspection ................................................................. 114
Systematic verification of chemical weapons production facilities and cessation of their activities ........................................................................ 115
Verification of destruction of chemical weapons production facilities .................... 116
Verification of temporary conversion of a chemical weapons production facility into a chemical weapons destruction facility .............................................. 116

PART VI: ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION IN ACCORDANCE WITH ARTICLE VI:

D. CONVERSION OF CHEMICAL WEAPONS PRODUCTION FACILITIES TO PURPOSES NOT PROHIBITED UNDER THIS CONVENTION .............. 117

Procedures for requesting conversion ................................................................ 117
Actions pending a decision ........................................................................ 119
Conditions for conversion ........................................................................ 120
Decisions by the Executive Council and the Conference ......................................... 120
Detailed plans for conversion ..................................................................... 121
Review of detailed plans ........................................................................ 122

PART VII: ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION IN ACCORDANCE WITH ARTICLE VI:

REGIME FOR SCHEDULE 1 CHEMICALS AND FACILITIES RELATED TO SUCH CHEMICALS

A. GENERAL PROVISIONS .................................................. 124

B. TRANSFERS .................................................................. 124

C. PRODUCTION ............................................................... 125

General principles for production ................................................................ 125
Single small-scale facility ........................................................................ 125
Other facilities ......................................................................................... 125

D. DECLARATIONS ............................................................. 126

Single small-scale facility ........................................................................ 126
Other facilities referred to in paragraphs 10 and 11 ........................................ 127

E. VERIFICATION ................................................................. 129

Single small-scale facility ........................................................................ 129
Other facilities referred to in paragraphs 10 and 11 ........................................ 129

PART VII: ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION IN ACCORDANCE WITH ARTICLE VI:

REGIME FOR SCHEDULE 2 CHEMICALS AND FACILITIES RELATED TO SUCH CHEMICALS

A. DECLARATIONS ............................................................. 131

Declarations of aggregate national data ................................................................ 131
Declarations of plant sites producing, processing or consuming Schedule 2 chemicals ......................................................................................... 131
Declarations on past production of Schedule 2 chemicals for chemical weapons purposes ......................................................................................... 133
Information to States Parties ........................................................................ 134
CONTENTS (continued)

B. VERIFICATION .................................................. 134
   General ................................................. 134
   Inspection aims .................................... 135
   Initial inspections ................................ 135
   Inspections ........................................ 136
   Inspection procedures ............................ 136
   Notification of inspection ....................... 137

C. TRANSFERS TO STATES NOT PARTY TO THIS CONVENTION ........ 138

PART VIII: ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION IN ACCORDANCE WITH ARTICLE VI:

REGIME FOR SCHEDULE 3 CHEMICALS AND FACILITIES RELATED TO SUCH CHEMICALS

A. DECLARATIONS .................................................. 139
   Declarations of aggregate national data .......... 139
   Declarations of plant sites producing Schedule 3 chemicals ........................................ 139
   Declarations on past production of Schedule 3 chemicals for chemical weapons purposes ...... 141
   Information to States Parties ....................... 141

B. VERIFICATION .................................................. 141
   General ................................................. 141
   Inspection aims .................................... 142
   Inspection procedures ................................ 142
   Notification of inspection ....................... 143

C. TRANSFERS TO STATES NOT PARTY TO THIS CONVENTION ........ 144

PART IX: ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION IN ACCORDANCE WITH ARTICLE VI:

REGIME FOR OTHER CHEMICAL PRODUCTION FACILITIES

A. DECLARATIONS .................................................. 145
   List of other chemical production facilities ... 145
   Assistance by the Technical Secretariat .......... 146
   Information to States Parties ................... 146

B. VERIFICATION .................................................. 146
   General ................................................. 146
   Inspection aims .................................... 147
   Inspection procedures ................................ 147
   Notification of inspection ....................... 148

C. IMPLEMENTATION AND REVIEW OF SECTION B .......................... 148

   Implementation ....................................... 148
   Review .................................................. 149

PART X: CHALLENGE INSPECTIONS PURSUANT TO ARTICLE IX

A. DESIGNATION AND SELECTION OF INSPECTORS AND INSPECTION ASSISTANTS ......................... 150

B. PRE-INSPECTION ACTIVITIES .................................. 150
   Notification ........................................... 150
   Entry into the territory of the inspected State Party or the Host State ......................... 152
   Alternative determination of final perimeter ......................................................... 153
   Verification of location ................................ 154
   Securing the site, exit monitoring ................. 154
   Pre-inspection briefing and inspection plan .......... 155
   Perimeter activities .................................. 156

C. CONDUCT OF INSPECTIONS ................................... 156
   General rules ......................................... 156
   Managed access ....................................... 156
   Observer .............................................. 159
   Duration of inspection ................................ 160

D. POST-INSPECTION ACTIVITIES ................................ 160
   Departure .............................................. 160
   Reports ............................................... 160

PART XI: INVESTIGATIONS IN CASES OF ALLEGED USE OF CHEMICAL WEAPONS

A. GENERAL ..................................................... 162

B. PRE-INSPECTION ACTIVITIES ................................ 162
   Request for an investigation ....................... 162
   Notification .......................................... 162
   Assignment of inspection team ..................... 163
   Dispatch of inspection team ........................ 163
   Briefings .............................................. 163
PART I

DEFINITIONS

1. "Approved Equipment" means the devices and instruments necessary for the performance of the inspection team’s duties that have been certified by the Technical Secretariat in accordance with regulations prepared by the Technical Secretariat pursuant to Part II, paragraph 27 of this Annex. Such equipment may also refer to the administrative supplies or recording materials that would be used by the inspection team.

2. "Building" as referred to in the definition of chemical weapons production facility in Article II comprises specialized buildings and standard buildings.

   (a) "Specialized Building" means:

   (i) Any building, including underground structures, containing specialized equipment in a production or filling configuration;

   (ii) Any building, including underground structures, which has distinctive features which distinguish it from buildings normally used for chemical production or filling activities not prohibited under this Convention.

   (b) "Standard Building" means any building, including underground structures, constructed to prevailing industry standards for facilities not producing any chemical specified in Article II, paragraph 8 (a) (i), or corrosive chemicals.

3. "Challenge Inspection" means the inspection of any facility or location in the territory or in any other place under the jurisdiction or control of a State Party requested by another State Party pursuant to Article IX, paragraphs 8 to 25.

4. "Discrete Organic Chemical" means any chemical belonging to the class of chemical compounds consisting of all compounds of carbon except for its oxides, sulfides and metal carbonates, identifiable by chemical name, by structural formula, if known, and by Chemical Abstracts Service registry number, if assigned.

5. "Equipment" as referred to in the definition of chemical weapons production facility in Article II comprises specialized equipment and standard equipment.

   (a) "Specialized Equipment" means:

   (i) The main production train, including any reactor or equipment for product synthesis, separation or purification, any equipment used directly for heat transfer in the final technological stage, such as in reactors or in product separation, as well as any other equipment which has been in contact with any chemical
specified in Article II, paragraph 8 (a) (i), or would be in contact with such a chemical if the facility were operated;

(ii) Any chemical weapon filling machines;

(iii) Any other equipment specially designed, built or installed for the operation of the facility as a chemical weapons production facility, as distinct from a facility constructed according to prevailing commercial industry standards for facilities not producing any chemical specified in Article II, paragraph 8 (a) (i), or corrosive chemicals, such as: equipment made of high-nickel alloys or other special corrosion-resistant material; special equipment for waste control, waste treatment, air filtering, or solvent recovery; special containment enclosures and safety shields; non-standard laboratory equipment used to analyse toxic chemicals for chemical weapons purposes; custom-designed process control panels; or dedicated spares for specialized equipment.

(b) "Standard Equipment" means:

(i) Production equipment which is generally used in the chemical industry and is not included in the types of specialized equipment;

(ii) Other equipment commonly used in the chemical industry, such as: fire-fighting equipment; guard and security/safety surveillance equipment; medical facilities, laboratory facilities; or communications equipment.

6. "Facility" in the context of Article VI means any of the industrial sites as defined below ("plant site", "plant" and "unit").

(a) "Plant Site" (Works, Factory) means the local integration of one or more plants, with any intermediate administrative levels, which are under one operational control, and includes common infrastructure, such as:

(i) Administration and other offices;

(ii) Repair and maintenance shops;

(iii) Medical centre;

(iv) Utilities;

(v) Central analytical laboratory;

(vi) Research and development laboratories;

(vii) Central effluent and waste treatment area; and

(viii) Warehouse storage.

(b) "Plant" (Production facility, Workshop) means a relatively self-contained area, structure or building containing one or more units with auxiliary and associated infrastructure, such as:

(i) Small administrative section;

(ii) Storage/handling areas for feedstock and products;

(iii) Effluent/waste handling/treatment area;

(iv) Control/analytical laboratory;

(v) First aid service/related medical section; and

(vi) Records associated with the movement into, around and from the site, of declared chemicals and their feedstock or product chemicals formed from them, as appropriate.

(c) "Unit" (Production unit, Process unit) means the combination of those items of equipment, including vessels and vessel set up, necessary for the production, processing or consumption of a chemical.

7. "Facility Agreement" means an agreement or arrangement between a State Party and the Organization relating to a specific facility subject to on-site verification pursuant to Articles IV, V and VI.

8. "Host State" means the State on whose territory lie facilities or areas of another State, Party to this Convention, which are subject to inspection under this Convention.

9. "In-Country Escort" means individuals specified by the inspected State Party and, if appropriate, by the Host State, if they so wish, to accompany and assist the inspection team during the in-country period.

10. "In-Country Period" means the period from the arrival of the inspection team at a point of entry until its departure from the State at a point of entry.

11. "Initial Inspection" means the first on-site inspection of facilities to verify declarations submitted pursuant to Articles III, IV, V and VI and this Annex.

12. "Inspected State Party" means the State Party on whose territory or in any other place under its jurisdiction or control an inspection pursuant to this Convention takes place, or the State Party whose facility or area on the territory of a Host State is subject to such an inspection; it does not, however, include the State Party specified in Part II, paragraph 21 of this Annex.
13. "Inspection Assistant" means an individual designated by the Technical Secretariat as set forth in Part II, Section A, of this Annex to assist inspectors in an inspection or visit, such as medical, security and administrative personnel and interpreters.

14. "Inspection Mandate" means the instructions issued by the Director-General to the inspection team for the conduct of a particular inspection.

15. "Inspection Manual" means the compilation of additional procedures for the conduct of inspections developed by the Technical Secretariat.

16. "Inspection Site" means any facility or area at which an inspection is carried out and which is specifically defined in the respective facility agreement or inspection request or mandate or inspection request as expanded by the alternative or final perimeter.

17. "Inspection Team" means the group of inspectors and inspection assistants assigned by the Director-General to conduct a particular inspection.

18. "Inspector" means an individual designated by the Technical Secretariat according to the procedures set forth in Part II, Section A, of this Annex, to carry out an inspection or visit in accordance with this Convention.

19. "Model Agreement" means a document specifying the general form and content for an agreement concluded between a State Party and the Organization for fulfilling the verification provisions specified in this Annex.

20. "Observer" means a representative of a requesting State Party or a third State Party to observe a challenge inspection.

21. "Perimeter" in case of challenge inspection means the external boundary of the inspection site, defined by either geographic coordinates or description on a map.

(a) "Requested Perimeter" means the inspection site perimeter as specified in conformity with Part X, paragraph 8, of this Annex;

(b) "Alternative Perimeter" means the inspection site perimeter as specified, alternatively to the requested perimeter, by the inspected State Party; it shall conform to the requirements specified in Part X, paragraph 17, of this Annex;

(c) "Final Perimeter" means the final inspection site perimeter as agreed in negotiations between the inspection team and the inspected State Party, in accordance with Part X, paragraphs 16 to 21, of this Annex;

(d) "Declared Perimeter" means the external boundary of the facility declared pursuant to Articles III, IV, V and VI.

22. "Period of Inspection", for the purposes of Article IX, means the period of time from provision of access to the inspection team to the inspection site until its departure from the inspection site, exclusive of time spent on briefings before and after the verification activities.

23. "Period of Inspection", for the purposes of Articles IV, V and VI, means the period of time from arrival of the inspection team at the inspection site until its departure from the inspection site, exclusive of time spent on briefings before and after the verification activities.

24. "Point of Entry"/"Point of Exit" means a location designated for the in-country arrival of inspection teams for inspections pursuant to this Convention or for their departure after completion of their mission.

25. "Requesting State Party" means a State Party which has requested a challenge inspection pursuant to Article IX.

26. "Tonne" means metric ton, i.e. 1,000 kg.

PART II

GENERAL RULES OF VERIFICATION

A. DESIGNATION OF INSPECTORS AND INSPECTION ASSISTANTS

1. Not later than 30 days after entry into force of this Convention the Technical Secretariat shall communicate, in writing, to all States Parties the names, nationalities and ranks of the inspectors and inspection assistants proposed for designation, as well as a description of their qualifications and professional experiences.

2. Each State Party shall immediately acknowledge receipt of the list of inspectors and inspection assistants, proposed for designation communicated to it. The State Party shall inform the Technical Secretariat in writing of its acceptance of each inspector and inspection assistant, not later than 30 days after acknowledgement of receipt of the list. Any inspector and inspection assistant included in this list shall be regarded as designated unless a State Party, not later than 30 days after acknowledgement of receipt of the list, declares its non-acceptance in writing. The State Party may include the reason for the objection.

In the case of non-acceptance, the proposed inspector or inspection assistant shall not undertake or participate in verification activities on the territory or in any other place under the jurisdiction or control of the State Party which has declared its non-acceptance. The Technical Secretariat shall, as necessary, submit further proposals in addition to the original list.

3. Verification activities under this Convention shall only be performed by designated inspectors and inspection assistants.
4. Subject to the provisions of paragraph 5, a State Party has the right at any time to object to an inspector or inspection assistant who has already been designated. It shall notify the Technical Secretariat of its objection in writing and may include the reason for the objection. Such objection shall come into effect 30 days after receipt by the Technical Secretariat. The Technical Secretariat shall immediately inform the State Party concerned of the withdrawal of the designation of the inspector or inspection assistant.

5. A State Party that has been notified of an inspection shall not seek to have removed from the inspection team for that inspection any of the designated inspectors or inspection assistants named in the inspection team list.

6. The number of inspectors or inspection assistants accepted by and designated to a State Party must be sufficient to allow for availability and rotation of appropriate numbers of inspectors and inspection assistants.

7. If, in the opinion of the Director-General, the non-acceptance of proposed inspectors or inspection assistants impedes the designation of a sufficient number of inspectors or inspection assistants or otherwise hampers the effective fulfilment of the tasks of the Technical Secretariat, the Director-General shall refer the issue to the Executive Council.

8. Whenever amendments to the above-mentioned lists of inspectors and inspection assistants are necessary or requested, replacement inspectors and inspection assistants shall be designated in the same manner as set forth with respect to the initial list.

9. The members of the inspection team carrying out an inspection of a facility of a State Party located on the territory of another State Party shall be designated in accordance with the procedures set forth in this Annex as applied both to the inspected State Party and the Host State Party.

B. PRIVILEGES AND IMMUNITIES

10. Each State Party shall, not later than 30 days after acknowledgement of receipt of the list of inspectors and inspection assistants or of changes thereto, provide multiple entry/exit and/or transit visas and other such documents to enable each inspector or inspection assistant to enter and to remain on the territory of that State Party for the purpose of carrying out inspection activities. These documents shall be valid for at least two years after their provision to the Technical Secretariat.

11. To exercise their functions effectively, inspectors and inspection assistants shall be accorded privileges and immunities as set forth in subparagraphs (a) to (i). Privileges and immunities shall be granted to members of the inspection team for the sake of this Convention and not for the personal benefit of the individuals themselves. Such privileges and immunities shall be accorded to them for the entire period between arrival on and departure from the territory of the inspected State Party or Host State, and thereafter with respect to acts previously performed in the exercise of their official functions.

(a) The members of the inspection team shall be accorded the inviolability enjoyed by diplomatic agents pursuant to Article 29 of the Vienna Convention on Diplomatic Relations of 18 April 1961.

(b) The living quarters and office premises occupied by the inspection team carrying out inspection activities pursuant to this Convention shall be accorded the inviolability and protection accorded to the premises of diplomatic agents pursuant to Article 30, paragraph 1, of the Vienna Convention on Diplomatic Relations.

(c) The papers and correspondence, including records, of the inspection team shall enjoy the inviolability accorded to all papers and correspondence of diplomatic agents pursuant to Article 30, paragraph 2, of the Vienna Convention on Diplomatic Relations. The inspection team shall have the right to use codes for their communications with the Technical Secretariat.

(d) Samples and approved equipment carried by members of the inspection team shall be inviolable subject to provisions contained in this Convention and exempt from all customs duties. Hazardous samples shall be transported in accordance with relevant regulations.

(e) The members of the inspection team shall be accorded the immunities accorded to diplomatic agents pursuant to Article 31, paragraphs 1, 2 and 3, of the Vienna Convention on Diplomatic Relations.

(f) The members of the inspection team carrying out prescribed activities pursuant to this Convention shall be accorded the exemption from duties and taxes accorded to diplomatic agents pursuant to Article 34 of the Vienna Convention on Diplomatic Relations.

(g) The members of the inspection team shall be permitted to bring into the territory of the inspected State Party or Host State Party, without payment of any customs duties or related charges, articles for personal use, with the exception of articles the import or export of which is prohibited by law or controlled by quarantine regulations.

(h) The members of the inspection team shall be accorded the same currency and exchange facilities as are accorded to representatives of foreign Governments on temporary official missions.

(i) The members of the inspection team shall not engage in any professional or commercial activity for personal profit on the territory of the inspected State Party or the Host State.
The Host State Party shall facilitate the inspection of those facilities or areas and shall provide for the necessary support to enable the inspection team to carry out its tasks in a timely and effective manner. States Parties through whose territory transit is required to inspect facilities or areas of an inspected State Party shall facilitate such transit.

20. In cases where facilities or areas of an inspected State Party are located on the territory of a State not Party to this Convention, the inspected State Party shall take all necessary measures to ensure that inspections of those facilities or areas can be carried out in accordance with the provisions of this Annex. A State Party that has one or more facilities or areas on the territory of a State not Party to this Convention shall take all necessary measures to ensure acceptance by the Host State of inspectors and inspection assistants designated to that State Party. If an inspected State Party is unable to ensure access, it shall demonstrate that it took all necessary measures to ensure access.

21. In cases where the facilities or areas sought to be inspected are located on the territory of a State Party, but in a place under the jurisdiction or control of a State not Party to this Convention, the State Party shall take all necessary measures as would be required of an inspected State Party and a Host State Party to ensure that inspections of such facilities or areas can be carried out in accordance with the provisions of this Annex. If the State Party is unable to ensure access to those facilities or areas, it shall demonstrate that it took all necessary measures to ensure access. This paragraph shall not apply where the facilities or areas sought to be inspected are those of the State Party.

Arrangements for use of non-scheduled aircraft

22. For inspections pursuant to Article IX and for other inspections where timely travel is not feasible using scheduled commercial transport, an inspection team may need to utilize aircraft owned or chartered by the Technical Secretariat. Not later than 30 days after this Convention enters into force for it, each State Party shall inform the Technical Secretariat of the standing diplomatic clearance number for non-scheduled aircraft transporting inspection teams and equipment necessary for inspection into and out of the territory in which an inspection site is located. Aircraft routings to and from the designated point of entry shall be along established international airways that are agree upon between the States Parties and the Technical Secretariat as the basis for such diplomatic clearance.

23. When a non-scheduled aircraft is used, the Technical Secretariat shall provide the inspected State Party with a flight plan, through the National Authority, for the aircraft’s flight from the last airfield prior to entering the airspace of the State in which the inspection site is located to the point of entry, not less than six hours before the scheduled departure time from that airfield. Such a plan shall be filed in accordance with the procedures of the International Civil Aviation Organization applicable to civil aircraft. For its owned or chartered
flights, the Technical Secretariat shall include in the remarks section of each flight plan the standing diplomatic clearance number and the appropriate notation identifying the aircraft as an inspection aircraft.

24. Not less than three hours before the scheduled departure of the inspection team from the last airfield prior to entering the airspace of the State in which the inspection is to take place, the inspected State Party or Host State Party shall ensure that the flight plan filed in accordance with paragraph 23 is approved so that the inspection team may arrive at the point of entry by the estimated arrival time.

25. The inspected State Party shall provide parking, security protection, servicing and fuel as required by the Technical Secretariat for the aircraft of the inspection team at the point of entry when such aircraft is owned or chartered by the Technical Secretariat. Such aircraft shall not be liable for landing fees, departure tax, and similar charges. The Technical Secretariat shall bear the cost of such fuel, security protection and servicing.

Administrative arrangements

26. The inspected State Party shall provide or arrange for the amenities necessary for the inspection team such as communication means, interpretation services to the extent necessary for the performance of interviewing and other tasks, transportation, working space, lodging, meals and medical care. In this regard, the inspected State Party shall be reimbursed by the Organization for such costs incurred by the inspection team.

Approved equipment

27. Subject to paragraph 29, there shall be no restriction by the inspected State Party on the inspection team bringing onto the inspection site such equipment, approved in accordance with paragraph 28, which the Technical Secretariat has determined to be necessary to fulfill the inspection requirements. The Technical Secretariat shall prepare and, as appropriate, update a list of approved equipment, which may be needed for the purposes described above, and regulations governing such equipment shall be in accordance with this Annex. In establishing the list of approved equipment and these regulations, the Technical Secretariat shall ensure that safety considerations for all the types of facilities at which such equipment is likely to be used, are taken fully into account. A list of approved equipment shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (4).

28. The equipment shall be in the custody of the Technical Secretariat and be designated, calibrated and approved by the Technical Secretariat. The Technical Secretariat shall, to the extent possible, select that equipment which is specifically designed for the specific kind of inspection required. Designated and approved equipment shall be specifically protected against unauthorized alteration.

29. The inspected State Party shall have the right, without prejudice to the prescribed time-frames, to inspect the equipment in the presence of inspection team members at the point of entry, i.e., to check the identity of the equipment brought in or removed from the territory of the inspected State Party or the Host State. To facilitate such identification, the Technical Secretariat shall attach documents and devices to authenticate its designation and approval of the equipment. The inspection of the equipment shall also ascertain to the satisfaction of the inspected State Party that the equipment meets the description of the approved equipment for the particular type of inspection. The inspected State Party may exclude equipment not meeting that description or equipment without the above-mentioned authentication documents and devices. Procedures for the inspection of equipment shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (4).

30. In cases where the inspection team finds it necessary to use equipment available on site not belonging to the Technical Secretariat and requests the inspected State Party to enable the team to use such equipment, the inspected State Party shall comply with the request to the extent it can.

D. PRE-INSPECTION ACTIVITIES

Notification

31. The Director-General shall notify the State Party before the planned arrival of the inspection team at the point of entry and within the prescribed time-frames, where specified, of its intention to carry out an inspection.

32. Notifications made by the Director-General shall include the following information:

(a) The type of inspection;
(b) The point of entry;
(c) The date and estimated time of arrival at the point of entry;
(d) The means of arrival at the point of entry;
(e) The site to be inspected;
(f) The names of inspectors and inspection assistants;
(g) If appropriate, aircraft clearance for special flights.

33. The inspected State Party shall acknowledge the receipt of a notification by the Technical Secretariat of an intention to conduct an inspection, not later than one hour after receipt of such notification.

34. In the case of an inspection of a facility of a State Party located on the territory of another State Party, both States Parties shall be simultaneously notified in accordance with paragraphs 31 and 32.
Entry into the territory of the inspected State Party or Host State and transfer to the inspection site

35. The inspected State Party or Host State Party which has been notified of the arrival of an inspection team, shall ensure its immediate entry into the territory and shall through an in-country escort or by other means do everything in its power to ensure the safe conduct of the inspection team and its equipment and supplies, from its point of entry to the inspection site(s) and to a point of exit.

36. The inspected State Party or Host State Party shall, as necessary, assist the inspection team in reaching the inspection site not later than 12 hours after the arrival at the point of entry.

Pre-inspection briefing

37. Upon arrival at the inspection site and before the commencement of the inspection, the inspection team shall be briefed by facility representatives, with the aid of maps and other documentation as appropriate, on the facility, the activities carried out there, safety measures and administrative and logistic arrangements necessary for the inspection. The time spent for the briefing shall be limited to the minimum necessary and in any event not exceed three hours.

E. CONDUCT OF INSPECTIONS

General rules

38. The members of the inspection team shall discharge their functions in accordance with the provisions of this Convention, as well as rules established by the Director-General and facility agreements concluded between States Parties and the Organization.

39. The inspection team shall strictly observe the inspection mandate issued by the Director-General. It shall refrain from activities going beyond this mandate.

40. The activities of the inspection team shall be so arranged as to ensure the timely and effective discharge of its functions and the least possible inconvenience to the inspected State Party or Host State and disturbance to the facility or area inspected. The inspection team shall avoid unnecessarily hampering or delaying the operation of a facility and avoid affecting its safety. In particular, the inspection team shall not operate any facility. If inspectors consider that, to fulfill their mandate, particular operations should be carried out in a facility, they shall request the designated representative of the inspected facility to have them performed. The representative shall carry out the request to the extent possible.

41. In the performance of their duties on the territory of an inspected State Party or Host State, the members of the inspection team shall, if the inspected State Party so requests, be accompanied by representatives of the inspected State Party, but the inspection team must not thereby be delayed or otherwise hindered in the exercise of its functions.

42. Detailed procedures for the conduct of inspections shall be developed for inclusion in the inspection manual by the Technical Secretariat, taking into account guidelines to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (1).

Safety

43. In carrying out their activities, inspectors and inspection assistants shall observe safety regulations established at the inspection site, including those for the protection of controlled environments within a facility and for personal safety. In order to implement these requirements, appropriate detailed procedures shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (4).

Communications

44. Inspectors shall have the right throughout the in-country period to communicate with the Headquarters of the Technical Secretariat. For this purpose they may use their own, duly certified, approved equipment and may request that the inspected State Party or Host State Party provide them with access to other telecommunications. The inspection team shall have the right to use its own two-way system of radio communications between personnel patrolling the perimeter and other members of the inspection team.

Inspection team and inspected State Party rights

45. The inspection team shall, in accordance with the relevant Articles and Annexes of this Convention as well as with facility agreements and procedures set forth in the inspection manual, have the right to unimpeded access to the inspection site. The items to be inspected will be chosen by the inspectors.

46. Inspectors shall have the right to interview any facility personnel in the presence of representatives of the inspected State Party with the purpose of establishing relevant facts. Inspectors shall only request information and data which are necessary for the conduct of the inspection, and the inspected State Party shall furnish such information upon request. The inspected State Party shall have the right to object to questions posed to the facility personnel if those questions are deemed not relevant to the inspection. If the head of the inspection team objects and states their relevance, the questions shall be provided in writing to the inspected State Party for reply. The inspection team may note any refusal to permit interviews or to allow questions to be answered and any explanations given, in that part of the inspection report that deals with the cooperation of the inspected State Party.

47. Inspectors shall have the right to inspect documentation and records they deem relevant to the conduct of their mission.

48. Inspectors shall have the right to have photographs taken at their request by representatives of the inspected State Party or of the inspected facility. The capability to take instant development
photographic prints shall be available. The inspection team shall determine whether photographs conform to those requested and, if not, repeat photographs shall be taken. The inspection team and the inspected State Party shall each retain one copy of every photograph.

49. The representatives of the inspected State Party shall have the right to observe all verification activities carried out by the inspection team.

50. The inspected State Party shall receive copies, at its request, of the information and data gathered about its facility(ies) by the Technical Secretariat.

51. Inspectors shall have the right to request clarifications in connection with ambiguities that arise during an inspection. Such requests shall be made promptly through the representative of the inspected State Party. The representative of the inspected State Party shall provide the inspection team, during the inspection, with such clarification as may be necessary to remove the ambiguity. If questions relating to an object or a building located within the inspection site are not resolved, the object or building shall, if requested, be photographed for the purpose of clarifying its nature and function. If the ambiguity cannot be removed during the inspection, the inspectors shall notify the Technical Secretariat immediately. The inspectors shall include in the inspection report any such unresolved question, relevant clarifications, and a copy of any photographs taken.

Collection, handling and analysis of samples

52. Representatives of the inspected State Party or of the inspected facility shall take samples at the request of the inspection team in the presence of inspectors. If so agreed in advance with the representatives of the inspected State Party or of the inspected facility, the inspection team may take samples itself.

53. Where possible, the analysis of samples shall be performed on-site. The inspection team shall have the right to perform on-site analysis of samples using approved equipment brought by it. At the request of the inspection team, the inspected State Party shall, in accordance with agreed procedures, provide assistance for the analysis of samples on-site. Alternatively, the inspection team may request that appropriate analysis on-site be performed in its presence.

54. The inspected State Party has the right to retain portions of all samples taken or take duplicate samples and be present when samples are analysed on-site.

55. The inspection team shall, if it deems it necessary, transfer samples for analysis off-site at laboratories designated by the Organization.

56. The Director-General shall have the primary responsibility for the security, integrity and preservation of samples and for ensuring that the confidentiality of samples transferred for analysis off-site is protected. The Director-General shall do so in accordance with procedures, to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i), for inclusion in the inspection manual. He shall:

(a) Establish a stringent regime governing the collection, handling, transport and analysis of samples;

(b) Certify the laboratories designated to perform different types of analysis;

(c) Oversee the standardization of equipment and procedures at these designated laboratories, mobile analytical equipment and procedures, and monitor quality control and overall standards in relation to the certification of these laboratories, mobile equipment and procedures; and

(d) Select from among the designated laboratories those which shall perform analytical or other functions in relation to specific investigations.

57. When off-site analysis is to be performed, samples shall be analysed in at least two designated laboratories. The Technical Secretariat shall ensure the expeditious processing of the analysis. The samples shall be accounted for by the Technical Secretariat and any unused samples or portions thereof shall be returned to the Technical Secretariat.

58. The Technical Secretariat shall compile the results of the laboratory analysis of samples relevant to compliance with this Convention and include them in the final inspection report. The Technical Secretariat shall include in the report detailed information concerning the equipment and methodology employed by the designated laboratories.

Extension of inspection duration

59. Periods of inspection may be extended by agreement with the representative of the inspected State Party.

Debriefing

60. Upon completion of an inspection the inspection team shall meet with representatives of the inspected State Party and the personnel responsible for the inspection site to review the preliminary findings of the inspection team and to clarify any ambiguities. The inspection team shall provide to the representatives of the inspected State Party its preliminary findings in written form according to a standardized format, together with a list of any samples and copies of written information and data gathered and other material to be taken off-site. The document shall be signed by the head of the inspection team. In order to indicate that he has taken notice of the contents of the document, the representative of the inspected State Party shall countersign the document. This meeting shall be completed not later than 24 hours after the completion of the inspection.
F. DEPARTURE

61. Upon completion of the post-inspection procedures, the inspection team shall leave, as soon as possible, the territory of the inspected State Party or the Host State.

G. REPORTS

62. Not later than 10 days after the inspection, the inspectors shall prepare a factual, final report on the activities conducted by them and on their findings. It shall only contain facts relevant to compliance with this Convention, as provided for under the inspection mandate. The report shall also provide information as to the manner in which the State Party inspected cooperated with the inspection team. Differing observations made by inspectors may be attached to the report. The report shall be kept confidential.

63. The final report shall immediately be submitted to the inspected State Party. Any written comments, which the inspected State Party may make on its findings shall be annexed to it. The final report together with annexed comments made by the inspected State Party shall be submitted to the Director-General not later than 30 days after the inspection.

64. Should the report contain uncertainties, or should cooperation between the National Authority and the inspectors not measure up to the standards required, the Director-General shall approach the State Party for clarification.

65. If the uncertainties cannot be removed or the facts established are of a nature to suggest that obligations undertaken under this Convention have not been met, the Director-General shall inform the Executive Council without delay.

H. APPLICATION OF GENERAL PROVISIONS

66. The provisions of this Part shall apply to all inspections conducted pursuant to this Convention, except where the provisions of this Part differ from the provisions set forth for specific types of inspections in Parts III to XI of this Annex, in which case the latter provisions shall take precedence.

PART III

GENERAL PROVISIONS FOR VERIFICATION MEASURES PURSUANT TO ARTICLES IV, V AND VI, PARAGRAPH 3

A. INITIAL INSPECTIONS AND FACILITY AGREEMENTS

1. Each declared facility subject to on-site inspection pursuant to Articles IV, V, and VI, paragraph 3, shall receive an initial inspection promptly after the facility is declared. The purpose of this inspection of the facility shall be to verify information provided and to obtain any additional information needed for planning future verification activities at the facility, including on-site inspections and continuous monitoring with on-site instruments, and to work on the facility agreements.

2. States Parties shall ensure that the verification of declarations and the initiation of the verification measures can be accomplished by the Technical Secretariat at all facilities within the established time-frames after this Convention enters into force for them.

3. Each State Party shall conclude a facility agreement with the Organization for each facility declared and subject to on-site inspection pursuant to Articles IV, V, and VI, paragraph 3.

4. Facility agreements shall be completed not later than 180 days after this Convention enters into force for the State Party or after the facility has been declared for the first time, except for a chemical weapons destruction facility to which paragraphs 5 to 7 shall apply.

5. In the case of a chemical weapons destruction facility that begins operations more than one year after this Convention enters into force for the State Party, the facility agreement shall be completed not less than 180 days before the facility begins operation.

6. In the case of a chemical weapons destruction facility that is in operation when this Convention enters into force for the State Party, or begins operation not later than one year thereafter, the facility agreement shall be completed not later than 210 days after this Convention enters into force for the State Party, except that the Executive Council may decide that transitional verification arrangements, approved in accordance with Part IV (A), paragraph 51, of this Annex and including a transitional facility agreement, provisions for verification through on-site inspection and monitoring with on-site instruments, and the time-frame for application of the arrangements, are sufficient.

7. In the case of a facility, referred to in paragraph 6, that will cease operations not later than two years after this Convention enters into force for the State Party, the Executive Council may decide that transitional verification arrangements, approved in accordance with Part IV (A), paragraph 51, of this Annex and including a transitional facility agreement, provisions for verification through on-site inspection and monitoring with on-site instruments, and the time-frame for application of the arrangements, are sufficient.

8. Facility agreements shall be based on models for such agreements and provide for detailed arrangements which shall govern inspections at each facility. The model agreements shall include provisions to take into account future technological developments and shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (1).

9. The Technical Secretariat may retain at each site a sealed container for photographs, plans and other information that it may wish to refer to in the course of subsequent inspections.
B. STANDING ARRANGEMENTS

10. Where applicable, the Technical Secretariat shall have the right to have continuous monitoring instruments and systems and seals installed and to use them, in conformity with the relevant provisions in this Convention and the facility agreements between States Parties and the Organization.

11. The inspected State Party shall, in accordance with agreed procedures, have the right to inspect any instrument used or installed by the inspection team and to have it tested in the presence of representatives of the inspected State Party. The inspection team shall have the right to use the instruments that were installed by the inspected State Party for its own monitoring of the technological process of the destruction of chemical weapons. To this end, the inspection team shall have the right to inspect those instruments that it intends to use for purposes of verification of the destruction of chemical weapons and to have them tested in its presence.

12. The inspected State Party shall provide the necessary preparation and support for the establishment of continuous monitoring instruments and systems.

13. In order to implement paragraphs 11 and 12, appropriate detailed procedures shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (4).

14. The inspected State Party shall immediately notify the Technical Secretariat if an event occurs or may occur at a facility where monitoring instruments are installed, which may have an impact on the monitoring system. The inspected State Party shall coordinate subsequent actions with the Technical Secretariat with a view to restoring the operation of the monitoring system and establishing interim measures, if necessary, as soon as possible.

15. The inspection team shall verify during each inspection that the monitoring system functions correctly and that placed seals have not been tampered with. In addition, visits to service the monitoring system may be required to perform any necessary maintenance or replacement of equipment, or to adjust the coverage of the monitoring system as required.

16. If the monitoring system indicates any anomaly, the Technical Secretariat shall immediately take action to determine whether this resulted from equipment malfunction or activities at the facility. If, after this examination, the problem remains unresolved, the Technical Secretariat shall immediately ascertain the actual situation, including through immediate on-site inspection of, or visit to, the facility if necessary. The Technical Secretariat shall report any such problem immediately after its detection to the inspected State Party which shall assist in its resolution.

C. PRE-INSPECTION ACTIVITIES

17. The inspected State Party shall, except as specified in paragraph 18, be notified of inspections not less than 24 hours in advance of the planned arrival of the inspection team at the point of entry.

18. The inspected State Party shall be notified of initial inspections not less than 72 hours in advance of the estimated time of arrival of the inspection team at the point of entry.

PART IV (A)
DESTRUCTION OF CHEMICAL WEAPONS AND ITS VERIFICATION PURSUANT TO ARTICLE IV

A. DECLARATIONS

Chemical weapons

1. The declaration of chemical weapons by a State Party pursuant to Article III, paragraph 1 (a) (ii), shall include the following:

(a) The aggregate quantity of each chemical declared;

(b) The precise location of each chemical weapons storage facility, expressed by:

(i) Name;

(ii) Geographical coordinates; and

(iii) A detailed site diagram, including a boundary map and the location of bunkers/storage areas within the facility.

(c) The detailed inventory for each chemical weapons storage facility including:

(i) Chemicals defined as chemical weapons in accordance with Article II;

(ii) Unfilled munitions, sub-munitions, devices and equipment defined as chemical weapons;

(iii) Equipment specially designed for use directly in connection with the employment of munitions, sub-munitions, devices or equipment specified in sub-subparagraph (ii);

(iv) Chemicals specifically designed for use directly in connection with the employment of munitions, sub-munitions, devices or equipment specified in sub-subparagraph (ii).
2. For the declaration of chemicals referred to in paragraph 1 (c) (i), the following shall apply:

(a) Chemicals shall be declared in accordance with the Schedules specified in the Annex on Chemicals;

(b) For a chemical not listed in the Schedules in the Annex on Chemicals the information required for possible assignment of the chemical to the appropriate Schedule shall be provided, including the toxicity of the pure compound. For a precursor, the toxicity and identity of the principal final reaction product(s) shall be provided;

(c) Chemicals shall be identified by chemical name in accordance with current International Union of Pure and Applied Chemistry (IUPAC) nomenclature, structural formula and Chemical Abstracts Service registry number, if assigned. For a precursor, the toxicity and identity of the principal final reaction product(s) shall be provided;

(d) In cases involving mixtures of two or more chemicals, each chemical shall be identified and the percentage of each shall be provided, and the mixture shall be declared under the category of the most toxic chemical. If a component of a binary chemical weapon consists of a mixture of two or more chemicals, each chemical shall be identified and the percentage of each provided;

(e) Binary chemical weapons shall be declared under the relevant end product within the framework of the categories of chemical weapons referred to in paragraph 16. The following supplementary information shall be provided for each type of binary chemical munition/device:

(i) The chemical name of the toxic end-product;

(ii) The chemical composition and quantity of each component;

(iii) The actual weight ratio between the components;

(iv) Which component is considered the key component;

(v) The projected quantity of the toxic end-product calculated on a stoichiometric basis from the key component, assuming 100 per cent yield. A declared quantity (in tonnes) of the key component intended for a specific toxic end-product shall be considered equivalent to the quantity (in tonnes) of this toxic end-product calculated on a stoichiometric basis assuming 100 per cent yield.

(f) For multicomponent chemical weapons, the declaration shall be analogous to that envisaged for binary chemical weapons;

(g) For each chemical the form of storage, i.e. munitions, sub-munitions, devices, equipment or bulk containers and other containers shall be declared. For each form of storage the following shall be listed:

(i) Type;

(ii) Size or calibre;

(iii) Number of items; and

(iv) Nominal weight of chemical fill per item.

(b) For each chemical the total weight present at the storage facility shall be declared;

(i) In addition, for chemicals stored in bulk, the percentage purity shall be declared, if known.

3. For each type of unfilled munitions, sub-munitions, devices or equipment, referred to in paragraph 1 (c) (ii), the information shall include:

(a) The number of items;

(b) The nominal fill volume per item;

(c) The intended chemical fill.

Declarations of chemical weapons pursuant to Article III, paragraph 1 (a) (iii)

4. The declaration of chemical weapons pursuant to Article III, paragraph 1 (a) (iii), shall contain all information specified in paragraphs 1 to 3 above. It is the responsibility of the State Party on whose territory the chemical weapons are located to make appropriate arrangements with the other State to ensure that the declarations are made. If the State Party on whose territory the chemical weapons are located is not able to fulfil its obligations under this paragraph, it shall state the reasons therefor.

Declarations of past transfers and receipts

5. A State Party that has transferred or received chemical weapons since 1 January 1946 shall declare these transfers or receipts pursuant to Article III, paragraph 1 (a) (iv), provided the amount transferred or received exceeded 1 tonne per chemical per year in bulk and/or munition form. This declaration shall be made according to the inventory format specified in paragraphs 1 and 2. This declaration shall also indicate the supplier and recipient countries, the dates of the transfers or receipts and, as precisely as possible, the current location of the transferred items. When not all the specified information is available for transfers or receipts of chemical weapons for the period between 1 January 1946 and 1 January 1970, the State Party shall declare whatever information is still available to it and provide an explanation as to why it cannot submit a full declaration.
Submission of the general plan for destruction of chemical weapons

6. The general plan for destruction of chemical weapons submitted pursuant to Article III, paragraph 1 (a) (v), shall provide an overview of the entire national chemical weapons destruction programme of the State Party and information on the efforts of the State Party to fulfill the destruction requirements contained in this Convention. The plan shall specify:

(a) A general schedule for destruction, giving types and approximate quantities of chemical weapons planned to be destroyed in each annual destruction period for each existing chemical weapons destruction facility and, if possible, for each planned chemical weapons destruction facility;

(b) The number of chemical weapons destruction facilities existing or planned to be operated over the destruction period;

(c) For each existing or planned chemical weapons destruction facility:
   (i) Name and location; and
   (ii) The types and approximate quantities of chemical weapons, and the type (for example, nerve agent or blister agent) and approximate quantity of chemical fill, to be destroyed;

(d) The plans and programmes for training personnel for the operation of destruction facilities;

(e) The national standards for safety and emissions that the destruction facilities must satisfy;

(f) Information on the development of new methods for destruction of chemical weapons and on the improvement of existing methods;

(g) The cost estimates for destroying the chemical weapons; and

(h) Any issues which could adversely impact on the national destruction programme.

B. MEASURES TO SECURE THE STORAGE FACILITY AND STORAGE FACILITY PREPARATION

7. Not later than when submitting its declaration of chemical weapons, a State Party shall take such measures as it considers appropriate to secure its storage facilities and shall prevent any movement of its chemical weapons out of the facilities, except their removal for destruction.

8. A State Party shall ensure that chemical weapons at its storage facilities are configured to allow ready access for verification in accordance with paragraphs 37 to 49.

9. While a storage facility remains closed for any movement of chemical weapons out of the facility other than their removal for destruction, a State Party may continue at the facility standard maintenance activities, including standard maintenance of chemical weapons; safety monitoring and physical security activities; and preparation of chemical weapons for destruction.

10. Maintenance activities of chemical weapons shall not include:

   (a) Replacement of agent or of munition bodies;

   (b) Modification of the original characteristics of munitions, or parts or components thereof.

11. All maintenance activities shall be subject to monitoring by the Technical Secretariat.

C. DESTRUCTION

Principles and methods for destruction of chemical weapons

12. "Destruction of chemical weapons" means a process by which chemicals are converted in an essentially irreversible way to a form unsuitable for production of chemical weapons, and which in an irreversible manner renders munitions and other devices unusable as such.

13. Each State Party shall determine how it shall destroy chemical weapons, except that the following processes may not be used: dumping in any body of water, land burial or open-pit burning. It shall destroy chemical weapons only at specifically designated and appropriately designed and equipped facilities.

14. Each State Party shall ensure that its chemical weapons destruction facilities are constructed and operated in a manner to ensure the destruction of the chemical weapons; and that the destruction process can be verified under the provisions of this Convention.

Order of destruction

15. The order of destruction of chemical weapons is based on the obligations specified in Article I and the other Articles, including obligations regarding systematic on-site verification. It takes into account interests of States Parties for undiminished security during the destruction period; confidence-building in the early part of the destruction stage; gradual acquisition of experience in the course of destroying chemical weapons; and applicability irrespective of the actual composition of the stockpiles and the methods chosen for the destruction of the chemical weapons. The order of destruction is based on the principle of levelling out.

16. For the purpose of destruction, chemical weapons declared by each State Party shall be divided into three categories:

Category 1: Chemical weapons on the basis of Schedule 1 chemicals and their parts and components;
end-product shall be considered equivalent to the quantity (in tonnes) of this toxic end-product calculated on a stoichiometric basis assuming 100 per cent yield.

(b) A requirement to destroy a given quantity of the key component shall entail a requirement to destroy a corresponding quantity of the other component, calculated from the actual weight ratio of the components in the relevant type of binary chemical munition/device.

(c) If more of the other component is declared than is needed, based on the actual weight ratio between components, the excess shall be destroyed over the first two years after destruction operations begin.

(d) At the end of each subsequent operational year a State Party may retain an amount of the other declared component that is determined on the basis of the actual weight ratio of the components in the relevant type of binary chemical munition/device.

19. For multicomponent chemical weapons the order of destruction shall be analogous to that envisaged for binary chemical weapons.

Modification of intermediate destruction deadlines

20. The Executive Council shall review the general plans for destruction of chemical weapons, submitted pursuant to Article III, paragraph 1 (a) (v), and in accordance with paragraph 6, inter alia, to assess their conformity with the order of destruction set forth in paragraph 17. The Executive Council shall consult with any State Party whose plan does not conform, with the objective of bringing the plan into conformity.

21. If a State Party, due to exceptional circumstances beyond its control, believes that it cannot achieve the level of destruction specified for Phase 1, Phase 2 or Phase 3 of the order of destruction of Category 1 chemical weapons, it may propose changes in those levels. Such a proposal must be made not later than 120 days after the entry into force of this Convention and shall contain a detailed explanation of the reasons for the proposal.

22. Each State Party shall take all necessary measures to ensure destruction of Category 1 chemical weapons in accordance with the destruction deadlines set forth in paragraph 17 (a) as changed pursuant to paragraph 21. However, if a State Party believes that it will be unable to ensure the destruction of the percentage of Category 1 chemical weapons required by an intermediate destruction deadline, it may request the Executive Council to recommend to the Conference to grant an extension of its obligation to meet that deadline. Such a request must be made not less than 180 days before the intermediate destruction deadline and shall contain a detailed explanation of the reasons for the request and the plans of the State Party for ensuring that it will be able to fulfill its obligation to meet the next intermediate destruction deadline.
23. If an extension is granted, the State Party shall still be under the obligation to meet the cumulative destruction requirements set forth for the next destruction deadline. Extensions granted pursuant to this section shall not, in any way, modify the obligation of the State Party to destroy all Category 1 chemical weapons not later than 10 years after the entry into force of this Convention.

Extension of the deadline for completion of destruction

24. If a State Party believes that it will be unable to ensure the destruction of all Category 1 chemical weapons not later than 10 years after the entry into force of this Convention, it may submit a request to the Executive Council for an extension of the deadline for completing the destruction of such chemical weapons. Such a request must be made not later than nine years after the entry into force of this Convention.

25. The request shall contain:

(a) The duration of the proposed extension;
(b) A detailed explanation of the reasons for the proposed extension; and
(c) A detailed plan for destruction during the proposed extension and the remaining portion of the original 10-year period for destruction.

26. A decision on the request shall be taken by the Conference at its next session, on the recommendation of the Executive Council. Any extension shall be the minimum necessary, but in no case shall the deadline for a State Party to complete its destruction of all chemical weapons be extended beyond 15 years after the entry into force of this Convention. The Executive Council shall set conditions for the granting of the extension, including the specific verification measures deemed necessary as well as specific actions to be taken by the State Party to overcome problems in its destruction programme. Costs of verification during the extension period shall be allocated in accordance with Article IV, paragraph 16.

27. If an extension is granted, the State Party shall take appropriate measures to meet all subsequent deadlines.

28. The State Party shall continue to submit detailed annual plans for destruction in accordance with paragraph 29 and annual reports on the destruction of Category 1 chemical weapons in accordance with paragraph 36, until all Category 1 chemical weapons are destroyed. In addition, not later than at the end of each 90 days of the extension period, the State Party shall report to the Executive Council on its destruction activity. The Executive Council shall review progress towards completion of destruction and take the necessary measures to document this progress. All information concerning the destruction activities during the extension period shall be provided by the Executive Council to States Parties, upon request.

Detailed annual plans for destruction

29. The detailed annual plans for destruction shall be submitted to the Technical Secretariat not less than 60 days before each annual destruction period begins pursuant to Article IV, paragraph 7 (a), and shall specify:

(a) The quantity of each specific type of chemical weapon to be destroyed at each destruction facility and the inclusive dates when the destruction of each specific type of chemical weapon will be accomplished;

(b) The detailed site diagram for each chemical weapons destruction facility and any changes to previously submitted diagrams; and

(c) The detailed schedule of activities for each chemical weapons destruction facility for the upcoming year, identifying time required for design, construction or modification of the facility, installation of equipment, equipment check-out and operator training, destruction operations for each specific type of chemical weapon, and scheduled periods of inactivity.

30. A State Party shall provide, for each of its chemical weapons destruction facilities, detailed facility information to assist the Technical Secretariat in developing preliminary inspection procedures for use at the facility.

31. The detailed facility information for each destruction facility shall include the following information:

(a) Name, address and location;

(b) Detailed, annotated facility drawings;

(c) Facility design drawings, process drawings, and piping and instrumentation design drawings;

(d) Detailed technical descriptions, including design drawings and instrument specifications, for the equipment required for: removing the chemical fill from the munitions, devices, and containers; temporarily storing the drained chemical fill; destroying the chemical agent; and destroying the munitions, devices, and containers;

(e) Detailed technical descriptions of the destruction process, including material flow rates, temperatures and pressures, and designed destruction efficiency;

(f) Design capacity for each specific type of chemical weapon;

(g) A detailed description of the products of destruction and the method of their ultimate disposal;
(h) A detailed technical description of measures to facilitate inspections in accordance with this Convention;

(i) A detailed description of any temporary holding area at the destruction facility that will be used to provide chemical weapons directly to the destruction facility, including site and facility drawings and information on the storage capacity for each specific type of chemical weapon to be destroyed at the facility;

(j) A detailed description of the safety and medical measures in force at the facility;

(k) A detailed description of the living quarters and working premises for the inspectors; and

(l) Suggested measures for international verification.

32. A State Party shall provide, for each of its chemical weapons destruction facilities, the plant operations manuals, the safety and medical plans, the laboratory operations and quality assurance and control manuals, and the environmental permits that have been obtained, except that this shall not include material previously provided.

33. A State Party shall promptly notify the Technical Secretariat of any developments that could affect inspection activities at its destruction facilities.

34. Deadlines for submission of the information specified in paragraphs 30 to 32 shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).

35. After a review of the detailed facility information for each destruction facility, the Technical Secretariat, if the need arises, shall enter into consultation with the State Party concerned in order to ensure that its chemical weapons destruction facilities are designed to assure the destruction of chemical weapons, to allow advanced planning on how verification measures may be applied and to ensure that the application of verification measures is consistent with proper facility operation, and that the facility operation allows appropriate verification.

Annual reports on destruction

36. Information regarding the implementation of plans for destruction of chemical weapons shall be submitted to the Technical Secretariat pursuant to Article IV, paragraph 7 (b), not later than 60 days after the end of each annual destruction period and shall specify the actual amounts of chemical weapons which were destroyed during the previous year at each destruction facility. If appropriate, reasons for not meeting destruction goals should be stated.

D. VERIFICATION

Verification of declarations of chemical weapons through on-site inspection

37. The purpose of the verification of declarations of chemical weapons shall be to confirm through on-site inspection the accuracy of the relevant declarations made pursuant to Article III.

38. The inspectors shall conduct this verification promptly after a declaration is submitted. They shall, inter alia, verify the quantity and identity of chemicals, types and number of munitions, devices and other equipment.

39. The inspectors shall employ, as appropriate, agreed seals, markers or other inventory control procedures to facilitate an accurate inventory of the chemical weapons at each storage facility.

40. As the inventory progresses, inspectors shall install such agreed seals as may be necessary to clearly indicate if any stocks are removed, and to ensure the securing of the storage facility during the inventory. After completion of the inventory, such seals will be removed unless otherwise agreed.

Systematic verification of storage facilities

41. The purpose of the systematic verification of storage facilities shall be to ensure that no undetected removal of chemical weapons from such facilities takes place.

42. The systematic verification shall be initiated as soon as possible after the declaration of chemical weapons is submitted and shall continue until all chemical weapons have been removed from the storage facility. It shall in accordance with the facility agreement, combine on-site inspection and monitoring with on-site instruments.

43. When all chemical weapons have been removed from the storage facility, the Technical Secretariat shall confirm the declaration of the State Party to that effect. After this confirmation, the Technical Secretariat shall terminate the systematic verification of the storage facility and shall promptly remove any monitoring instruments installed by the inspectors.

Inspections and visits

44. The particular storage facility to be inspected shall be chosen by the Technical Secretariat in such a way as to preclude the prediction of precisely when the facility is to be inspected. The guidelines for determining the frequency of systematic on-site inspections shall be elaborated by the Technical Secretariat, taking into account the recommendations to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).
45. The Technical Secretariat shall notify the inspected State Party of its decision to inspect or visit the storage facility 48 hours before the planned arrival of the inspection team at the facility for systematic inspections or visits. In cases of inspections or visits to resolve urgent problems, this period may be shortened. The Technical Secretariat shall specify the purpose of the inspection or visit.

46. The inspected State Party shall make any necessary preparations for the arrival of the inspectors and shall ensure their expeditious transportation from their point of entry to the storage facility. The facility agreement will specify administrative arrangements for inspectors.

47. The inspected State Party shall provide the inspection team upon its arrival at the chemical weapons storage facility to carry out an inspection, with the following data on the facility:

(a) The number of storage buildings and storage locations;

(b) For each storage building and storage location, the type and the identification number or designation, shown on the site diagram; and

(c) For each storage building and storage location at the facility, the number of items of each specific type of chemical weapon, and, for containers that are not part of binary munitions, the actual quantity of chemical fill in each container.

48. In carrying out an inventory, within the time available, inspectors shall have the right:

(a) To use any of the following inspection techniques:

(i) inventory all the chemical weapons stored at the facility;

(ii) inventory all the chemical weapons stored in specific buildings or locations at the facility, as chosen by the inspectors; or

(iii) inventory all the chemical weapons of one or more specific types stored at the facility, as chosen by the inspectors; and

(b) To check all items inventoried against agreed records.

49. Inspectors shall, in accordance with facility agreements:

(a) Have unimpeded access to all parts of the storage facilities including any munitions, devices, bulk containers, or other containers therein. While conducting their activity, inspectors shall comply with the safety regulations at the facility. The items to be inspected will be chosen by the inspectors; and

(b) Have the right, during the first and any subsequent inspection of each chemical weapons storage facility, to designate munitions, devices, and containers from which samples are to be taken, and to affix to such munitions, devices, and containers a unique tag that will indicate an attempt to remove or alter the tag. A sample shall be taken from a tagged item at a chemical weapons storage facility or a chemical weapons destruction facility as soon as it is practically possible in accordance with the corresponding destruction programmes, and, in any case, not later than by the end of the destruction operations.

Systematic verification of the destruction of chemical weapons

50. The purpose of verification of destruction of chemical weapons shall be:

(a) To confirm the identity and quantity of the chemical weapons stocks to be destroyed; and

(b) To confirm that these stocks have been destroyed.

51. Chemical weapons destruction operations during the first 390 days after the entry into force of this Convention shall be governed by transitional verification arrangements. Such arrangements, including a transitional facility agreement, provisions for verification through on-site inspection and monitoring with on-site instruments, and the time-frame for application of the arrangements, shall be agreed between the Organization and the inspected State Party. These arrangements shall be approved by the Executive Council not later than 60 days after this Convention enters into force for the State Party, taking into account the recommendations of the Technical Secretariat, which shall be based on an evaluation of the detailed facility information provided in accordance with paragraph 31 and a visit to the facility. The Executive Council shall, at its first session, establish the guidelines for such transitional verification arrangements, based on recommendations to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i). The transitional verification arrangements shall be devised to ensure that throughout the entire transition period, the destruction of chemical weapons in accordance with the purposes set forth in paragraph 50, and to avoid hampering ongoing destruction operations.

52. The provisions of paragraphs 53 to 61 shall apply to chemical weapons destruction operations that are to begin not earlier than 390 days after the entry into force of this Convention.

53. On the basis of this Convention and the detailed destruction facility information, and as the case may be, on experience from previous inspections, the Technical Secretariat shall prepare a draft plan for inspecting the destruction of chemical weapons at each destruction facility. The plan shall be completed and provided to the inspected State Party for comment not less than 270 days before the facility begins destruction operations pursuant to this Convention. Any differences between the Technical Secretariat and the inspected State Party should be resolved through consultations. Any unresolved matter shall be forwarded to the Executive Council for appropriate action with a view to facilitating the full implementation of this Convention.
54. The Technical Secretariat shall conduct an initial visit to each chemical weapons destruction facility of the inspected State Party not less than 240 days before each facility begins destruction operations pursuant to this Convention, to allow it to familiarize itself with the facility and assess the adequacy of the inspection plan.

55. In the case of an existing facility where chemical weapons destruction operations have already been initiated, the inspected State Party shall not be required to decontaminate the facility before the Technical Secretariat conducts an initial visit. The duration of the visit shall not exceed five days and the number of visiting personnel shall not exceed 15.

56. The agreed detailed plans for verification, with an appropriate recommendation by the Technical Secretariat, shall be forwarded to the Executive Council for review. The Executive Council shall review the plans with a view to approving them, consistent with verification objectives and obligations under this Convention. It should also confirm that verification schemes for destruction are consistent with verification aims and are efficient and practical. This review should be completed not less than 180 days before the destruction period begins.

57. Each member of the Executive Council may consult with the Technical Secretariat on any issues regarding the adequacy of the plan for verification. If there are no objections by any member of the Executive Council, the plan shall be put into action.

58. If there are any difficulties, the Executive Council shall enter into consultations with the State Party to reconcile them. If any difficulties remain unresolved, they shall be referred to the Conference.

59. The detailed facility agreements for chemical weapons destruction facilities shall specify, taking into account the specific characteristics of the destruction facility and its mode of operation:

(a) Detailed on-site inspection procedures; and

(b) Provisions for verification through continuous monitoring with on-site instruments and physical presence of inspectors.

60. Inspectors shall be granted access to each chemical weapons destruction facility not less than 60 days before the commencement of the destruction, pursuant to this Convention, at the facility. Such access shall be for the purpose of supervising the installation of the inspection equipment, inspecting this equipment and testing its operation, as well as for the purpose of carrying out a final engineering review of the facility. In the case of an existing facility where chemical weapons destruction operations have already been initiated, destruction operations shall be stopped for the minimum amount of time required, not to exceed 60 days, for installation and testing of the inspection equipment. Depending on the results of the testing and review, the State Party and the Technical Secretariat may agree on additions or changes to the detailed facility agreement for the facility.

61. The inspected State Party shall notify, in writing, the inspection team leader at a chemical weapons destruction facility not less than four hours before the departure of each shipment of chemical weapons from a chemical weapons storage facility to that destruction facility. This notification shall include the name of the storage facility, the estimated times of departure and arrival, the specific types and quantities of chemical weapons being transported, whether any tagged items are being moved, and the method of transportation. This notification may include notification of more than one shipment. The inspection team leader shall be promptly notified, in writing, of any changes in this information.

**Chemical weapons storage facilities at chemical weapons destruction facilities**

62. The inspectors shall verify the arrival of the chemical weapons at the destruction facility and the storing of these chemical weapons. The inspectors shall verify the inventory of each shipment, using agreed procedures consistent with facility safety regulations, prior to the destruction of the chemical weapons. They shall employ, as appropriate, agreed seals, markers or other inventory control procedures to facilitate an accurate inventory of the chemical weapons prior to destruction.

63. As soon and as long as chemical weapons are stored at chemical weapons storage facilities located at chemical weapons destruction facilities, these storage facilities shall be subject to systematic verification in conformity with the relevant facility agreements.

64. At the end of an active destruction phase, inspectors shall make an inventory of the chemical weapons, that have been removed from the storage facility, to be destroyed. They shall verify the accuracy of the inventory of the chemical weapons remaining, employing inventory control procedures as referred to in paragraph 62.

**Systematic on-site verification measures at chemical weapons destruction facilities**

65. The inspectors shall be granted access to conduct their activities at the chemical weapons destruction facilities and the chemical weapons storage facilities located at such facilities during the entire active phase of destruction.

66. At each chemical weapons destruction facility, to provide assurance that no chemical weapons are diverted and that the destruction process has been completed, inspectors shall have the right to verify through their physical presence and monitoring with on-site instruments:

(a) The receipt of chemical weapons at the facility;

(b) The temporary holding area for chemical weapons and the specific type and quantity of chemical weapons stored in that area;
B. REGIME FOR OLD CHEMICAL WEAPONS

3. A State Party which has on its territory old chemical weapons as defined in Article II, paragraph 5 (a), shall, not later than 30 days after this Convention enters into force for it, submit to the Technical Secretariat all available relevant information, including, to the extent possible, the location, type, quantity and the present condition of these old chemical weapons.

In the case of old chemical weapons as defined in Article II, paragraph 5 (b), the State Party shall submit to the Technical Secretariat a declaration pursuant to Article III, paragraph 1 (b) (i), including, to the extent possible, the information specified in Part IV (A), paragraphs 1 to 3, of this Annex.

4. A State Party which discovers old chemical weapons after this Convention enters into force for it shall submit to the Technical Secretariat the information specified in paragraph 3 not later than 180 days after the discovery of the old chemical weapons.

5. The Technical Secretariat shall conduct an initial inspection, and any further inspections as may be necessary, in order to verify the information submitted pursuant to paragraphs 3 and 4 and in particular to determine whether the chemical weapons meet the definition of old chemical weapons as specified in Article II, paragraph 5. Guidelines to determine the usability of chemical weapons produced between 1925 and 1946 shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).

6. A State Party shall treat old chemical weapons that have been confirmed by the Technical Secretariat as meeting the definition in Article II, paragraph 5 (a), as toxic waste. It shall inform the Technical Secretariat of the steps being taken to destroy or otherwise dispose of such old chemical weapons as toxic waste in accordance with its national legislation.

7. Subject to paragraphs 3 to 5, a State Party shall destroy old chemical weapons that have been confirmed by the Technical Secretariat as meeting the definition in Article II, paragraph 5 (b), in accordance with Article IV and Part IV (A) of this Annex. Upon request of a State Party, the Executive Council may, however, modify the provisions on time-limit and order of destruction of these old chemical weapons, if it determines that doing so would not pose a risk to the object and purpose of this Convention. The request shall contain specific proposals for modification of the provisions and a detailed explanation of the reasons for the proposed modification.

C. REGIME FOR ABANDONED CHEMICAL WEAPONS

8. A State Party on whose territory there are abandoned chemical weapons (hereinafter referred to as the "Territorial State Party") shall, not later than 30 days after this Convention enters into force for it, submit to the Technical Secretariat all available relevant information concerning the abandoned chemical weapons. This information
shall include, to the extent possible, the location, type, quantity and the present condition of the abandoned chemical weapons as well as information on the abandonment.

9. A State Party which discovers abandoned chemical weapons after this Convention enters into force for it shall, not later than 180 days after the discovery, submit to the Technical Secretariat all available relevant information concerning the discovered abandoned chemical weapons. This information shall include, to the extent possible, the location, type, quantity and the present condition of the abandoned chemical weapons as well as information on the abandonment.

10. A State Party which has abandoned chemical weapons on the territory of another State Party (hereinafter referred to as the "Abandoning State Party") shall, not later than 30 days after this Convention enters into force for it, submit to the Technical Secretariat all available relevant information concerning the abandoned chemical weapons. This information shall include, to the extent possible, the location, type, quantity as well as information on the abandonment, and the condition of the abandoned chemical weapons.

11. The Technical Secretariat shall conduct an initial inspection, and any further inspections as may be necessary, in order to verify all available relevant information submitted pursuant to paragraphs 8 to 10 and determine whether systematic verification in accordance with Part IV (A), paragraphs 41 to 43, of this Annex is required. It shall, if necessary, verify the origin of the abandoned chemical weapons and establish evidence concerning the abandonment and the identity of the Abandoning State.

12. The report of the Technical Secretariat shall be submitted to the Executive Council, the Territorial State Party, and to the Abandoning State Party or the State Party declared by the Territorial State Party or identified by the Technical Secretariat as having abandoned the chemical weapons. If one of the States Parties directly concerned is not satisfied with the report it shall have the right to settle the matter in accordance with provisions of this Convention or bring the issue to the Executive Council with a view to settling the matter expeditiously.

13. Pursuant to Article I, paragraph 3, the Territorial State Party shall have the right to request the State Party which has been established as the Abandoning State Party pursuant to paragraphs 8 to 12 to enter into consultations for the purpose of destroying the abandoned chemical weapons in cooperation with the Territorial State Party. It shall immediately inform the Technical Secretariat of this request.

14. Consultations between the Territorial State Party and the Abandoning State Party with a view to establishing a mutually agreed plan for destruction shall begin not later than 30 days after the Technical Secretariat has been informed of the request referred to in paragraph 13. The mutually agreed plan for destruction shall be transmitted to the Technical Secretariat not later than 180 days after the Technical Secretariat has been informed of the request referred to in paragraph 13. Upon the request of the Abandoning State Party and the Territorial State Party, the Executive Council may extend the time-limit for transmission of the mutually agreed plan for destruction.

15. For the purpose of destroying abandoned chemical weapons, the Abandoning State Party shall provide all necessary financial, technical, expert, facility as well as other resources. The Territorial State Party shall provide appropriate cooperation.

16. If the Abandoning State cannot be identified or is not a State Party, the Territorial State Party, in order to ensure the destruction of these abandoned chemical weapons, may request the Organization and other States Parties to provide assistance in the destruction of these abandoned chemical weapons.

17. Subject to paragraphs 8 to 16, Article IV and Part IV (A) of this Annex shall also apply to the destruction of abandoned chemical weapons. In the case of abandoned chemical weapons which also meet the definition of old chemical weapons in Article II, paragraph 5 (b), the Executive Council, upon the request of the Territorial State Party, individually or together with the Abandoning State Party, may modify or in exceptional cases suspend the application of provisions on destruction, if it determines that doing so would not pose a risk to the object and purpose of this Convention. In the case of abandoned chemical weapons which do not meet the definition of old chemical weapons in Article II, paragraph 5 (b), the Executive Council, upon the request of the Territorial State Party, individually or together with the Abandoning State Party, may in exceptional circumstances modify the provisions on the time-limit and the order of destruction, if it determines that doing so would not pose a risk to the object and purpose of this Convention. Any request as referred to in this paragraph shall contain specific proposals for modification of the provisions and a detailed explanation of the reasons for the proposed modification.

18. States Parties may conclude between themselves agreements or arrangements concerning the destruction of abandoned chemical weapons. The Executive Council may, upon request of the Territorial State Party, individually or together with the Abandoning State Party, decide that selected provisions of such agreements or arrangements take precedence over provisions of this Section, if it determines that the agreement or arrangement ensures the destruction of the abandoned chemical weapons in accordance with paragraph 17.

PART V
DESTRUCTION OF CHEMICAL WEAPONS PRODUCTION FACILITIES
AND ITS VERIFICATION PURSUANT TO ARTICLE V

A. DECLARATIONS

Declarations of chemical weapons production facilities

1. The declaration of chemical weapons production facilities by a State Party pursuant to Article III, paragraph 1 (c) (ii), shall contain for each facility:
(a) The name of the facility, the names of the owners, and the names of the companies or enterprises operating the facility since 1 January 1946;

(b) The precise location of the facility, including the address, location of the complex, location of the facility within the complex including the specific building and structure number, if any;

(c) A statement whether it is a facility for the manufacture of chemicals that are defined as chemical weapons or whether it is a facility for the filling of chemical weapons, or both;

(d) The date when the construction of the facility was completed and the periods during which any modifications to the facility were made, including the installation of new or modified equipment, that significantly changed the production process characteristics of the facility;

(e) Information on the chemicals defined as chemical weapons that were manufactured at the facility; the munitions, devices, and containers that were filled at the facility; and the dates of the beginning and cessation of such manufacture or filling:

(i) For chemicals defined as chemical weapons that were manufactured at the facility, such information shall be expressed in terms of the specific types of chemicals manufactured, indicating the chemical name in accordance with the current International Union of Pure and Applied Chemistry (IUPAC) nomenclature, structural formula, and the Chemical Abstracts Service registry number, if assigned, and in terms of the amount of each chemical expressed by weight of chemical in tonnes;

(ii) For munitions, devices and containers that were filled at the facility, such information shall be expressed in terms of the specific type of chemical weapons filled and the weight of the chemical fill per unit;

(f) The production capacity of the chemical weapons production facility;

(i) For a facility where chemical weapons were manufactured, production capacity shall be expressed in terms of the annual quantitative potential for manufacturing a specific substance on the basis of the technological process actually used or, in the case of processes not actually used, planned to be used at the facility;

(ii) For a facility where chemical weapons were filled, production capacity shall be expressed in terms of the quantity of chemical that the facility can fill into each specific type of chemical weapon a year;

(g) For each chemical weapons production facility that has not been destroyed, a description of the facility including:

(i) A site diagram;

(ii) A process flow diagram of the facility; and

(iii) An inventory of buildings at the facility, and specialized equipment at the facility and of any spare parts for such equipment;

(h) The present status of the facility, stating:

(i) The date when chemical weapons were last produced at the facility;

(ii) Whether the facility has been destroyed, including the date and manner of its destruction; and

(iii) Whether the facility has been used or modified before entry into force of this Convention for an activity not related to the production of chemical weapons, and if so, information on what modifications have been made, the date such non-chemical weapons related activity began and the nature of such activity, indicating, if applicable, the kind of product;

(i) A specification of the measures that have been taken by the State Party for closure of, and a description of the measures that have been or will be taken by the State Party to inactivate the facility;

(j) A description of the normal pattern of activity for safety and security at the inactivated facility; and

(k) A statement as to whether the facility will be converted for the destruction of chemical weapons and, if so, the dates for such conversions.

Declarations of chemical weapons production facilities pursuant to Article III, paragraph 1 (c) (iii)

2. The declaration of chemical weapons production facilities pursuant to Article III, paragraph 1 (c) (iii), shall contain all information specified in paragraph 1 above. It is the responsibility of the State Party on whose territory the facility is or has been located to make appropriate arrangements with the other State to ensure that the declarations are made. If the State Party on whose territory the facility is or has been located is not able to fulfil this obligation, it shall state the reasons therefor.

Declarations of past transfers and receipts

3. A State Party that has transferred or received chemical weapons production equipment since 1 January 1946 shall declare these transfers
and receipts pursuant to Article III, paragraph 1 (c) (iv), and in accordance with paragraph 5 below. When not all the specified information is available for transfer and receipt of such equipment for the period between 1 January 1946 and 1 January 1970, the State Party shall declare whatever information is still available to it and provide an explanation as to why it cannot submit a full declaration.

4. Chemical weapons production equipment referred to in paragraph 3 means:

(a) Specialized equipment;

(b) Equipment for the production of equipment specifically designed for use directly in connection with chemical weapons employment; and

(c) Equipment designed or used exclusively for producing non-chemical parts for chemical munitions.

5. The declaration concerning transfer and receipt of chemical weapons production equipment shall specify:

(a) Who received/transfered the chemical weapons production equipment;

(b) The identity of such equipment;

(c) The date of transfer or receipt;

(d) Whether the equipment was destroyed, if known; and

(e) Current disposition, if known.

Submission of general plans for destruction

6. For each chemical weapons production facility, a State Party shall supply the following information:

(a) Envisaged time-frame for measures to be taken; and

(b) Methods of destruction.

7. For each chemical weapons production facility that a State Party intends to convert temporarily into a chemical weapons destruction facility, the State Party shall supply the following information:

(a) Envisaged time-frame for conversion into a destruction facility;

(b) Envisaged time-frame for utilizing the facility as a chemical weapons destruction facility;

(c) Description of the new facility;

(d) Method of destruction of special equipment;

(e) Time-frame for destruction of the converted facility after it has been utilized to destroy chemical weapons; and

(f) Method of destruction of the converted facility.

Submission of annual plans for destruction and annual reports on destruction

8. The State Party shall submit an annual plan for destruction not less than 90 days before the beginning of the coming destruction year. The annual plan shall specify:

(a) Capacity to be destroyed;

(b) Name and location of the facilities where destruction will take place;

(c) List of buildings and equipment that will be destroyed at each facility; and

(d) Planned method(s) of destruction.

9. A State Party shall submit an annual report on destruction not later than 90 days after the end of the previous destruction year. The annual report shall specify:

(a) Capacity destroyed;

(b) Name and location of each facility where destruction took place;

(c) List of buildings and equipment that were destroyed at each facility;

(d) Methods of destruction.

10. For a chemical weapons production facility declared pursuant to Article III, paragraph 1 (c) (iii), it is the responsibility of the State Party on whose territory the facility is or has been located to make appropriate arrangements to ensure that the declarations specified in paragraphs 6 to 9 above are made. If the State Party on whose territory the facility is or has been located is not able to fulfil this obligation, it shall state the reasons therefor.

B. DESTRUCTION

General principles for destruction of chemical weapons production facilities

11. Each State Party shall decide on methods to be applied for the destruction of chemical weapons production facilities, according to the principles laid down in Article V and in this Part.
Principles and methods for closure of a chemical weapons production facility

12. The purpose of the closure of a chemical weapons production facility is to render it inactive.

13. Agreed measures for closure shall be taken by a State Party with due regard to the specific characteristics of each facility. Such measures shall include, inter alia:

(a) Prohibition of occupation of the specialized buildings and standard buildings of the facility except for agreed activities;

(b) Disconnection of equipment directly related to the production of chemical weapons, including, inter alia, process control equipment and utilities;

(c) Decommissioning of protective installations and equipment used exclusively for the safety of operations of the chemical weapons production facility;

(d) Installation of blind flanges and other devices to prevent the addition of chemicals to, or the removal of chemicals from, any specialized process equipment for synthesis, separation or purification of chemicals defined as a chemical weapon, any storage tank, or any machine for filling chemical weapons, the heating, cooling, or supply of electrical or other forms of power to such equipment, storage tanks, or machines; and

(e) Interruption of rail, road and other access routes for heavy transport to the chemical weapons production facility except those required for agreed activities.

14. While the chemical weapons production facility remains closed, a State Party may continue safety and physical security activities at the facility.

Technical maintenance of chemical weapons production facilities prior to their destruction

15. A State Party may carry out standard maintenance activities at chemical weapons production facilities only for safety reasons, including visual inspection, preventive maintenance, and routine repairs.

16. All planned maintenance activities shall be specified in the general and detailed plans for destruction. Maintenance activities shall not include:

(a) Replacement of any process equipment;

(b) Modification of the characteristics of the chemical process equipment;

(c) Production of chemicals of any type.

17. All maintenance activities shall be subject to monitoring by the Technical Secretariat.

Principles and methods for temporary conversion of chemical weapons production facilities into chemical weapons destruction facilities

18. Measures pertaining to the temporary conversion of chemical weapons production facilities into chemical weapons destruction facilities shall ensure that the regime for the temporarily converted facilities is at least as stringent as the regime for chemical weapons production facilities that have not been converted.

19. Chemical weapons production facilities converted into chemical weapons destruction facilities before entry into force of this Convention shall be declared under the category of chemical weapons production facilities.

They shall be subject to an initial visit by inspectors, who shall confirm the correctness of the information about these facilities. Verification that the conversion of these facilities was performed in such a manner as to render them inoperable as chemical weapons production facilities shall also be required, and shall fall within the framework of measures provided for the facilities that are to be rendered inoperable not later than 90 days after entry into force of this Convention.

20. A State Party that intends to carry out a conversion of chemical weapons production facilities shall submit to the Technical Secretariat, not later than 30 days after this Convention enters into force for it, or not later than 30 days after a decision has been taken for temporary conversion, a general facility conversion plan, and subsequently shall submit annual plans.

21. Should a State Party have the need to convert to a chemical weapons destruction facility an additional chemical weapons production facility that had been closed after this Convention entered into force for it, it shall inform the Technical Secretariat thereof not less than 150 days before conversion. The Technical Secretariat, in conjunction with the State Party, shall make sure that the necessary measures are taken to render that facility, after its conversion, inoperable as a chemical weapons production facility.

22. A facility converted for the destruction of chemical weapons shall not be more fit for resuming chemical weapons production than a chemical weapons production facility which has been closed and is under maintenance. Its reactivation shall require no less time than that required for a chemical weapons production facility that has been closed and is under maintenance.

23. Converted chemical weapons production facilities shall be destroyed not later than 10 years after entry into force of this Convention.

24. Any measures for the conversion of any given chemical weapons production facility shall be facility-specific and shall depend upon its individual characteristics.
25. The set of measures carried out for the purpose of converting a chemical weapons production facility into a chemical weapons destruction facility shall not be less than that which is provided for the disabling of other chemical weapons production facilities to be carried out not later than 90 days after this Convention enters into force for the State Party.

Principles and methods related to destruction of a chemical weapons production facility

26. A State Party shall destroy equipment and buildings covered by the definition of a chemical weapons production facility as follows:

(a) All specialised equipment and standard equipment shall be physically destroyed;

(b) All specialised buildings and standard buildings shall be physically destroyed.

27. A State Party shall destroy facilities for producing unfilled chemical munitions and equipment for chemical weapons employment as follows:

(a) Facilities used exclusively for production of non-chemical parts for chemical munitions or equipment specifically designed for use directly in connection with chemical weapons employment, shall be declared and destroyed. The destruction process and its verification shall be conducted according to the provisions of Article V and this Part of this Annex that govern destruction of chemical weapons production facilities;

(b) All equipment designed or used exclusively for producing non-chemical parts for chemical munitions shall be physically destroyed. Such equipment, which includes specially designed moulds and metal-forming dies, may be brought to a special location for destruction;

(c) All buildings and standard equipment used for such production activities shall be destroyed or converted for purposes not prohibited under this Convention, with confirmation, as necessary, through consultations and inspections as provided for under Article IX;

(d) Activities for purposes not prohibited under this Convention may continue while destruction or conversion proceeds.

Order of destruction

28. The order of destruction of chemical weapons production facilities is based on the obligations specified in Article I and the other Articles of this Convention, including obligations regarding systematic on-site verification. It takes into account interests of States Parties for undiminished security during the destruction period; confidence-building in the early part of the destruction stage; gradual acquisition of experience in the course of destroying chemical weapons production facilities; and applicability irrespective of the actual characteristics of the facilities and the methods chosen for their destruction. The order of destruction is based on the principle of levelling out.

29. A State Party shall, for each destruction period, determine which chemical weapons production facilities are to be destroyed and carry out the destruction in such a way that not more than what is specified in paragraphs 30 and 31 remains at the end of each destruction period. A State Party is not precluded from destroying its facilities at a faster pace.

30. The following provisions shall apply to chemical weapons production facilities that produce Schedule 1 chemicals:

(a) A State Party shall start the destruction of such facilities not later than one year after this Convention enters into force for it, and shall complete it not later than 10 years after entry into force of this Convention. For a State which is a Party at the entry into force of this Convention, this overall period shall be divided into three separate destruction periods, namely, years 2-5, years 6-8, and years 9-10. For States which become a Party after entry into force of this Convention, the destruction periods shall be adapted, taking into account paragraphs 28 and 29;

(b) Production capacity shall be used as the comparison factor for such facilities. It shall be expressed in agent tonnes, taking into account the rules specified for binary chemical weapons;

(c) Appropriate agreed levels of production capacity shall be established for the end of the year after entry into force of this Convention. Production capacity that exceeds the relevant level shall be destroyed in equal increments during the first two destruction periods;

(d) A requirement to destroy a given amount of capacity shall entail a requirement to destroy any other chemical weapons production facility that supplied the Schedule 1 facility or filled the Schedule 1 chemical produced there into munitions or devices;

(e) Chemical weapons production facilities that have been converted temporarily for destruction of chemical weapons shall continue to be subject to the obligation to destroy capacity according to the provisions of this paragraph.

31. A State Party shall start the destruction of chemical weapons production facilities not covered in paragraph 30 not later than one year after this Convention enters into force for it, and complete it not later than five years after entry into force of this Convention.

Detailed plans for destruction

32. Not less than 180 days before the destruction of a chemical weapons production facility starts, a State Party shall provide to the Technical Secretariat the detailed plans for destruction of the facility,
including proposed measures for verification of destruction referred to
in paragraph 33 (f), with respect to, inter alia:

(a) Timing of the presence of the inspectors at the facility to be
destroyed; and

(b) Procedures for verification of measures to be applied to each
item on the declared inventory.

33. The detailed plans for destruction of each chemical weapons
production facility shall contain:

(a) Detailed time schedule of the destruction process;

(b) Layout of the facility;

(c) Process flow diagram;

(d) Detailed inventory of equipment, buildings and other items to
be destroyed;

(e) Measures to be applied to each item on the inventory;

(f) Proposed measures for verification;

(g) Security/safety measures to be observed during the destruction
of the facility; and

(h) Working and living conditions to be provided for inspectors.

34. If a State Party intends to convert temporarily a chemical weapons
production facility into a chemical weapons destruction facility, it
shall notify the Technical Secretariat not less than 150 days before
undertaking any conversion activities. The notification shall:

(a) Specify the name, address, and location of the facility;

(b) Provide a site diagram indicating all structures and areas
that will be involved in the destruction of chemical weapons and also
identify all structures of the chemical weapons production facility that
are to be temporarily converted;

(c) Specify the types of chemical weapons, and the type and
quantity of chemical fill to be destroyed;

(d) Specify the destruction method;

(e) Provide a process flow diagram, indicating which portions of
the production process and specialized equipment will be converted for
the destruction of chemical weapons;

(f) Specify the seals and inspection equipment potentially
affected by the conversion, if applicable; and

(g) Provide a schedule identifying: The time allocated to design,
temporary conversion of the facility, installation of equipment,
equipment check-out, destruction operations, and closure.

35. In relation to the destruction of a facility that was temporarily
converted for destruction of chemical weapons, information shall be
provided in accordance with paragraphs 32 and 33.

Review of detailed plans

36. On the basis of the detailed plan for destruction and proposed
measures for verification submitted by the State Party, and on
experience from previous inspections, the Technical Secretariat shall
prepare a plan for verifying the destruction of the facility, consulting
closely with the State Party. Any differences between the Technical
Secretariat and the State Party concerning appropriate measures should
be resolved through consultations. Any unresolved matters shall be
forwarded to the Executive Council for appropriate action with a view to
facilitating the full implementation of this Convention.

37. To ensure that the provisions of Article V and this Part are
fulfilled, the combined plans for destruction and verification shall be
agreed upon between the Executive Council and the State Party. This
agreement should be completed, not less than 60 days before the planned
initiation of destruction.

38. Each member of the Executive Council may consult with the Technical
Secretariat on any issues regarding the adequacy of the combined plan
for destruction and verification. If there are no objections by any
member of the Executive Council, the plan shall be put into action.

39. If there are any difficulties, the Executive Council shall enter
into consultations with the State Party to reconcile them. If any
difficulties remain unresolved they shall be referred to the
Conference. The resolution of any differences over methods of
destruction shall not delay the execution of other parts of the
destruction plan that are acceptable.

40. If agreement is not reached with the Executive Council on aspects
of verification, or if the approved verification plan cannot be put into
action, verification of destruction shall proceed through continuous
monitoring with on-site instruments and physical presence of inspectors.

41. Destruction and verification shall proceed according to the agreed
plan. The verification shall not unduly interfere with the destruction
process and shall be conducted through the presence of inspectors
on-site to witness the destruction.

42. If required verification or destruction actions are not taken as
planned, all States Parties shall be so informed.
C. VERIFICATION

Verification of declarations of chemical weapons production facilities through on-site inspection

43. The Technical Secretariat shall conduct an initial inspection of each chemical weapons production facility in the period between 90 and 120 days after this Convention enters into force for the State Party.

44. The purposes of the initial inspection shall be:

(a) To confirm that the production of chemical weapons has ceased and that the facility has been inactivated in accordance with this Convention;

(b) To permit the Technical Secretariat to familiarize itself with the measures that have been taken to cease production of chemical weapons at the facility;

(c) To permit the inspectors to install temporary seals;

(d) To permit the inspectors to confirm the inventory of buildings and specialized equipment;

(e) To obtain information necessary for planning inspection activities at the facility, including use of tamper-indicating seals and other agreed equipment, which shall be installed pursuant to the detailed facility agreement for the facility; and

(f) To conduct preliminary discussions regarding a detailed agreement on inspection procedures at the facility.

45. Inspectors shall employ, as appropriate, agreed seals, markers or other inventory control procedures to facilitate an accurate inventory of the declared items at each chemical weapons production facility.

46. Inspectors shall install such agreed devices as may be necessary to indicate if any resumption of production of chemical weapons occurs or if any declared item is removed. They shall take the necessary precaution not to hinder closure activities by the inspected State Party. Inspectors may return to maintain and verify the integrity of the devices.

47. If, on the basis of the initial inspection, the Director-General believes that additional measures are necessary to inactivate the facility in accordance with this Convention, the Director-General may request, not later than 135 days after this Convention enters into force for a State Party, that such measures be implemented by the inspected State Party not later than 180 days after this Convention enters into force for it. At its discretion, the inspected State Party may satisfy the request. If it does not satisfy the request, the Inspected State Party and the Director-General shall consult to resolve the matter.

Systematic verification of chemical weapons production facilities and cessation of their activities

48. The purpose of the systematic verification of a chemical weapons production facility shall be to ensure that any resumption of production of chemical weapons or removal of declared items will be detected at this facility.

49. The detailed facility agreement for each chemical weapons production facility shall specify:

(a) Detailed on-site inspection procedures, which may include:

(i) Visual examinations;

(ii) Checking and servicing of seals and other agreed devices; and

(iii) Obtaining and analysing samples;

(b) Procedures for using tamper-indicating seals and other agreed equipment to prevent the undetected reactivation of the facility, which shall specify:

(i) The type, placement, and arrangements for installation; and

(ii) The maintenance of such seals and equipment; and

(c) Other agreed measures.

50. The seals or other approved equipment provided for in a detailed agreement on inspection measures for that facility shall be placed not later than 240 days after this Convention enters into force for a State Party. Inspectors shall be permitted to visit each chemical weapons production facility for the installation of such seals or equipment.

51. During each calendar year, the Technical Secretariat shall be permitted to conduct up to four inspections of each chemical weapons production facility.

52. The Director-General shall notify the inspected State Party of his decision to inspect or visit a chemical weapons production facility 48 hours before the planned arrival of the inspection team at the facility for systematic inspections or visits. In the case of inspections or visits to resolve urgent problems, this period may be shortened. The Director-General shall specify the purpose of the inspection or visit.

53. Inspectors shall, in accordance with the facility agreements, have unimpeded access to all parts of the chemical weapons production facilities. The items on the declared inventory to be inspected shall be chosen by the inspectors.
54. The guidelines for determining the frequency of systematic on-site inspections shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i). The particular production facility to be inspected shall be chosen by the Technical Secretariat in such a way as to preclude the prediction of precisely when the facility is to be inspected.

Verification of destruction of chemical weapons production facilities

55. The purpose of systematic verification of the destruction of chemical weapons production facilities shall be to confirm that the facility is destroyed in accordance with the obligations under this Convention and that each item on the declared inventory is destroyed in accordance with the agreed detailed plan for destruction.

56. When all items on the declared inventory have been destroyed, the Technical Secretariat shall confirm the declaration of the State Party to that effect. After this confirmation, the Technical Secretariat shall terminate the systematic verification of the chemical weapons production facility and shall promptly remove all devices and monitoring instruments installed by the inspectors.

57. After this confirmation, the State Party shall make the declaration that the facility has been destroyed.

Verification of temporary conversion of a chemical weapons production facility into a chemical weapons destruction facility

58. Not later than 90 days after receiving the initial notification of the intent to convert temporarily a production facility, the inspectors shall have the right to visit the facility to familiarize themselves with the proposed temporary conversion and to study possible inspection measures that will be required during the conversion.

59. Not later than 60 days after such a visit, the Technical Secretariat and the inspected State Party shall conclude a transition agreement containing additional inspection measures for the temporary conversion period. The transition agreement shall specify inspection procedures, including the use of seals, monitoring equipment, and inspections, that will provide confidence that no chemical weapons production takes place during the conversion process. This agreement shall remain in force from the beginning of the temporary conversion activity until the facility begins operation as a chemical weapons destruction facility.

60. The inspected State Party shall not remove or convert any portion of the facility, or remove or modify any seal or other agreed inspection equipment that may have been installed pursuant to this Convention until the transition agreement has been concluded.

61. Once the facility begins operation as a chemical weapons destruction facility, it shall be subject to the provisions of Part IV (A) of this Annex applicable to chemical weapons destruction facilities. Arrangements for the pre-operation period shall be governed by the transition agreement.

62. During destruction operations the inspectors shall have access to all portions of the temporarily converted chemical weapons production facilities, including those that are not directly involved with the destruction of chemical weapons.

63. Before the commencement of work at the facility to convert it temporarily for chemical weapons destruction purposes and after the facility has ceased to function as a facility for chemical weapons destruction, the facility shall be subject to the provisions of this Part applicable to chemical weapons production facilities.

D. Conversion of chemical weapons production facilities to purposes not prohibited under this Convention

Procedures for requesting conversion

64. A request to use a chemical weapons production facility for purposes not prohibited under this Convention may be made for any facility that a State Party is already using for such purposes before this Convention enters into force for it, or that it plans to use for such purposes.

65. For a chemical weapons production facility that is being used for purposes not prohibited under this Convention when this Convention enters into force for the State Party, the request shall be submitted to the Director-General not later than 30 days after this Convention enters into force for the State Party. The request shall contain, in addition to data submitted in accordance with paragraph 1 (b) (iii), the following information:

(a) A detailed justification for the request;

(b) A general facility conversion plan that specifies:

(i) The nature of the activity to be conducted at the facility;

(ii) If the planned activity involves production, processing, or consumption of chemicals: the name of each of the chemicals, the flow diagram of the facility, and the quantities planned to be produced, processed, or consumed annually;

(iii) Which buildings or structures are proposed to be used and what modifications are proposed, if any;

(iv) Which buildings or structures have been destroyed or are proposed to be destroyed and the plans for destruction;

(v) What equipment is to be used in the facility;
(vi) What equipment has been removed and destroyed and what equipment is proposed to be removed and destroyed and the plans for its destruction;

(vii) The proposed schedule for conversion, if applicable; and

(viii) The nature of the activity of each other facility operating at the site; and

(c) A detailed explanation of how measures set forth in subparagraph (b), as well as any other measures proposed by the State Party, will ensure the prevention of standby chemical weapons production capability at the facility.

66. For a chemical weapons production facility that is not being used for purposes not prohibited under this Convention when this Convention enters into force for the State Party, the request shall be submitted to the Director-General not later than 30 days after the decision to convert, but in no case later than four years after this Convention enters into force for the State Party. The request shall contain the following information:

(a) A detailed justification for the request, including its economic needs;

(b) A general facility conversion plan that specifies:

(i) The nature of the activity planned to be conducted at the facility;

(ii) If the planned activity involves production, processing, or consumption of chemicals: the name of each of the chemicals, the flow diagram of the facility, and the quantities planned to be produced, processed, or consumed annually;

(iii) Which buildings or structures are proposed to be retained and what modifications are proposed, if any;

(iv) Which buildings or structures have been destroyed or are proposed to be destroyed and the plans for destruction;

(v) What equipment is proposed for use in the facility;

(vi) What equipment is proposed to be removed and destroyed and the plans for its destruction;

(vii) The proposed schedule for conversion; and

(viii) The nature of the activity of each other facility operating at the site; and

(c) A detailed explanation of how measures set forth in subparagraph (b), as well as any other measures proposed by the State Party, will ensure the prevention of standby chemical weapons production capability at the facility.

67. The State Party may propose in its request any other measures it deems appropriate to build confidence.

Actions pending a decision

68. Pending a decision of the Conference, a State Party may continue to use for purposes not prohibited under this Convention a facility that was being used for such purposes before this Convention enters into force for it, but only if the State Party certifies in its request that no specialized equipment and no specialized buildings are being used and that the specialized equipment and specialized buildings have been rendered inactive using the methods specified in paragraph 13.

69. If the facility, for which the request was made, was not being used for purposes not prohibited under this Convention before this Convention enters into force for the State Party, or if the certification required in paragraph 68 is not made, the State Party shall cease immediately all activity pursuant to Article V, paragraph 4. The State Party shall close the facility in accordance with paragraph 13 not later than 90 days after this Convention enters into force for it.

Conditions for conversion

70. As a condition for conversion of a chemical weapons production facility for purposes not prohibited under this Convention, all specialized equipment at the facility must be destroyed and all special features of buildings and structures that distinguish them from buildings and structures normally used for purposes not prohibited under this Convention and not involving Schedule 1 chemicals must be eliminated.

71. A converted facility shall not be used:

(a) For any activity involving production, processing, or consumption of a Schedule 1 chemical or a Schedule 2 chemical; or

(b) For the production of any highly toxic chemical, including any highly toxic organophosphorus chemical, or for any other activity that would require special equipment for handling highly toxic or highly corrosive chemicals, unless the Executive Council decides that such production or activity would pose no risk to the object and purpose of this Convention, taking into account criteria for toxicity, corrosiveness and, if applicable, other technical factors, to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (4).

72. Conversion of a chemical weapons production facility shall be completed not later than six years after entry into force of this Convention.
Decisions by the Executive Council and the Conference

73. Not later than 90 days after receipt of the request by the Director-General, an initial inspection of the facility shall be conducted by the Technical Secretariat. The purpose of this inspection shall be to determine the accuracy of the information provided in the request, to obtain information on the technical characteristics of the proposed converted facility, and to assess the conditions under which use for purposes not prohibited under this Convention may be permitted. The Director-General shall promptly submit a report to the Executive Council, the Conference, and all States Parties containing his recommendations on the measures necessary to convert the facility to purposes not prohibited under this Convention and to provide assurance that the converted facility will be used only for purposes not prohibited under this Convention.

74. If the facility has been used for purposes not prohibited under this Convention before this Convention enters into force for the State Party, and is continuing to be in operation, but the measures required to be certified under paragraph 68 have not been taken, the Director-General shall immediately inform the Executive Council, which may require implementation of measures it deems appropriate, inter alia, shut-down of the facility and removal of specialized equipment and modification of buildings or structures. The Executive Council shall stipulate the deadline for implementation of these measures and shall suspend consideration of the request pending their satisfactory completion. The facility shall be inspected promptly after the expiration of the deadline to determine whether the measures have been implemented. If not, the State Party shall be required to shut down completely all facility operations.

75. As soon as possible after receiving the report of the Director-General, the Conference, upon recommendation of the Executive Council, shall decide, taking into account the report and any views expressed by States Parties, whether to approve the request, and shall establish the conditions upon which approval is contingent. If any State Party objects to approval of the request and the associated conditions, consultations shall be undertaken among interested States Parties for up to 90 days to seek a mutually acceptable solution. A decision on the request and associated conditions, along with any proposed modifications thereto, shall be taken, as a matter of substance, as soon as possible after the end of the consultation period.

76. If the request is approved, a facility agreement shall be completed not later than 90 days after such a decision is taken. The facility agreement shall contain the conditions under which the conversion and use of the facility is permitted, including measures for verification. Conversion shall not begin before the facility agreement is concluded.

Detailed plans for conversion

77. Not later than 180 days before conversion of a chemical weapons production facility is planned to begin, the State Party shall provide the Technical Secretariat with the detailed plans for conversion of the facility, including proposed measures for verification of conversion, with respect to, inter alia:

(a) Timing of the presence of the inspectors at the facility to be converted; and

(b) Procedures for verification of measures to be applied to each item on the declared inventory.

78. The detailed plan for conversion of each chemical weapons production facility shall contain:

(a) Detailed time schedule of the conversion process;

(b) Layout of the facility before and after conversion;

(c) Process flow diagram of the facility before, and as appropriate, after the conversion;

(d) Detailed inventory of equipment, buildings and structures and other items to be destroyed and of the buildings and structures to be modified;

(e) Measures to be applied to each item on the inventory, if any;

(f) Proposed measures for verification;

(g) Security/safety measures to be observed during the conversion of the facility; and

(h) Working and living conditions to be provided for inspectors.

Review of detailed plans

79. On the basis of the detailed plan for conversion and proposed measures for verification submitted by the State Party, and on experience from previous inspections, the Technical Secretariat shall prepare a plan for verifying the conversion of the facility, consulting closely with the State Party. Any differences between the Technical Secretariat and the State Party concerning appropriate measures shall be resolved through consultations. Any unresolved matters shall be forwarded to the Executive Council for appropriate action with a view to facilitate the full implementation of this Convention.

80. To ensure that the provisions of Article V and this Part are fulfilled, the combined plans for conversion and verification shall be agreed upon between the Executive Council and the State Party. This agreement shall be completed not less than 60 days before conversion is planned to begin.

81. Each member of the Executive Council may consult with the Technical Secretariat on any issue regarding the adequacy of the combined plan for conversion and verification. If there are no objections by any member of the Executive Council, the plan shall be put into action.
82. If there are any difficulties, the Executive Council should enter into consultations with the State Party to reconcile them. If any difficulties remain unresolved, they should be referred to the Conference. The resolution of any differences over methods of conversion should not delay the execution of other parts of the conversion plan that are acceptable.

83. If agreement is not reached with the Executive Council on aspects of verification, or if the approved verification plan cannot be put into action, verification of conversion shall proceed through continuous monitoring with on-site instruments and physical presence of inspectors.

84. Conversion and verification shall proceed according to the agreed plan. The verification shall not unduly interfere with the conversion process and shall be conducted through the presence of inspectors to confirm the conversion.

85. For the 10 years after the Director-General certifies that conversion is complete, the State Party shall provide to inspectors unimpeded access to the facility at any time. The inspectors shall have the right to observe all areas, all activities, and all items of equipment at the facility. The inspectors shall have the right to verify that the activities at the facility are consistent with any conditions established under this Section, by the Executive Council and the Conference. The inspectors shall also have the right, in accordance with provisions of Part II, Section E, of this Annex to receive samples from any area of the facility and to analyze them to verify the absence of Schedule 1 chemicals, their stable by-products and decomposition products and of Schedule 2 chemicals and to verify that the activities at the facility are consistent with any other conditions on chemical activities established under this Section, by the Executive Council and the Conference. The inspectors shall also have the right to managed access, in accordance with Part X, Section C, of this Annex, to the plant site at which the facility is located. During the 10-year period, the State Party shall report annually on the activities at the converted facility. Upon completion of the 10-year period, the Executive Council, taking into account recommendations of the Technical Secretariat, shall decide on the nature of continued verification measures.

86. Costs of verification of the converted facility shall be allocated in accordance with Article V, paragraph 19.

PART VI

ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION
IN ACCORDANCE WITH ARTICLE VI

REGIME FOR SCHEDULE 1 CHEMICALS AND FACILITIES RELATED TO SUCH CHEMICALS

A. GENERAL PROVISIONS

1. A State Party shall not produce, acquire, retain or use Schedule 1 chemicals outside the territories of States Parties and shall not transfer such chemicals outside its territory except to another State Party.

2. A State Party shall not produce, acquire, retain, transfer or use Schedule 1 chemicals unless:

(a) The chemicals are applied to research, medical, pharmaceutical or protective purposes; and

(b) The types and quantities of chemicals are strictly limited to those which can be justified for such purposes; and

(c) The aggregate amount of such chemicals at any given time for such purposes is equal to or less than 1 tonne; and

(d) The aggregate amount for such purposes acquired by a State Party in any year through production, withdrawal from chemical weapons stocks and transfer is equal to or less than 1 tonne.

B. TRANSFERS

3. A State Party may transfer Schedule 1 chemicals outside its territory only to another State Party and only for research, medical, pharmaceutical or protective purposes in accordance with paragraph 2.

4. Chemicals transferred shall not be retransferred to a third State.

5. Not less than 30 days before any transfer to another State Party both States Parties shall notify the Technical Secretariat of the transfer.

6. Each State Party shall make a detailed annual declaration regarding transfers during the previous year. The declaration shall be submitted not later than 90 days after the end of that year and shall for each Schedule 1 chemical that has been transferred include the following information:

(a) The chemical name, structural formula and Chemical Abstracts Service registry number, if assigned;

(b) The quantity acquired from other States or transferred to other States Parties. For each transfer the quantity, recipient and purpose shall be included.

C. PRODUCTION

General principles for production

7. Each State Party, during production under paragraphs 8 to 12, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall conduct such production in accordance with its national standards for safety and emissions.
Single small-scale facility

8. Each State Party that produces Schedule I chemicals for research, medical, pharmaceutical or protective purposes shall carry out the production at a single small-scale facility approved by the State Party, except as set forth in paragraphs 10, 11 and 12.

9. The production at a single small-scale facility shall be carried out in reaction vessels in production lines not configured for continuous operation. The volume of such a reaction vessel shall not exceed 100 litres, and the total volume of all reaction vessels with a volume exceeding 5 litres shall not be more than 500 litres.

Other facilities

10. Production of Schedule I chemicals in aggregate quantities not exceeding 10 kg per year may be carried out for protective purposes at one facility outside a single small-scale facility. This facility shall be approved by the State Party.

11. Production of Schedule I chemicals in quantities of more than 100 g per year may be carried out for research, medical or pharmaceutical purposes outside a single small-scale facility in aggregate quantities not exceeding 10 kg per year per facility. These facilities shall be approved by the State Party.

12. Synthesis of Schedule I chemicals for research, medical or pharmaceutical purposes, but not for protective purposes, may be carried out at laboratories in aggregate quantities less than 100 g per year per facility. These facilities shall not be subject to any obligation relating to declaration and verification as specified in Sections D and E.

D. DECLARATIONS

Single small-scale facility

13. Each State Party that plans to operate a single small-scale facility shall provide the Technical Secretariat with the precise location and a detailed technical description of the facility, including an inventory of equipment and detailed diagrams. For existing facilities, this initial declaration shall be provided not later than 30 days after this Convention enters into force for the State Party. Initial declarations on new facilities shall be provided not less than 180 days before operations are to begin.

14. Each State Party shall give advance notification to the Technical Secretariat of planned changes related to the initial declaration. The notification shall be submitted not less than 180 days before the changes are to take place.

15. A State Party producing Schedule I chemicals at a single small-scale facility shall make a detailed annual declaration regarding the activities of the facility for the previous year. The declaration shall be submitted not later than 90 days after the end of that year and shall include:

(a) Identification of the facility;

(b) For each Schedule I chemical produced, acquired, consumed or stored at the facility, the following information:

(i) The chemical name, structural formula and Chemical Abstracts Service registry number, if assigned;

(ii) The methods employed and quantity produced;

(iii) The name and quantity of precursors listed in Schedules 1, 2, or 3 used for production of Schedule I chemicals;

(iv) The quantity consumed at the facility and the purpose(s) of the consumption;

(v) The quantity received from or shipped to other facilities in the State Party. For each shipment the quantity, recipient and purpose should be included;

(vi) The maximum quantity stored at any time during the year; and

(vii) The quantity stored at the end of the year; and

(c) Information on any changes at the facility during the year compared to previously submitted detailed technical descriptions of the facility including inventories of equipment and detailed diagrams.

16. Each State Party producing Schedule I chemicals at a single small-scale facility shall make a detailed annual declaration regarding the projected activities and the anticipated production at the facility for the coming year. The declaration shall be submitted not less than 90 days before the beginning of that year and shall include:

(a) Identification of the facility;

(b) For each Schedule I chemical anticipated to be produced, consumed or stored at the facility, the following information:

(i) The chemical name, structural formula and Chemical Abstracts Service registry number, if assigned;

(ii) The quantity anticipated to be produced and the purpose of the production; and

(c) Information on any anticipated changes at the facility during the year compared to previously submitted detailed technical descriptions of the facility including inventories of equipment and detailed diagrams.
production at the facility for the coming year. The declaration shall be submitted not less than 90 days before the beginning of that year and shall include:

(a) Identification of the facility;

(b) For each Schedule 1 chemical the following information:

(i) The chemical name, structural formula and Chemical Abstracts Service registry number, if assigned; and

(ii) The quantity anticipated to be produced, the time periods when the production is anticipated to take place and the purposes of the production; and

(c) Information on any anticipated changes at the facility or its relevant parts, during the year compared to previously submitted detailed technical descriptions of the facility.

E. VERIFICATION

Single small-scale facility

21. The aim of verification activities at the single small-scale facility shall be to verify that the quantities of Schedule 1 chemicals produced are correctly declared and, in particular, that their aggregate amount does not exceed 1 tonne.

22. The facility shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments.

23. The number, intensity, duration, timing and mode of inspections for a particular facility shall be based on the risk to the object and purpose of this Convention posed by the relevant chemicals, the characteristics of the facility and the nature of the activities carried out there. Appropriate guidelines shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).

24. The purpose of the initial inspection shall be to verify information provided concerning the facility, including verification of the limits on reaction vessels set forth in paragraph 9.

25. Not later than 180 days after this Convention enters into force for a State Party, it shall conclude a facility agreement, based on a model agreement, with the Organization, covering detailed inspection procedures for the facility.

26. Each State Party planning to establish a single small-scale facility after this Convention enters into force for it shall conclude a facility agreement, based on a model agreement, with the Organization, covering detailed inspection procedures for the facility before it begins operation or is used.
27. A model for agreements shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (1).

Other facilities referred to in paragraphs 10 and 11

28. The aim of verification activities at any facility referred to in paragraphs 10 and 11 shall be to verify that:

(a) The facility is not used to produce any Schedule 1 chemical, except for the declared chemicals;

(b) The quantities of Schedule 1 chemicals produced, processed or consumed are correctly declared and consistent with needs for the declared purpose; and

(c) The Schedule 1 chemical is not diverted or used for other purposes.

29. The facility shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments.

30. The number, intensity, duration, timing and mode of inspections for a particular facility shall be based on the risk to the object and purpose of this Convention posed by the quantities of chemicals produced, the characteristics of the facility and the nature of the activities carried out there. Appropriate guidelines shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (1).

31. Not later than 180 days after this Convention enters into force for a State Party, it shall conclude facility agreements with the Organization, based on a model agreement covering detailed inspection procedures for each facility.

32. Each State Party planning to establish such a facility after entry into force of this Convention shall conclude a facility agreement with the Organization before the facility begins operation or is used.

PART VII

ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION
IN ACCORDANCE WITH ARTICLE VI

REGIME FOR SCHEDULE 2 CHEMICALS AND FACILITIES
RELATED TO SUCH CHEMICALS

A. DECLARATIONS

Declarations of aggregate national data

1. The initial and annual declarations to be provided by each State Party pursuant to Article VI, paragraphs 7 and 8, shall include aggregate national data for the previous calendar year on the quantities produced, processed, consumed, imported and exported of each Schedule 2 chemical, as well as a quantitative specification of import and export for each country involved.

2. Each State Party shall submit:

(a) Initial declarations pursuant to paragraph 1 not later than 30 days after this Convention enters into force for it; and, starting in the following calendar year,

(b) Annual declarations not later than 90 days after the end of the previous calendar year.

Declarations of plant sites producing, processing or consuming Schedule 2 chemicals

3. Initial and annual declarations are required for all plant sites that comprise one or more plant(s) which produced, processed or consumed during any of the previous three calendar years or is anticipated to produce, process or consume in the next calendar year more than:

(a) 1 kg of a chemical designated "*" in Schedule 2, part A;

(b) 100 kg of any other chemical listed in Schedule 2, part A; or

(c) 1 tonne of a chemical listed in Schedule 2, part B.

4. Each State Party shall submit:

(a) Initial declarations pursuant to paragraph 3 not later than 30 days after this Convention enters into force for it; and, starting in the following calendar year;

(b) Annual declarations on past activities not later than 90 days after the end of the previous calendar year;

(c) Annual declarations on anticipated activities not later than 60 days before the beginning of the following calendar year. Any such activity additionally planned after the annual declaration has been submitted shall be declared not later than five days before this activity begins.

5. Declarations pursuant to paragraph 3 are generally not required for mixtures containing a low concentration of a Schedule 2 chemical. They are only required, in accordance with guidelines, in cases where the ease of recovery from the mixture of the Schedule 2 chemical and its total weight are deemed to pose a risk to the object and purpose of this Convention. These guidelines shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (1).

6. Declarations of a plant site pursuant to paragraph 3 shall include:

(a) The name of the plant site and the name of the owner, company, or enterprise operating it;
(b) Its precise location including the address; and

(c) The number of plants within the plant site which are declared pursuant to Part VIII of this Annex.

7. Declarations of a plant site pursuant to paragraph 3 shall also include, for each plant which is located within the plant site and which falls under the specifications set forth in paragraph 3, the following information:

(a) The name of the plant and the name of the owner, company, or enterprise operating it;

(b) Its precise location within the plant site including the specific building or structure number, if any;

(c) Its main activities;

(d) Whether the plant:

(i) Produces, processes, or consumes the declared Schedule 2 chemical(s);

(ii) Is dedicated to such activities or multi-purpose; and

(iii) Performs other activities with regard to the declared Schedule 2 chemical(s), including a specification of that other activity (e.g. storage); and

(e) The production capacity of the plant for each declared Schedule 2 chemical.

8. Declarations of a plant site pursuant to paragraph 3 shall also include the following information on each Schedule 2 chemical above the declaration threshold:

(a) The chemical name, common or trade name used by the facility, structural formula, and Chemical Abstracts Service registry number, if assigned;

(b) In the case of the initial declaration: the total amount produced, processed, consumed, imported and exported by the plant site in each of the three previous calendar years;

(c) In the case of the annual declaration on past activities: the total amount produced, processed, consumed, imported and exported by the plant site in the previous calendar year;

(d) In the case of the annual declaration on anticipated activities: the total amount anticipated to be produced, processed or consumed by the plant site in the following calendar year, including the anticipated time periods for production, processing or consumption; and

(e) The purposes for which the chemical was or will be produced, processed or consumed:

(i) Processing and consumption on site with a specification of the product types;

(ii) Sale or transfer within the territory or to any other place under the jurisdiction or control of the State Party, with a specification whether to other industry, trader or other destination and, if possible, of final product types;

(iii) Direct export, with a specification of the States involved; or

(iv) Other, including a specification of these other purposes.

Declarations on past production of Schedule 2 chemicals for chemical weapons purposes

9. Each State Party shall, not later than 30 days after this Convention enters into force for it, declare all plant sites comprising plants that produced at any time since 1 January 1946 a Schedule 2 chemical for chemical weapons purposes.

10. Declarations of a plant site pursuant to paragraph 9 shall include:

(a) The name of the plant site and the name of the owner, company, or enterprise operating it;

(b) Its precise location including the address;

(c) For each plant which is located within the plant site, and which falls under the specifications set forth in paragraph 9, the name information as required under paragraph 7, subparagraphs (a) to (e); and

(d) For each Schedule 2 chemical produced for chemical weapons purposes:

(i) The chemical name, common or trade name used by the plant site for chemical weapons production purposes, structural formula, and Chemical Abstracts Service registry number, if assigned;

(ii) The dates when the chemical was produced and the quantity produced; and

(iii) The location to which the chemical was delivered and the final product produced there, if known.

Information to States Parties

11. A list of plant sites declared under this Section together with the information provided under paragraphs 6 (a), 7 (c), 7 (d) (i),
7 (d) (iii), 8 (a) and 10 shall be transmitted by the Technical Secretariat to States Parties upon request.

B. VERIFICATION

General

12. Verification provided for in Article VI, paragraph 4, shall be carried out through on-site inspection at those of the declared plant sites that comprise one or more plants which produced, processed or consumed during any of the previous three calendar years or are anticipated to produce, process or consume in the next calendar year more than:

(a) 10 kg of a chemical designated "**" in Schedule 2, part A;
(b) 1 tonne of any other chemical listed in Schedule 2, part A; or
(c) 10 tonnes of a chemical listed in Schedule 2, part B.

13. The programme and budget of the Organization to be adopted by the Conference pursuant to Article VIII, paragraph 21 (a) shall contain, as a separate item, a programme and budget for verification under this Section. In the allocation of resources made available for verification under Article VI, the Technical Secretariat shall, during the first three years after the entry into force of this Convention, give priority to the initial inspections of plant sites declared under Section A. The allocation shall thereafter be reviewed on the basis of the experience gained.

14. The Technical Secretariat shall conduct initial inspections and subsequent inspections in accordance with paragraphs 15 to 22.

Inspection aims

15. The general aim of inspections shall be to verify that activities are in accordance with obligations under this Convention and consistent with the information to be provided in declarations. Particular aims of inspections at plant sites declared under Section A shall include verification of:

(a) The absence of any Schedule 1 chemical, especially its production, except if in accordance with Part VI of this Annex;
(b) Consistency with declarations of levels of production, processing or consumption of Schedule 2 chemicals; and
(c) Non-diversion of Schedule 2 chemicals for activities prohibited under this Convention.

Initial inspections

16. Each plant site to be inspected pursuant to paragraph 12 shall receive an initial inspection as soon as possible but preferably not later than three years after entry into force of this Convention. Plant sites declared after this period shall receive an initial inspection not later than one year after production, processing or consumption is first declared. Selection of plant sites for initial inspections shall be made by the Technical Secretariat in such a way as to preclude the prediction of precisely when the plant site is to be inspected.

17. During the initial inspection, a draft facility agreement for the plant site shall be prepared unless the inspected State Party and the Technical Secretariat agree that it is not needed.

18. With regard to frequency and intensity of subsequent inspections, inspectors shall during the initial inspection assess the risk to the object and purpose of this Convention posed by the relevant chemicals, the characteristics of the plant site and the nature of the activities carried out there, taking into account, inter alia, the following criteria:

(a) The toxicity of the scheduled chemicals and of the end-products produced with it, if any;
(b) The quantity of the scheduled chemicals typically stored at the inspected site;
(c) The quantity of feedstock chemicals for the scheduled chemicals typically stored at the inspected site;
(d) The production capacity of the Schedule 2 plants; and
(e) The capability and convertibility for initiating production, storage and filling of toxic chemicals at the inspected site.

Inspections

19. Having received the initial inspection, each plant site to be inspected pursuant to paragraph 12 shall be subject to subsequent inspections.

20. In selecting particular plant sites for inspection and in deciding on the frequency and intensity of inspections, the Technical Secretariat shall give due consideration to the risk to the object and purpose of this Convention posed by the relevant chemical, the characteristics of the plant site and the nature of the activities carried out there, taking into account the respective facility agreement as well as the results of the initial inspections and subsequent inspections.

21. The Technical Secretariat shall choose a particular plant site to be inspected in such a way as to preclude the prediction of exactly when it will be inspected.

22. No plant site shall receive more than two inspections per calendar year under the provisions of this Section. This, however, shall not limit inspections pursuant to Article IV.
Inspection procedures

23. In addition to agreed guidelines, other relevant provisions of this Annex and the Confidentiality Annex, paragraphs 24 to 30 below shall apply.

24. A facility agreement for the declared plant site shall be concluded not later than 90 days after completion of the initial inspection between the inspected State Party and the Organization unless the inspected State Party and the Technical Secretariat agree that it is not needed. It shall be based on a model agreement and govern the conduct of inspections at the declared plant site. The agreement shall specify the frequency and intensity of inspections as well as detailed inspection procedures, consistent with paragraphs 25 to 29.

25. The focus of the inspection shall be the declared Schedule 2 plant(s) within the declared plant site. If the inspection team requests access to other parts of the plant site, access to these areas shall be granted in accordance with the obligation to provide clarification pursuant to Part II, paragraph 51, of this Annex and in accordance with the facility agreement, or, in the absence of a facility agreement, in accordance with the rules of managed access as specified in Part X, Section C, of this Annex.

26. Access to records shall be provided, as appropriate, to provide assurance that there has been no diversion of the declared chemical and that production has been consistent with declarations.

27. Sampling and analysis shall be undertaken to check for the absence of undeclared scheduled chemicals.

28. Areas to be inspected may include:

(a) Areas where feed chemicals (reactants) are delivered or stored;

(b) Areas where manipulative processes are performed upon the reactants prior to addition to the reaction vessels;

(c) Feed lines as appropriate from the areas referred to in subparagraph (a) or subparagraph (b) to the reaction vessels together with any associated valves, flow meters, etc.;

(d) The external aspect of the reaction vessels and ancillary equipment;

(e) Lines from the reaction vessels leading to long- or short-term storage or to equipment further processing the declared Schedule 2 chemicals;

(f) Control equipment associated with any of the items under subparagraphs (a) to (e);

(g) Equipment and areas for waste and effluent handling;

(h) Equipment and areas for disposition of chemicals not up to specification.

29. The period of inspection shall not last more than 96 hours; however, extensions may be agreed between the inspection team and the inspected State Party.

Notification of inspection

30. A State Party shall be notified by the Technical Secretariat of the inspection not less than 48 hours before the arrival of the inspection team at the plant site to be inspected.

C. TRANSFERS TO STATES NOT PARTY TO THIS CONVENTION

31. Schedule 2 chemicals shall only be transferred to or received from States Parties. This obligation shall take effect three years after entry into force of this Convention.

32. During this interim three-year period, each State Party shall require an end-use certificate, as specified below, for transfers of Schedule 2 chemicals to States not Party to this Convention. For such transfers, each State Party shall adopt the necessary measures to ensure that the transferred chemicals shall only be used for purposes not prohibited under this Convention. Inter alia, the State Party shall require from the recipient State a certificate stating, in relation to the transferred chemicals:

(a) That they will only be used for purposes not prohibited under this Convention;

(b) That they will not be re-transferred;

(c) Their types and quantities;

(d) Their end-use(s); and

(e) The name(s) and address(es) of the end-user(s).

PART VIII

ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION
IN ACCORDANCE WITH ARTICLE VI

REJIGME FOR SCHEDULE 3 CHEMICALS AND FACILITIES RELATED TO SUCH CHEMICALS

A. DECLARATIONS

Declarations of aggregate national data

1. The initial and annual declarations to be provided by a State Party pursuant to Article VI, paragraphs 7 and 8, shall include aggregate
national data for the previous calendar year on the quantities produced, imported and exported of each Schedule 3 chemical, as well as a quantitative specification of import and export for each country involved.

2. Each State Party shall submit:

(a) Initial declarations pursuant to paragraph 1 not later than 30 days after this Convention enters into force for it; and, starting in the following calendar year,

(b) Annual declarations not later than 90 days after the end of the previous calendar year.

Declarations of plant sites producing Schedule 3 chemicals

3. Initial and annual declarations are required for all plant sites that comprise one or more plants which produced during the previous calendar year or are anticipated to produce in the next calendar year more than 30 tonnes of a Schedule 3 chemical.

4. Each State Party shall submit:

(a) Initial declarations pursuant to paragraph 3 not later than 30 days after this Convention enters into force for it; and, starting in the following calendar year;

(b) Annual declarations on past activities not later than 90 days after the end of the previous calendar year;

(c) Annual declarations on anticipated activities not later than 60 days before the beginning of the following calendar year. Any such activity additionally planned after the annual declaration has been submitted shall be declared not later than five days before this activity begins.

5. Declarations pursuant to paragraph 3 are generally not required for mixtures containing a low concentration of a Schedule 3 chemical. They are only required, in accordance with guidelines, in such cases where the ease of recovery from the mixture of the Schedule 3 chemical and its total weight are deemed to pose a risk to the object and purpose of this Convention. These guidelines shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (4).

6. Declarations of a plant site pursuant to paragraph 3 shall include:

(a) The name of the plant site and the name of the owner, company, or enterprise operating it;

(b) Its precise location including the address; and

(c) The number of plants within the plant site which are declared pursuant to Part VII of this Annex.

7. Declarations of a plant site pursuant to paragraph 3 shall also include, for each plant which is located within the plant site and which falls under the specifications set forth in paragraph 3, the following information:

(a) The name of the plant and the name of the owner, company, or enterprise operating it;

(b) Its precise location within the plant site, including the specific building or structure number, if any;

(c) Its main activities.

8. Declarations of a plant site pursuant to paragraph 3 shall also include the following information on each Schedule 3 chemical above the declaration threshold:

(a) The chemical name, common or trade name used by the facility, structural formula, and Chemical Abstracts Service registry number, if assigned;

(b) The approximate amount of production of the chemical in the previous calendar year, or, in case of declarations on anticipated activities, anticipated for the next calendar year, expressed in the ranges: 30 to 200 tonnes, 200 to 1,000 tonnes, 1,000 to 10,000 tonnes, 10,000 to 100,000 tonnes, and above 100,000 tonnes; and

(c) The purposes for which the chemical was or will be produced.

Declarations on past production of Schedule 3 chemicals for chemical weapons purposes

9. Each State Party shall, not later than 30 days after this Convention enters into force for it, declare all plant sites comprising plants that produced at any time since 1 January 1946 a Schedule 3 chemical for chemical weapons purposes.

10. Declarations of a plant site pursuant to paragraph 9 shall include:

(a) The name of the plant site and the name of the owner, company, or enterprise operating it;

(b) Its precise location including the address;

(c) For each plant which is located within the plant site, and which falls under the specifications set forth in paragraph 9, the same information as required under paragraph 7, subparagraphs (a) to (c); and

(d) For each Schedule 3 chemical produced for chemical weapons purposes:

(i) The chemical name, common or trade name used by the plant site for chemical weapons production purposes, structural formula, and Chemical Abstracts Service registry number, if assigned;
(ii) The dates when the chemical was produced and the quantity produced; and

(iii) The location to which the chemical was delivered and the final product produced there, if known.

**Information to States Parties**

11. A list of plant sites declared under this Section together with the information provided under paragraphs 6, 7 (a), 7 (c), 8 (a) and 10 shall be transmitted by the Technical Secretariat to States Parties upon request.

**B. VERIFICATION**

**General**

12. Verification provided for in paragraph 5 of Article VI shall be carried out through on-site inspections at those declared plant sites which produced during the previous calendar year or are anticipated to produce in the next calendar year in excess of 200 tonnes aggregate of any Schedule 3 chemical above the declaration threshold of 30 tonnes.

13. The programme and budget of the Organization to be adopted by the Conference pursuant to Article VIII, paragraph 21 (a), shall contain, as a separate item, a programme and budget for verification under this Section taking into account Part VII, paragraph 13, of this Annex.

14. Under this Section, the Technical Secretariat shall randomly select plant sites for inspection through appropriate mechanisms, such as the use of specially designed computer software, on the basis of the following weighting factors:

(a) Equitable geographical distribution of inspections; and

(b) The information on the declared plant sites available to the Technical Secretariat, related to the relevant chemical, the characteristics of the plant site and the nature of the activities carried out there.

15. No plant site shall receive more than two inspections per year under the provisions of this Section. This, however, shall not limit inspections pursuant to Article IX.

16. In selecting plant sites for inspection under this Section, the Technical Secretariat shall observe the following limitation for the combined number of inspections to be received by a State Party per calendar year under this Part and Part IX of this Annex: the combined number of inspections shall not exceed three plus 5 per cent of the total number of plant sites declared by a State Party under both this Part and Part IX of this Annex, or 20 inspections, whichever of these two figures is lower.

**Inspection aims**

17. At plant sites declared under Section A, the general aim of inspections shall be to verify that activities are consistent with the information to be provided in declarations. The particular aim of inspections shall be the verification of the absence of any Schedule 3 chemical, especially its production, except if in accordance with Part VI of this Annex.

**Inspection procedures**

18. In addition to agreed guidelines, other relevant provisions of this Annex and the Confidentiality Annex, paragraphs 19 to 25 below shall apply.

19. There shall be no facility agreement, unless requested by the inspected State Party.

20. The focus of the inspections shall be the declared Schedule 3 plant(s) within the declared plant site. If the inspection team, in accordance with Part II, paragraph 51, of this Annex, requests access to other parts of the plant site for clarification of ambiguities, the extent of such access shall be agreed between the inspection team and the inspected State Party.

21. The inspection team may have access to records in situations in which the inspection team and the inspected State Party agree that such access will assist in achieving the objectives of the inspection.

22. Sampling and on-site analysis may be undertaken to check for the absence of undeclared scheduled chemicals. In case of unresolved ambiguities, samples may be analysed in a designated off-site laboratory, subject to the inspected State Party's agreement.

23. Areas to be inspected may include:

(a) Areas where feed chemicals (reactants) are delivered or stored;

(b) Areas where manipulative processes are performed upon the reactants prior to addition to the reaction vessel;

(c) Feed lines as appropriate from the areas referred to in subparagraph (a) or subparagraph (b) to the reaction vessel together with any associated valves, flow meters, etc.;

(d) The external aspect of the reaction vessels and ancillary equipment;

(e) Lines from the reaction vessels leading to long- or short-term storage or to equipment further processing the declared Schedule 3 chemicals;

(f) Control equipment associated with any of the items under subparagraphs (a) to (e);
(g) Equipment and areas for waste and effluent handling;

(h) Equipment and areas for disposal of chemicals not up to specification.

24. The period of inspection shall not last more than 24 hours; however, extensions may be agreed between the inspection team and the inspected State Party.

Notification of inspection

25. A State Party shall be notified by the Technical Secretariat of the inspection not less than 120 hours before the arrival of the inspection team at the plant site to be inspected.

C. TRANSFERS TO STATES NOT PARTY TO THIS CONVENTION

26. When transferring Schedule 3 chemicals to States not Party to this Convention, each State Party shall adopt the necessary measures to ensure that the transferred chemicals shall only be used for purposes not prohibited under this Convention. Inter alia, the State Party shall require from the recipient State a certificate stating, in relation to the transferred chemicals:

(a) That they will only be used for purposes not prohibited under this Convention;

(b) That they will not be re-transferred;

(c) Their types and quantities;

(d) Their end-use(s); and

(e) The name(s) and address(es) of the end-user(s).

27. Five years after entry into force of this Convention, the Conference shall consider the need to establish other measures regarding transfers of Schedule 3 chemicals to States not Party to this Convention.

PART IX

ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION IN ACCORDANCE WITH ARTICLE VI

REGIME FOR OTHER CHEMICAL PRODUCTION FACILITIES

A. DECLARATIONS

List of other chemical production facilities

1. The initial declaration to be provided by each State Party pursuant to Article VI, paragraph 7, shall include a list of all plant sites that:

(a) Produced by synthesis during the previous calendar year more than 200 tonnes of unscheduled discrete organic chemicals; or

(b) Comprise one or more plants which produced by synthesis during the previous calendar year more than 30 tonnes of an unscheduled discrete organic chemical containing the elements phosphorus, sulfur or fluorine (hereinafter referred to as "PSF-plants" and "PSF-chemical").

2. The list of other chemical production facilities to be submitted pursuant to paragraph 1 shall not include plant sites that exclusively produced explosives or hydrocarbons.

3. Each State Party shall submit its list of other chemical production facilities pursuant to paragraph 1 as part of its initial declaration not later than 30 days after this Convention enters into force for it. Each State Party shall, not later than 90 days after the beginning of each following calendar year, provide annually the information necessary to update the list.

4. The list of other chemical production facilities to be submitted pursuant to paragraph 1 shall include the following information on each plant site:

(a) The name of the plant site and the name of the owner, company, or enterprise operating it;

(b) The precise location of the plant site including its address;

(c) Its main activities; and

(d) The approximate number of plants producing the chemicals specified in paragraph 1 in the plant site.

5. With regard to plant sites listed pursuant to paragraph 1 (a), the list shall also include information on the approximate aggregate amount of production of the unscheduled discrete organic chemicals in the previous calendar year expressed in the ranges: under 1,000 tonnes, 1,000 to 10,000 tonnes and above 10,000 tonnes.

6. With regard to plant sites listed pursuant to paragraph 1 (b), the list shall also specify the number of PSF-plants within the plant site and include information on the approximate aggregate amount of production of PSF-chemicals produced by each PSF-plant in the previous calendar year expressed in the ranges: under 200 tonnes, 200 to 1,000 tonnes, 1,000 to 10,000 tonnes and above 10,000 tonnes.

Assistance by the Technical Secretariat

7. If a State Party, for administrative reasons, deems it necessary to ask for assistance in compiling its list of chemical production facilities pursuant to paragraph 1, it may request the Technical Secretariat to provide such assistance. Questions as to the completeness of the list shall then be resolved through consultations between the State Party and the Technical Secretariat.
Information to States Parties

8. The lists of other chemical production facilities submitted pursuant to paragraph 1, including the information provided under paragraph 4, shall be transmitted by the Technical Secretariat to States Parties upon request.

B. VERIFICATION

General

9. Subject to the provisions of Section C, verification as provided for in Article VI, paragraph 6, shall be carried out through on-site inspection at:

(a) Plant sites listed pursuant to paragraph 1 (a); and

(b) Plant sites listed pursuant to paragraph 1 (b) that comprise one or more PSF-plants which produced during the previous calendar year more than 200 tonnes of a PSF-chemical.

10. The programme and budget of the Organization to be adopted by the Conference pursuant to Article VIII, paragraph 21 (a), shall contain, as a separate item, a programme and budget for verification under this Section after its implementation has started.

11. Under this Section, the Technical Secretariat shall randomly select plant sites for inspection through appropriate mechanisms, such as the use of specially designed computer software, on the basis of the following weighting factors:

(a) Equitable geographical distribution of inspections;

(b) The information on the listed plant sites available to the Technical Secretariat, related to the characteristics of the plant site and the activities carried out there; and

(c) Proposals by States Parties on a basis to be agreed upon in accordance with paragraph 25.

12. No plant site shall receive more than two inspections per year under the provisions of this Section. This, however, shall not limit inspections pursuant to Article IX.

13. In selecting plant sites for inspection under this Section, the Technical Secretariat shall observe the following limitation for the combined number of inspections to be received by a State Party per calendar year under this Part and Part VIII of this Annex: the combined number of inspections shall not exceed three plus 5 per cent of the total number of plant sites declared by a State Party under both this Part and Part VIII of this Annex, or 20 inspections, whichever of these two figures is lower.

Inspection aims

14. At plant sites listed under Section A, the general aim of inspections shall be to verify that activities are consistent with the information to be provided in declarations. The particular aim of inspections shall be the verification of the absence of any Schedule I chemical, especially its production, except if in accordance with Part VI of this Annex.

Inspection procedures

15. In addition to agreed guidelines, other relevant provisions of this Annex and the Confidentiality Annex, paragraphs 16 to 20 below shall apply.

16. There shall be no facility agreement, unless requested by the inspected State Party.

17. The focus of inspection at a plant site selected for inspection shall be the plant(s) producing the chemicals specified in paragraph 1, in particular the PSF-plants listed pursuant to paragraph 1 (b). The inspected State Party shall have the right to manage access to these plants in accordance with the rules of managed access as specified in Part X, Section C, of this Annex. If the inspection team, in accordance with Part II, paragraph 51, of this Annex, requests access to other parts of the plant site for clarification of ambiguities, the extent of such access shall be agreed between the inspection team and the inspected State Party.

18. The inspection team may have access to records in situations in which the inspection team and the inspected State Party agree that such access will assist in achieving the objectives of the inspection.

19. Sampling and on-site analysis may be undertaken to check for the absence of undeclared scheduled chemicals. In cases of unresolved ambiguities, samples may be analysed in a designated off-site laboratory, subject to the inspected State Party's agreement.

20. The period of inspection shall not last more than 24 hours; however, extensions may be agreed between the inspection team and the inspected State Party.

Notification of inspection

21. A State Party shall be notified by the Technical Secretariat of the inspection not less than 120 hours before the arrival of the inspection team at the plant site to be inspected.

C. IMPLEMENTATION AND REVIEW OF SECTION B

Implementation

22. The implementation of Section B shall start at the beginning of the fourth year after entry into force of this Convention unless the
Conference, at its regular session in the third year after entry into force of this Convention, decides otherwise.

23. The Director-General shall, for the regular session of the Conference in the third year after entry into force of this Convention, prepare a report which outlines the experience of the Technical Secretariat in implementing the provisions of Parts VII and VIII of this Annex as well as of Section A of this Part.

24. At its regular session in the third year after entry into force of this Convention, the Conference, on the basis of a report of the Director-General, may also decide on the distribution of resources available for verification under Section B between "PSF-plants" and other chemical production facilities. Otherwise, this distribution shall be left to the expertise of the Technical Secretariat and be added to the weighting factors in paragraph 11.

25. At its regular session in the third year after entry into force of this Convention, the Conference, upon advice of the Executive Council, shall decide on which basis (e.g. regional) proposals by States Parties for inspections should be presented to be taken into account as a weighting factor in the selection process specified in paragraph 11.

Review

26. At the first special session of the Conference convened pursuant to Article VIII, paragraph 22, the provisions of this Part of the Verification Annex shall be re-examined in the light of a comprehensive review of the overall verification regime for the chemical industry (Article VI, Parts VII to IX of this Annex) on the basis of the experience gained. The Conference shall then make recommendations so as to improve the effectiveness of the verification regime.

PART X

CHALLENGE INSPECTIONS PURSUANT TO ARTICLE IX

A. DESIGNATION AND SELECTION OF INSPECTORS AND INSPECTION ASSISTANTS

1. Challenge inspections pursuant to Article IX shall only be performed by inspectors and inspection assistants especially designated for this function. In order to designate inspectors and inspection assistants for challenge inspections pursuant to Article IX, the Director-General shall, by selecting inspectors and inspection assistants from among the inspectors and inspection assistants for routine inspection activities, establish a list of proposed inspectors and inspection assistants. It shall comprise a sufficiently large number of inspectors and inspection assistants having the necessary qualification, experience, skill and training, to allow for flexibility in the selection of the inspectors, taking into account their availability, and the need for rotation. Due regard shall be paid also to the importance of selecting inspectors and inspection assistants on as wide a geographical basis as possible. The designation of inspectors and inspection assistants shall follow the procedures provided for under Part II, Section A, of this Annex.

2. The Director-General shall determine the size of the inspection team and select its members taking into account the circumstances of a particular request. The size of the inspection team shall be kept to a minimum necessary for the proper fulfilment of the inspection mandate. No national of the requesting State Party or the inspected State Party shall be a member of the inspection team.

B. PRE-INSPECTION ACTIVITIES

3. Before submitting the inspection request for a challenge inspection, the State Party may seek confirmation from the Director-General that the Technical Secretariat is in a position to take immediate action on the request. If the Director-General cannot provide such confirmation immediately, he shall do so at the earliest opportunity, in keeping with the order of requests for confirmation. He shall also keep the State Party informed of when it is likely that immediate action can be taken. Should the Director-General reach the conclusion that timely action on requests can no longer be taken, he may ask the Executive Council to take appropriate action to improve the situation in the future.

Notification

4. The inspection request for a challenge inspection to be submitted to the Executive Council and the Director-General shall contain at least the following information:

(a) The State Party to be inspected and, if applicable, the Host State;

(b) The point of entry to be used;

(c) The size and type of the inspection site;

(d) The concern regarding possible non-compliance with this Convention including a specification of the relevant provisions of this Convention about which the concern has arisen, and of the nature and circumstances of the possible non-compliance as well as all appropriate information on the basis of which the concern has arisen; and

(e) The name of the observer of the requesting State Party.

The requesting State Party may submit any additional information it deems necessary.

5. The Director-General shall within one hour acknowledge to the requesting State Party receipt of its request.

6. The requesting State Party shall notify the Director-General of the location of the inspection site in due time for the Director-General to be able to provide this information to the inspected State Party not
less than 12 hours before the planned arrival of the inspection team at the point of entry.

7. The inspection site shall be designated by the requesting State Party as specifically as possible by providing a site diagram related to a reference point with geographic coordinates, specified to the nearest second, if possible. If possible, the requesting State Party shall also provide a map with a general indication of the inspection site and a diagram specifying as precisely as possible the requested perimeter of the site to be inspected.

8. The requested perimeter shall:

(a) Run at least a 10 metre distance outside any buildings or other structures;

(b) Not cut through existing security enclosures; and

(c) Run at least a 10 metre distance outside any existing security enclosures that the requesting State Party intends to include within the requested perimeter.

9. If the requested perimeter does not conform with the specifications of paragraph 8, it shall be redrawn by the inspection team so as to conform with that provision.

10. The Director-General shall, not less than 12 hours before the planned arrival of the inspection team at the point of entry, inform the Executive Council about the location of the inspection site as specified in paragraph 7.

11. Contemporaneously with informing the Executive Council according to paragraph 10, the Director-General shall transmit the inspection request to the inspected State Party including the location of the inspection site as specified in paragraph 7. This notification shall also include the information specified in Part II, paragraph 32, of this Annex.

12. Upon arrival of the inspection team at the point of entry, the inspected State Party shall be informed by the inspection team of the inspection mandate.

Entry into the territory of the inspected State Party or the Host State

13. The Director-General shall, in accordance with Article IX, paragraphs 13 to 18, dispatch an inspection team as soon as possible after an inspection request has been received. The inspection team shall arrive at the point of entry specified in the request in the minimum time possible, consistent with the provisions of paragraphs 10 and 11.

14. If the requested perimeter is acceptable to the inspected State Party, it shall be designated as the final perimeter as early as possible, but in no case later than 24 hours after the arrival of the inspection team at the point of entry. The inspected State Party shall transport the inspection team to the final perimeter of the inspection site. If the inspected State Party deems it necessary, such transportation may begin up to 12 hours before the expiry of the time period specified in this paragraph for the designation of the final perimeter. Transportation shall, in any case, be completed not later than 36 hours after the arrival of the inspection team at the point of entry.

15. For all declared facilities, the procedures in subparagraphs (a) and (b) shall apply. (For the purposes of this Part, "declared facility" means all facilities declared pursuant to Articles III, IV, and V. With regard to Article VI, "declared facility" means only facilities declared pursuant to Part VI of this Annex, as well as declared plants specified by declarations pursuant to Part VII, paragraphs 7 and 10 (c), and Part VIII, paragraphs 7 and 10 (c), of this Annex.)

(a) If the requested perimeter is contained within or conforms with the declared perimeter, the declared perimeter shall be considered the final perimeter. The final perimeter may, however, if agreed by the inspected State Party, be made smaller in order to conform with the perimeter requested by the requesting State Party.

(b) The inspected State Party shall transport the inspection team to the final perimeter as soon as practicable, but in any case shall ensure their arrival at the perimeter not later than 24 hours after the arrival of the inspection team at the point of entry.

Alternative determination of final perimeter

16. At the point of entry, if the inspected State Party cannot accept the requested perimeter, it shall propose an alternative perimeter as soon as possible, but in any case not later than 24 hours after the arrival of the inspection team at the point of entry. In case of differences of opinion, the inspected State Party and the inspection team shall engage in negotiations with the aim of reaching agreement on a final perimeter.

17. The alternative perimeter should be designated as specifically as possible in accordance with paragraph 8. It shall include the whole of the requested perimeter and should, as a rule, bear a close relationship to the latter, taking into account natural terrain features and man-made boundaries. It should normally run close to the surrounding security barrier if such a barrier exists. The inspected State Party should seek to establish such a relationship between the perimeters by a combination of at least two of the following means:

(a) An alternative perimeter that does not extend to an area significantly greater than that of the requested perimeter;

(b) An alternative perimeter that is a short, uniform distance from the requested perimeter;
18. If the alternative perimeter is acceptable to the inspection team, it shall become the final perimeter and the inspection team shall be transported from the point of entry to that perimeter. If the inspected State Party deems it necessary, such transportation may begin up to 12 hours before the expiry of the time period specified in paragraph 16 for proposing an alternative perimeter. Transportation shall, in any case, be completed not later than 36 hours after the arrival of the inspection team at the point of entry.

19. If a final perimeter is not agreed, the perimeter negotiations shall be concluded as early as possible, but in no case shall they continue more than 24 hours after the arrival of the inspection team at the point of entry. If no agreement is reached, the inspected State Party shall transport the inspection team to a location at the alternative perimeter. If the inspected State Party deems it necessary, such transportation may begin up to 12 hours before the expiry of the time period specified in paragraph 16 for proposing an alternative perimeter. Transportation shall, in any case, be completed not later than 36 hours after the arrival of the inspection team at the point of entry.

20. Once at the location, the inspected State Party shall provide the inspection team with prompt access to the alternative perimeter to facilitate negotiations and agreement on the final perimeter and access within the final perimeter.

21. If no agreement is reached within 72 hours after the arrival of the inspection team at the location, the alternative perimeter shall be designated the final perimeter.

Verification of location

22. To help establish that the inspection site to which the inspection team has been transported corresponds to the inspection site specified by the requesting State Party, the inspection team shall have the right to use approved location-finding equipment and have such equipment installed according to its directions. The inspection team may verify its location by reference to local landmarks identified from maps. The inspected State Party shall assist the inspection team in this task.

Securing the site, exit monitoring

23. Not later than 12 hours after the arrival of the inspection team at the point of entry, the inspected State Party shall begin collecting factual information of all vehicular exit activity from all exit points for all land, air, and water vehicles of the requested perimeter. It shall provide this information to the inspection team upon its arrival at the alternative or final perimeter, whichever occurs first.

24. This obligation may be met by collecting factual information in the form of traffic logs, photographs, video recordings, or data from chemical evidence equipment provided by the inspection team to monitor such exit activity. Alternatively, the inspected State Party may also meet this obligation by allowing one or more members of the inspection team independently to maintain traffic logs, take photographs, make video recordings of exit traffic, or use chemical evidence equipment, and conduct other activities as may be agreed between the inspected State Party and the inspection team.

25. Upon the inspection team's arrival at the alternative perimeter or final perimeter, whichever occurs first, securing the site, which means exit monitoring procedures by the inspection team, shall begin.

26. Such procedures shall include: the identification of vehicular exits, the making of traffic logs, the taking of photographs, and the making of video recordings by the inspection team of exits and exit traffic. The inspection team has the right to go, under escort, to any other part of the perimeter to check that there is no other exit activity.

27. Additional procedures for exit monitoring activities as agreed upon by the inspection team and the inspected State Party may include, inter alia:

(a) Use of sensors;
(b) Random selective access;
(c) Sample analysis.

28. All activities for securing the site and exit monitoring shall take place within a band around the outside of the perimeter, not exceeding 50 metres in width, measured outward.

29. The inspection team has the right to inspect on a managed access basis vehicular traffic exiting the site. The inspected State Party shall make every reasonable effort to demonstrate to the inspection team that any vehicle, subject to inspection, to which the inspection team is not granted full access, is not being used for purposes related to the possible non-compliance concerns raised in the inspection request.

30. Personnel and vehicles entering and personnel and personal passenger vehicles exiting the site are not subject to inspection.

31. The application of the above procedures may continue for the duration of the inspection, but may not unreasonably hamper or delay the normal operation of the facility.

Pre-inspection briefing and inspection plan

32. To facilitate development of an inspection plan, the inspected State Party shall provide a safety and logistical briefing to the inspection team prior to access.
33. The pre-inspection briefing shall be held in accordance with Part II, paragraph 37, of this Annex. In the course of the pre-inspection briefing, the inspected State Party may indicate to the inspection team the equipment, documentation, or areas it considers sensitive and not related to the purpose of the challenge inspection. In addition, personnel responsible for the site shall brief the inspection team on the physical layout and other relevant characteristics of the site. The inspection team shall be provided with a map or sketch drawn to scale showing all structures and significant geographic features at the site. The inspection team shall also be briefed on the availability of facility personnel and records.

34. After the pre-inspection briefing, the inspection team shall prepare, on the basis of the information available and appropriate to it, an initial inspection plan which specifies the activities to be carried out by the inspection team, including the specific areas of the site to which access is desired. The inspection plan shall also specify whether the inspection team will be divided into subgroups. The inspection plan shall be made available to the representatives of the inspected State Party and the inspection site. Its implementation shall be consistent with the provisions of Section C, including those related to access and activities.

Perimeter activities

35. Upon the inspection team's arrival at the final or alternative perimeter, whichever occurs first, the team shall have the right to commence immediately perimeter activities in accordance with the procedures set forth under this Section, and to continue these activities until the completion of the challenge inspection.

36. In conducting the perimeter activities, the inspection team shall have the right to:

(a) Use monitoring instruments in accordance with Part II, paragraphs 27 to 30, of this Annex;

(b) Take wipes, air, soil or effluent samples; and

(c) Conduct any additional activities which may be agreed between the inspection team and the inspected State Party.

37. The perimeter activities of the inspection team may be conducted within a band around the outside of the perimeter up to 50 metres in width measured outward from the perimeter. If the inspected State Party agrees, the inspection team may also have access to any building or structure within the perimeter band. All directional monitoring shall be oriented inward. For declared facilities, at the discretion of the inspected State Party, the band could run inside, outside, or on both sides of the declared perimeter.

C. CONDUCT OF INSPECTIONS

General rules

38. The inspected State Party shall provide access within the requested perimeter as well as, if different, the final perimeter. The extent and nature of access to a particular place or places within these perimeters shall be negotiated between the inspection team and the inspected State Party on a managed access basis.

39. The inspected State Party shall provide access within the requested perimeter as soon as possible, but in any case not later than 108 hours after the arrival of the inspection team at the point of entry in order to clarify the concern regarding possible non-compliance with this Convention raised in the inspection request.

40. Upon the request of the inspection team, the inspected State Party may provide aerial access to the inspection site.

41. In meeting the requirement to provide access as specified in paragraph 38, the inspected State Party shall be under the obligation to allow the greatest degree of access taking into account any constitutional obligations it may have with regard to proprietary rights or searches and seizures. The inspected State Party has the right under managed access to take such measures as are necessary to protect national security. The provisions in this paragraph may not be invoked by the inspected State Party to conceal evasion of its obligations not to engage in activities prohibited under this Convention.

42. If the inspected State Party provides less than full access to places, activities, or information, it shall be under the obligation to make every reasonable effort to provide alternative means to clarify the possible non-compliance concern that generated the challenge inspection.

43. Upon arrival at the final perimeter of facilities declared pursuant to Articles IV, V and VI, access shall be granted following the pre-inspection briefing and discussion of the inspection plan which shall be limited to the minimum necessary and in any event shall not exceed three hours. For facilities declared pursuant to Article III, paragraph 1 (d), negotiations shall be conducted and managed access commenced not later than 12 hours after arrival at the final perimeter.

44. In carrying out the challenge inspection in accordance with the inspection request, the inspection team shall use only those methods necessary to provide sufficient relevant facts to clarify the concern about possible non-compliance with the provisions of this Convention, and shall refrain from activities not relevant thereto. It shall collect and document such facts as are related to the possible non-compliance with this Convention by the inspected State Party, but shall neither seek nor document information which is clearly not related thereto, unless the inspected State Party expressly requests it to do so. Any material collected and subsequently found not to be relevant shall not be retained.
45. The inspection team shall be guided by the principle of conducting the challenge inspection in the least intrusive manner possible, consistent with the effective and timely accomplishment of its mission. Wherever possible, it shall begin with the least intrusive procedures it deems acceptable and proceed to more intrusive procedures only as it deems necessary.

**Managed access**

46. The inspection team shall take into consideration suggested modifications of the inspection plan and proposals which may be made by the inspected State Party, at whatever stage of the inspection including the pre-inspection briefing, to ensure that sensitive equipment, information or areas, not related to chemical weapons, are protected.

47. The inspected State Party shall designate the perimeter entry/exit points to be used for access. The inspection team and the inspected State Party shall negotiate: the extent of access to any particular place or places within the final and requested perimeters as provided in paragraph 48; the particular inspection activities, including sampling, to be conducted by the inspection team; the performance of particular activities by the inspected State Party; and the provision of particular information by the inspected State Party.

48. In conformity with the relevant provisions in the Confidentiality Annex the inspected State Party shall have the right to take measures to protect sensitive installations and prevent disclosure of confidential information and data not related to chemical weapons. Such measures may include, *inter alia*:

(a) Removal of sensitive papers from office spaces;

(b) Shrouding of sensitive displays, stores, and equipment;

(c) Shrouding of sensitive pieces of equipment, such as computer or electronic systems;

(d) Logging off of computer systems and turning off of data indicating devices;

(e) Restriction of sample analysis to presence or absence of chemicals listed in Schedules 1, 2 and 3 or appropriate degradation products;

(f) Using random selective access techniques whereby the inspectors are requested to select a given percentage or number of buildings of their choice to inspect; the same principle can apply to the interior and content of sensitive buildings;

(g) In exceptional cases, giving only individual inspectors access to certain parts of the inspection site.

49. The inspected State Party shall make every reasonable effort to demonstrate to the inspection team that any object, building, structure, container or vehicle to which the inspection team has not had full access, or which has been protected in accordance with paragraph 48, is not used for purposes related to the possible non-compliance concerns raised in the inspection request.

50. This may be accomplished by means of, *inter alia*, the partial removal of a shroud or environmental protection cover, at the discretion of the inspected State Party, by means of a visual inspection of the interior of an enclosed space from its entrance, or by other methods.

51. In the case of facilities declared pursuant to Articles IV, V and VI, the following shall apply:

(a) For facilities with facility agreements, access and activities within the final perimeter shall be unimpeded within the boundaries established by the agreements;

(b) For facilities without facility agreements, negotiation of access and activities shall be governed by the applicable general inspection guidelines established under this Convention;

(c) Access beyond that granted for inspections under Articles IV, V and VI shall be managed in accordance with procedures of this section.

52. In the case of facilities declared pursuant to Article III, paragraph 1 (d), the following shall apply: if the inspected State Party, using procedures of paragraphs 47 and 48, has not granted full access to areas or structures not related to chemical weapons, it shall make every reasonable effort to demonstrate to the inspection team that such areas or structures are not used for purposes related to the possible non-compliance concerns raised in the inspection request.

**Observer**

53. In accordance with the provisions of Article IX, paragraph 12, on the participation of an observer in the challenge inspection, the requesting State Party shall liaise with the Technical Secretariat to coordinate the arrival of the observer at the same point of entry as the inspection team within a reasonable period of the inspection team's arrival.

54. The observer shall have the right throughout the period of inspection to be in communication with the embassy of the requesting State Party located in the inspected State Party or in the Host State or, in the case of absence of an embassy, with the requesting State Party itself. The inspected State Party shall provide means of communication to the observer.

55. The observer shall have the right to arrive at the alternative or final perimeter of the inspection site, wherever the inspection team arrives first, and to have access to the inspection site as granted by the inspected State Party. The observer shall have the right to make recommendations to the inspection team, which the team shall take into account to the extent it deems appropriate. Throughout the inspection,
the inspection team shall keep the observer informed about the conduct
of the inspection and the findings.

56. Throughout the in-country period, the inspected State Party shall
provide or arrange for the amenities necessary for the observer such as
communication means, interpretation services, transportation, working
space, lodging, meals and medical care. All the costs in connection
with the stay of the observer on the territory of the inspected State
Party or the Host State shall be borne by the requesting State Party.

Duration of inspection

57. The period of inspection shall not exceed 84 hours, unless extended
by agreement with the inspected State Party.

D. POST-INSPECTION ACTIVITIES

Departure

58. Upon completion of the post-inspection procedures at the inspection
site, the inspection team and the observer of the requesting State Party
shall proceed promptly to a point of entry and shall then leave the
territory of the inspected State Party in the minimum time possible.

Reports

59. The inspection report shall summarize in a general way the
activities conducted by the inspection team and the factual findings of
the inspection team, particularly with regard to the concerns regarding
possible non-compliance with this Convention cited in the request for
the challenge inspection, and shall be limited to information directly
related to this Convention. It shall also include an assessment by the
inspection team of the degree and nature of access and cooperation
granted to the inspectors and the extent to which this enabled them to
fulfil the inspection mandate. Detailed information relating to the
concerns regarding possible non-compliance with this Convention cited in
the request for the challenge inspection shall be submitted as an
Appendix to the final report and be retained within the Technical
Secretariat under appropriate safeguards to protect sensitive information.

60. The inspection team shall, not later than 72 hours after its return
to its primary work location, submit a preliminary inspection report,
having taken into account, inter alia, paragraph 17 of the
Confidentiality Annex, to the Director-General. The Director-General
shall promptly transmit the preliminary inspection report to the
requesting State Party, the inspected State Party and to the Executive
Council.

61. A draft final inspection report shall be made available to the
inspected State Party not later than 20 days after the completion of the
challenge inspection. The inspected State Party has the right to
identify any information and data not related to chemical weapons which
should, in its view, due to its confidential character, not be
circulated outside the Technical Secretariat. The Technical Secretariat
shall consider proposals for changes to the draft final inspection
report made by the inspected State Party and, using its own discretion,
wherever possible, adopt them. The final report shall then be submitted
not later than 30 days after the completion of the challenge inspection
to the Director-General for further distribution and consideration in
accordance with Article IX, paragraphs 21 to 25.

PART XI

INVESTIGATIONS IN CASES OF ALLEGED USE OF CHEMICAL WEAPONS

A. GENERAL

1. Investigations of alleged use of chemical weapons, or of alleged
use of riot control agents as a method of warfare, initiated pursuant to
Articles IX or X, shall be conducted in accordance with this Annex and
detailed procedures to be established by the Director-General.

2. The following additional provisions address specific procedures
required in cases of alleged use of chemical weapons.

B. PRE-INSPECTION ACTIVITIES

Request for an investigation

3. The request for an investigation of an alleged use of chemical
weapons to be submitted to the Director-General, to the extent possible,
should include the following information:

(a) The State Party on whose territory use of chemical weapons is
alleged to have taken place;

(b) The point of entry or other suggested safe routes of access;

(c) Location and characteristics of the areas where chemical
weapons are alleged to have been used;

(d) When chemical weapons are alleged to have been used;

(e) Types of chemical weapons believed to have been used;

(f) Extent of alleged use;

(g) Characteristics of the possible toxic chemicals;

(h) Effects on humans, animals and vegetation;

(i) Request for specific assistance, if applicable.

4. The State Party which has requested an investigation may submit at
any time any additional information it deems necessary.
Notification

5. The Director-General shall immediately acknowledge receipt to the requesting State Party of its request and inform the Executive Council and all States Parties.

6. If applicable, the Director-General shall notify the State Party on whose territory an investigation has been requested. The Director-General shall also notify other States Parties if access to their territories might be required during the investigation.

Assignment of inspection team

7. The Director-General shall prepare a list of qualified experts whose particular field of expertise could be required in an investigation of alleged use of chemical weapons and constantly keep this list updated. This list shall be communicated, in writing, to each State Party not later than 30 days after entry into force of this Convention and after each change to the list. Any qualified expert included in this list shall be regarded as designated unless a State Party, not later than 30 days after receipt of the list, declares its non-acceptance in writing.

8. The Director-General shall select the leader and members of an inspection team from the inspectors and inspection assistants already designated for challenge inspections taking into account the circumstances and specific nature of a particular request. In addition, members of the inspection team may be selected from the list of qualified experts when, in the view of the Director-General, expertise not available among inspectors already designated is required for the proper conduct of a particular investigation.

9. When briefing the inspection team, the Director-General shall include any additional information provided by the requesting State Party, or any other sources, to ensure that the inspection can be carried out in the most effective and expedient manner.

Dispatch of inspection team

10. Immediately upon the receipt of a request for an investigation of alleged use of chemical weapons the Director-General shall, through contacts with the relevant States Parties, request and confirm arrangements for the safe reception of the team.

11. The Director-General shall dispatch the team at the earliest opportunity, taking into account the safety of the team.

12. If the inspection team has not been dispatched within 24 hours from the receipt of the request, the Director-General shall inform the Executive Council and the States Parties concerned about the reasons for the delay.

13. The inspection team shall have the right to be briefed by representatives of the inspected State Party upon arrival and at any time during the inspection.

14. Before the commencement of the inspection the inspection team shall prepare an inspection plan to serve, inter alia, as a basis for logistic and safety arrangements. The inspection plan shall be updated as need arises.

C. CONDUCT OF INSPECTIONS

Access

15. The inspection team shall have the right of access to any and all areas which could be affected by the alleged use of chemical weapons. It shall also have the right of access to hospitals, refugee camps and other locations it deems relevant to the effective investigation of the alleged use of chemical weapons. For such access, the inspection team shall consult with the inspected State Party.

Sampling

16. The inspection team shall have the right to collect samples of types, and in quantities it considers necessary. If the inspection team deems it necessary, and if so requested by it, the inspected State Party shall assist in the collection of samples under the supervision of inspectors or inspection assistants. The inspected State Party shall also permit and cooperate in the collection of appropriate control samples from areas neighbouring the site of the alleged use and from other areas as requested by the inspection team.

17. Samples of importance in the investigation of alleged use include toxic chemicals, munitions and devices, remnants of munitions and devices, environmental samples (air, soil, vegetation, water, snow, etc.) and biomedical samples from human or animal sources (blood, urine, excreta, tissue etc.).

18. If duplicate samples cannot be taken and the analysis is performed at off-site laboratories, any remaining sample shall, if so requested, be returned to the inspected State Party after the completion of the analysis.

Extension of inspection site

19. If the inspection team during an inspection deems it necessary to extend the investigation into a neighbouring State Party, the Director-General shall notify that State Party about the need for access to its territory and request and confirm arrangements for the safe reception of the team.
Extension of inspection duration

20. If the inspection team deems that safe access to a specific area relevant to the investigation is not possible, the requesting State Party shall be informed immediately. If necessary, the period of inspection shall be extended until safe access can be provided and the inspection team will have concluded its mission.

Interviews

21. The inspection team shall have the right to interview and examine persons who may have been affected by the alleged use of chemical weapons. It shall also have the right to interview eyewitnesses of the alleged use of chemical weapons and medical personnel, and other persons who have treated or have come into contact with persons who may have been affected by the alleged use of chemical weapons. The inspection team shall have access to medical histories, if available, and be permitted to participate in autopsies, as appropriate, of persons who may have been affected by the alleged use of chemical weapons.

D. REPORTS

Procedures

22. The inspection team shall, not later than 24 hours after its arrival on the territory of the inspected State Party, send a situation report to the Director-General. It shall further throughout the investigation send progress reports as necessary.

23. The inspection team shall, not later than 72 hours after its return to its primary work location, submit a preliminary report to the Director-General. The final report shall be submitted to the Director-General not later than 30 days after its return to its primary work location. The Director-General shall promptly transmit the preliminary and final reports to the Executive Council and to all States Parties.

Contents

24. The situation report shall indicate any urgent need for assistance and any other relevant information. The progress reports shall indicate any further need for assistance that might be identified during the course of the investigation.

25. The final report shall summarize the factual findings of the inspection, particularly with regard to the alleged use cited in the request. In addition, a report of an investigation of an alleged use shall include a description of the investigation process, tracing its various stages, with special reference to:
   
   (a) The locations and time of sampling and on-site analyses; and
   
   (b) Supporting evidence, such as the records of interviews, the results of medical examinations and scientific analyses, and the documents examined by the inspection team.

26. If the inspection team collects through, inter alia, identification of any impurities or other substances during laboratory analysis of samples taken, any information in the course of its investigation that might serve to identify the origin of any chemical weapons used, that information shall be included in the report.

E. STATES NOT PARTY TO THIS CONVENTION

27. In the case of alleged use of chemical weapons involving a State not Party to this Convention or in territory not controlled by a State Party, the Organization shall closely cooperate with the Secretary-General of the United Nations. If so requested, the Organization shall put its resources at the disposal of the Secretary-General of the United Nations.
ANNEX ON THE PROTECTION OF CONFIDENTIAL INFORMATION
("CONFIDENTIALITY ANNEX")

CONTENTS

A. GENERAL PRINCIPLES FOR THE HANDLING OF CONFIDENTIAL INFORMATION ........................................ 168

B. EMPLOYMENT AND CONDUCT OF PERSONNEL IN THE TECHNICAL SECRETARIAT ...................................... 170

C. MEASURES TO PROTECT SENSITIVE INSTALLATIONS AND PREVENT DISCLOSURE OF CONFIDENTIAL DATA IN THE COURSE OF ON-SITE VERIFICATION ACTIVITIES ........................................... 171

D. PROCEDURES IN CASE OF BREACHES OR ALLEGED BREACHES OF CONFIDENTIALITY .................................. 172

A. GENERAL PRINCIPLES FOR THE HANDLING OF CONFIDENTIAL INFORMATION

1. The obligation to protect confidential information shall pertain to the verification of both civil and military activities and facilities. Pursuant to the general obligations set forth in Article VIII, the Organization shall:

(a) Require only the minimum amount of information and data necessary for the timely and efficient carrying out of its responsibilities under this Convention;

(b) Take the necessary measures to ensure that inspectors and other staff members of the Technical Secretariat meet the highest standards of efficiency, competence, and integrity;

(c) Develop agreements and regulations to implement the provisions of this Convention and shall specify as precisely as possible the information to which the Organization shall be given access by a State Party.

2. The Director-General shall have the primary responsibility for ensuring the protection of confidential information. The Director-General shall establish a stringent regime governing the handling of confidential information by the Technical Secretariat, and in doing so, shall observe the following guidelines:

(a) Information shall be considered confidential if:

(i) It is so designated by the State Party from which the information was obtained and to which the information refers; or

(ii) In the judgement of the Director-General, its unauthorized disclosure could reasonably be expected to cause damage to the State Party to which it refers or to the mechanisms for implementation of this Convention;

(b) All data and documents obtained by the Technical Secretariat shall be evaluated by the appropriate unit of the Technical Secretariat in order to establish whether they contain confidential information. Data required by States Parties to be assured of the continued compliance with this Convention by other States Parties shall be routinely provided to them. Such data shall encompass:

(i) The initial and annual reports and declarations provided by States Parties under Articles III, IV, V and VI, in accordance with the provisions set forth in the Verification Annex;

(ii) General reports on the results and effectiveness of verification activities; and

(iii) Information to be supplied to all States Parties in accordance with the provisions of this Convention;
(c) No information obtained by the Organization in connection with the implementation of this Convention shall be published or otherwise released, except, as follows:

(i) General information on the implementation of this Convention may be compiled and released publicly in accordance with the decisions of the Conference or the Executive Council;

(ii) Any information may be released with the express consent of the State Party to which the information refers;

(iii) Information classified as confidential shall be released by the Organization only through procedures which ensure that the release of information only occurs in strict conformity with the needs of this Convention. Such procedures shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i);

(d) The level of sensitivity of confidential data or documents shall be established, based on criteria to be applied uniformly in order to ensure their appropriate handling and protection. For this purpose, a classification system shall be introduced, which by taking account of relevant work undertaken in the preparation of this Convention shall provide for clear criteria ensuring the inclusion of information into appropriate categories of confidentiality and the justified durability of the confidential nature of information. While providing for the necessary flexibility in its implementation the classification system shall protect the rights of States Parties providing confidential information. A classification system shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i);

(e) Confidential information shall be stored securely at the premises of the Organization. Some data or documents may also be stored with the National Authority of a State Party. Sensitive information, including, inter alia, photographs, plans and other documents required only for the inspection of a specific facility may be kept under lock and key at this facility;

(f) To the greatest extent consistent with the effective implementation of the verification provisions of this Convention, information shall be handled and stored by the Technical Secretariat in a form that precludes direct identification of the facility to which it pertains;

(g) The amount of confidential information removed from a facility shall be kept to the minimum necessary for the timely and effective implementation of the verification provisions of this Convention; and

(h) Access to confidential information shall be regulated in accordance with its classification. The dissemination of confidential information within the Organization shall be strictly on a need-to-know basis.

3. The Director-General shall report annually to the Conference on the implementation of the regime governing the handling of confidential information by the Technical Secretariat.

4. Each State Party shall treat information which it receives from the Organization in accordance with the level of confidentiality established for that information. Upon request, a State Party shall provide details on the handling of information provided to it by the Organization.

B. EMPLOYMENT AND CONDUCT OF PERSONNEL IN THE TECHNICAL SECRETARIAT

5. Conditions of staff employment shall be such as to ensure that access to and handling of confidential information shall be in conformity with the procedures established by the Director-General in accordance with Section A.

6. Each position in the Technical Secretariat shall be governed by a formal position description that specifies the scope of access to confidential information, if any, needed in that position.

7. The Director-General, the inspectors and the other members of the staff shall not disclose even after termination of their functions to any unauthorized persons any confidential information coming to their knowledge in the performance of their official duties. They shall not communicate to any State, organization or person outside the Technical Secretariat any information to which they have access in connection with their activities in relation to any State Party.

8. In the discharge of their functions inspectors shall only request the information and data which are necessary to fulfill their mandate. They shall not make any records of information collected incidentally and not related to verification of compliance with this Convention.

9. The staff shall enter into individual secrecy agreements with the Technical Secretariat covering their period of employment and a period of five years after it is terminated.

10. In order to avoid improper disclosures, inspectors and staff members shall be appropriately advised and reminded about security considerations and of the possible penalties that they would incur in the event of improper disclosure.

11. Not less than 30 days before an employee is given clearance for access to confidential information that refers to activities on the territory or in any other place under the jurisdiction or control of a State Party, the State Party concerned shall be notified of the proposed clearance. For inspectors the notification of a proposed designation shall fulfill this requirement.

12. In evaluating the performance of inspectors and any other employees of the Technical Secretariat, specific attention shall be given to the employee's record regarding protection of confidential information.
C. MEASURES TO PROTECT SENSITIVE INSTALLATIONS AND PREVENT DISCLOSURE OF CONFIDENTIAL DATA IN THE COURSE OF ON-SITE VERIFICATION ACTIVITIES

13. States Parties may take such measures as they deem necessary to protect confidentiality, provided that they fulfill their obligations to demonstrate compliance in accordance with the relevant Articles and the Verification Annex. When receiving an inspection, the State Party may indicate to the inspection team the equipment, documentation or areas that it considers sensitive and not related to the purpose of the inspection.

14. Inspection teams shall be guided by the principle of conducting on-site inspections in the least intrusive manner possible consistent with the effective and timely accomplishment of their mission. They shall take into consideration proposals which may be made by the State Party receiving the inspection, at whatever stage of the inspection, to ensure that sensitive equipment or information, not related to chemical weapons, is protected.

15. Inspection teams shall strictly abide by the provisions set forth in the relevant Articles and Annexes governing the conduct of inspections. They shall fully respect the procedures designed to protect sensitive installations and to prevent the disclosure of confidential data.

16. In the elaboration of arrangements and facility agreements, due regard shall be paid to the requirement of protecting confidential information. Agreements on inspection procedures for individual facilities shall also include specific and detailed arrangements with regard to the determination of those areas of the facility to which inspectors are granted access, the storage of confidential information on-site, the scope of the inspection effort in agreed areas, the taking of samples and their analysis, the access to records and the use of instruments and continuous monitoring equipment.

17. The report to be prepared after each inspection shall only contain facts relevant to compliance with this Convention. The report shall be handled in accordance with the regulations established by the Organization governing the handling of confidential information. If necessary, the information contained in the report shall be processed into less sensitive forms before it is transmitted outside the Technical Secretariat and the inspected State Party.

D. PROCEDURES IN CASE OF BREACHES OR ALLEGED BREACHES OF CONFIDENTIALITY

18. The Director-General shall establish necessary procedures to be followed in case of breaches or alleged breaches of confidentiality, taking into account recommendations to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (a).

19. The Director-General shall oversee the implementation of individual secrecy agreements. The Director-General shall promptly initiate an investigation if, in his judgement, there is sufficient indication that obligations concerning the protection of confidential information have been violated. The Director-General shall also promptly initiate an investigation if an allegation concerning a breach of confidentiality is made by a State Party.

20. The Director-General shall impose appropriate punitive and disciplinary measures on staff members who have violated their obligations to protect confidential information. In cases of serious breaches, the immunity from jurisdiction may be waived by the Director-General.

21. States Parties shall, to the extent possible, cooperate and support the Director-General in investigating any breach or alleged breach of confidentiality and in taking appropriate action in case a breach has been established.

22. The Organization shall not be held liable for any breach of confidentiality committed by members of the Technical Secretariat.

23. For breaches involving both a State Party and the Organization, a "Commission for the settlement of disputes related to confidentiality", set up as a subsidiary organ of the Conference, shall consider the case. This Commission shall be appointed by the Conference. Rules governing its composition and operating procedures shall be adopted by the Conference at its first session.
Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997
Treaty Series

Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations

VOLUME 2056

Recueil des Traités

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

No. 35597

Multilateral

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. Oslo, 18 September 1997

Entry into force: 1 March 1999, in accordance with article 17 (1) (see following page)

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

Registration with the Secretariat of the United Nations: ex officio, 1 March 1999

Multilatéral

Convention sur l'interdiction de l'emploi, du stockage, de la production et du transfert des mines antipersonnel et sur leur destruction. Oslo, 18 septembre 1997

Entrée en vigueur: 1er mars 1999, conformément au paragraphe 1 de l'article 17 (voir la page suivante)

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

Enregistrement auprès du Secrétariat des Nations Unies: d'office, 1er mars 1999

United Nations • Nations Unies
New York, 2002
Article 2. Definitions

These terms are defined as follows:

1. "Personnel mines" are those directed against a military or (in the case of the sea) naval target.

Article 3. General Obligations

States Parties agree to:

1. Reducing and then destroying all personnel mines, in accordance with the convention, in order to reduce the number of personnel mines and to facilitate the implementation of the provisions of the convention.

Article 4. Additional provisions

Additional provisions are made in order to facilitate the implementation of the convention.

Additional provisions are made in order to facilitate the implementation of the convention.

The States Parties:
Article 3. Exceptions

1. Notwithstanding the general obligations under Article 1, the retention or transfer of a number of anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques is permitted. The amount of such mines shall not exceed the minimum number absolutely necessary for the above-mentioned purposes.

2. The transfer of anti-personnel mines for the purpose of destruction is permitted.

Article 4. Destruction of Stockpiled Anti-Personnel Mines

Except as provided for in Article 3, each State Party undertakes to destroy or ensure the destruction of all stockpiled anti-personnel mines it owns or possesses, or that are under its jurisdiction or control, as soon as possible but not later than four years after the entry into force of this Convention for that State Party.

Article 5. Destruction of Anti-Personnel Mines in Mined Areas

1. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party.

2. Each State Party shall make every effort to identify all areas under its jurisdiction or control in which anti-personnel mines are known or suspected to be emplaced and shall ensure as soon as possible that all anti-personnel mines in mined areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means, to ensure the effective exclusion of civilians, until all anti-personnel mines contained therein have been destroyed. The marking shall at least be to the standards set out in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.

3. If a State Party believes that it will be unable to destroy or ensure the destruction of all anti-personnel mines referred to in paragraph 1 within that time period, it may submit a request to a Meeting of the States Parties or a Review Conference for an extension of the deadline for completing the destruction of such anti-personnel mines, for a period of up to ten years.

4. Each request shall contain:
   (a) The duration of the proposed extension;
   (b) A detailed explanation of the reasons for the proposed extension, including:
      (i) The preparation and status of work conducted under national demining programs;
      (ii) The financial and technical means available to the State Party for the destruction of all the anti-personnel mines; and
      (iii) Circumstances which impede the ability of the State Party to destroy all the anti-personnel mines in mined areas;
   (c) The humanitarian, social, economic, and environmental implications of the extension; and
   (d) Any other information relevant to the request for the proposed extension.

5. The Meeting of the States Parties or the Review Conference shall, taking into consideration the factors contained in paragraph 4, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension period.

6. Such an extension may be renewed upon the submission of a new request in accordance with paragraphs 3, 4 and 5 of this Article. In requesting a further extension period a State Party shall submit relevant additional information on what has been undertaken in the previous extension period pursuant to this Article.

Article 6. International Cooperation and Assistance

1. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance, where feasible, from other States Parties to the extent possible.

2. Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment, material and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on the provision of mine clearance equipment and related technological information for humanitarian purposes.

3. Each State Party in a position to do so shall provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims and for mine awareness programmes. Such assistance may be provided, inter alia, through the United Nations system, international, regional or national organizations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent societies and their International Federation, non-governmental organizations, or on a bilateral basis.

4. Each State Party in a position to do so shall provide assistance for mine clearance and related activities. Such assistance may be provided, inter alia, through the United Nations system, international or regional organizations or institutions, non-governmental organizations or institutions, or on a bilateral basis, or by contributing to the United Nations Voluntary Trust Fund for Assistance in Mine Clearance, or other regional funds that deal with demining.

5. Each State Party in a position to do so shall provide assistance for the destruction of stockpiled anti-personnel mines.

6. Each State Party undertakes to provide information to the database on mine clearance established within the United Nations system, especially information concerning various means and technologies of mine clearance, and lists of experts, expert agencies or national points of contact on mine clearance.
7. States Parties may request the United Nations, regional organizations, other States Parties or other competent intergovernmental or non-governmental fora to assist its authorities in the elaboration of a national demining program to determine, inter alia:
(a) The extent and scope of the anti-personnel mine problem;
(b) The financial, technological and human resources that are required for the implementation of the programme;
(c) The estimated number of years necessary to destroy all anti-personnel mines in mined areas under the jurisdiction or control of the concerned State Party;
(d) Mine awareness activities to reduce the incidence of mine-related injuries or deaths;
(e) Assistance to mine victims;
(f) The relationship between the Government of the concerned State Party and the relevant governmental, intergovernmental or non-governmental entities that will work in the implementation of the program.
8. Each State Party giving and receiving assistance under the provisions of this Article shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programs.

Article 7. Transparency Measures

1. Each State Party shall report to the Secretary-General of the United Nations as soon as practicable, and in any event not later than 180 days after the entry into force of this Convention for that State Party on:
(a) The national implementation measures referred to in Article 9;
(b) The total of all stockpiled anti-personnel mines owned or possessed by it, or under its jurisdiction or control, to include a breakdown of the type, quantity and, if possible, lot numbers of each type of anti-personnel mine stockpiled;
(c) To the extent possible, the location of all mined areas that contain, or are suspected to contain, anti-personnel mines under its jurisdiction or control, to include as much detail as possible regarding the type and quantity of each type of anti-personnel mine in each mined area and when they were emplaced;
(d) The types, quantities and, if possible, lot numbers of all anti-personnel mines retained or transferred for the development of and training in mine detection, mine clearance or mine destruction techniques, or transferred for the purpose of destruction, as well as the institutions authorized by a State Party to retain or transfer anti-personnel mines, in accordance with Article 3;
(e) The status of programmes for the conversion or de-commissioning of anti-personnel mine production facilities;
(f) The status of programmes for the destruction of anti-personnel mines in accordance with Articles 4 and 5, including details of the methods which will be used in destruction, the location of all destruction sites and the applicable safety and environmental standards to be observed;

(g) The types and quantities of all anti-personnel mines destroyed after the entry into force of this Convention for that State Party, to include a breakdown of the quantity of each type of anti-personnel mine destroyed, in accordance with Articles 4 and 5, respectively, along with, if possible, the lot numbers of each type of anti-personnel mine in the case of destruction in accordance with Article 4;
(h) The technical characteristics of each type of anti-personnel mine produced, to the extent known, and those currently owned or possessed by a State Party, giving, where reasonably possible, such categories of information as may facilitate identification and clearance of anti-personnel mines; at a minimum, this information shall include the dimensions, fusing, explosive content, metallic content, colour photographs and other information which may facilitate mine clearance; and
(i) The measures taken to provide an immediate and effective warning to the population in relation to all areas identified under paragraph 2 of Article 5.
2. The information provided in accordance with this Article shall be updated by the States Parties annually, covering the last calendar year, and reported to the Secretary-General of the United Nations not later than 30 April of each year.
3. The Secretary-General of the United Nations shall transmit all such reports received to the States Parties.

Article 8. Facilitation and Clarification of Compliance

1. The States Parties agree to consult and cooperate with each other regarding the implementation of the provisions of this Convention, and to work together in a spirit of cooperation to facilitate compliance by States Parties with their obligations under this Convention.
2. If one or more States Parties wish to clarify and seek to resolve questions relating to compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations, a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded Requests for Clarification, care being taken to avoid abuse. A State Party that receives a Request for Clarification shall provide, through the Secretary-General of the United Nations, within 28 days to the requesting State Party all information which would assist in clarifying this matter.
3. If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of the States Parties. The Secretary-General of the United Nations shall transmit the submission, accompanied by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond.
4. Pending the convening of any meeting of the States Parties, any of the States Parties concerned may request the Secretary-General of the United Nations to exercise his or her good offices to facilitate the clarification requested.
5. The requesting State Party may propose through the Secretary-General of the United Nations the convening of a Special Meeting of the States Parties to consider the matter. The Secretary-General of the United Nations shall then upon communicate this proposal and all information submitted by the States Parties concerned, to all States Parties with a request that they indicate whether they favour a Special Meeting of the States Parties, for the purpose of considering the matter. In the event that within 14 days from the date of such communication, at least one-third of the States Parties favours such a Special Meeting, the Secretary-General of the United Nations shall convene this Special Meeting of the States Parties within a further 14 days. A quorum for this Meeting shall consist of a majority of States Parties.

6. The Meeting of the States Parties or the Special Meeting of the States Parties, as the case may be, shall first determine whether to consider the matter further, taking into account all information submitted by the States Parties concerned. The Meeting of the States Parties or the Special Meeting of the States Parties shall make every effort to reach a decision by consensus. If despite all efforts to that end no agreement has been reached, it shall take this decision by a majority of States Parties present and voting.

7. All States Parties shall cooperate fully with the Meeting of the States Parties or the Special Meeting of the States Parties in the fulfillment of its review of the matter, including any fact-finding missions that are authorized in accordance with paragraph 8.

8. If further clarification is required, the Meeting of the States Parties or the Special Meeting of the States Parties shall authorize a fact-finding mission and decide on its mandate by a majority of States Parties present and voting. At any time the requested State Party may invite a fact-finding mission to its territory. Such a mission shall take place without a decision by a Meeting of the States Parties or a Special Meeting of the States Parties to authorize such a mission. The mission, consisting of up to 9 experts, designated and approved in accordance with paragraphs 9 and 10, may collect additional information on the spot or in other places directly related to the alleged compliance issue under the jurisdiction or control of the requested State Party.

9. The Secretary-General of the United Nations shall prepare and update a list of the names, nationalities and other relevant data of qualified experts provided by States Parties and communicate it to all States Parties. Any expert included on this list shall be regarded as designated for all fact-finding missions unless a State Party declares its non-acceptance in writing. In the event of non-acceptance, the expert shall not participate in fact-finding missions on the territory or any other place under the jurisdiction or control of the objecting State Party, if the non-acceptance was declared prior to the appointment of the expert to such missions.

10. Upon receiving a request from the Meeting of the States Parties or a Special Meeting of the States Parties, the Secretary-General of the United Nations shall, after consultations with the requested State Party, appoint the members of the mission, including its leader. Nationals of States Parties requesting the fact-finding mission or directly affected by it shall not be appointed to the mission. The members of the fact-finding mission shall enjoy privileges and immunities under Article VI of the Convention on the Privileges and Immunities of the United Nations, adopted on 13 February 1946.

11. Upon at least 72 hours notice, the members of the fact-finding mission shall arrive in the territory of the requested State Party at the earliest opportunity. The requested State Party shall take the necessary administrative measures to receive, transport and accommodate the mission, and shall be responsible for ensuring the security of the mission to the maximum extent possible while they are on territory under its control.

12. Without prejudice to the sovereignty of the requested State Party, the fact-finding mission may bring into the territory of the requested State Party the necessary equipment which shall be used exclusively for gathering information on the alleged compliance issue. Prior to its arrival, the mission will advise the requested State Party of the equipment that it intends to utilize in the course of its fact-finding mission.

13. The requested State Party shall make all efforts to ensure that the fact-finding mission is given the opportunity to speak with all relevant persons who may be able to provide information related to the alleged compliance issue.

14. The requested State Party shall grant access for the fact-finding mission to all areas and installations under its control where facts relevant to the compliance issue could be expected to be collected. This shall be subject to any arrangements that the requested State Party considers necessary for:

(a) The protection of sensitive equipment, information and areas;
(b) The protection of any constitutional obligations the requested State Party may have with regard to proprietary rights, searches and seizures, or other constitutional rights; or
(c) The physical protection and safety of the members of the fact-finding mission.

15. In the event that the requested State Party makes such arrangements, it shall make every reasonable effort to demonstrate through alternative means its compliance with this Convention.

16. The fact-finding mission may remain in the territory of the State Party concerned for no more than 14 days, and at any particular site no more than 7 days, unless otherwise agreed.

17. All information provided in confidence and not related to the subject matter of the fact-finding mission shall be treated on a confidential basis.

18. The fact-finding mission shall report, through the Secretary-General of the United Nations, to the Meeting of the States Parties or the Special Meeting of the States Parties the results of its findings.

19. The Meeting of the States Parties or the Special Meeting of the States Parties may consider all relevant information, including the report submitted by the fact-finding mission, and may request the requested State Party to take measures to address the compliance issue within a specified period of time. The requested State Party shall report on all measures taken in response to this request.

20. The Meeting of the States Parties or the Special Meeting of the States Parties may suggest to the States Parties concerned ways and means to further clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law. In circumstances where the issue at hand is determined to be due to circumstances beyond the control of the requested State Party, the Meeting of the States Parties shall consider the matter.
Parties or the Special Meeting of the States Parties may recommend appropriate measures, including the use of cooperative measures referred to in Article 6.

20. The Meeting of the States Parties or the Special Meeting of the States Parties shall make every effort to reach its decisions referred to in paragraphs 18 and 19 by consensus, otherwise by a two-thirds majority of States Parties present and voting.

Article 9. National Implementation Measures

Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.

Article 10. Settlement of Disputes

1. The States Parties shall consult and cooperate with each other to settle any dispute that may arise with regard to the application or the interpretation of this Convention. Each State Party may bring any such dispute before the Meeting of the States Parties.

2. The Meeting of the States Parties may contribute to the settlement of the dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties to a dispute to start the settlement procedure of their choice and recommending a time-limit for any agreed procedure.

3. This Article is without prejudice to the provisions of this Convention on facilitation and clarification of compliance.

Article 11. Meetings of the States Parties

1. The States Parties shall meet regularly in order to consider any matter with regard to the application or implementation of this Convention, including:

   (a) The operation and status of this Convention;
   (b) Matters arising from the reports submitted under the provisions of this Convention;
   (c) International cooperation and assistance in accordance with Article 6;
   (d) The development of technologies to clear anti-personnel mines;
   (e) Submissions of States Parties under Article 8; and
   (f) Decisions relating to submissions of States Parties as provided for in Article 5.

2. The First Meeting of the States Parties shall be convened by the Secretary-General of the United Nations within one year after the entry into force of this Convention. The subsequent meetings shall be convened by the Secretary-General of the United Nations annually until the first Review Conference.

3. Under the conditions set out in Article 8, the Secretary-General of the United Nations shall convene a Special Meeting of the States Parties.

4. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend these meetings as observers in accordance with the agreed Rules of Procedure.

Article 12. Review Conferences

1. A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary-General of the United Nations if so requested by one or more States Parties, provided that the interval between Review Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference.

2. The purpose of the Review Conference shall be:

   (a) To review the operation and status of this Convention;
   (b) To consider the need for and the interval between further Meetings of the States Parties referred to in paragraph 2 of Article 11;
   (c) To take decisions on submissions of States Parties as provided for in Article 5; and
   (d) To adopt, if necessary, in its final report conclusions related to the implementation of this Convention.

3. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Review Conference as observers in accordance with the agreed Rules of Procedure.

Article 13. Amendments

1. At any time after the entry into force of this Convention any State Party may propose amendments to this Convention. Any proposal for an amendment shall be communicated to the Depositary, who shall circulate it to all States Parties and shall seek their views on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notify the Depositary no later than 30 days after its circulation that they support further consideration of the proposal, the Depositary shall convene an Amendment Conference to which all States Parties shall be invited.

2. States not parties to this Convention, as well as the United Nations, other relevant international organizations or institutions, the International Committee of the Red Cross and relevant non-governmental organizations may be invited to attend each Amendment Conference as observers in accordance with the agreed Rules of Procedure.

3. The Amendment Conference shall be held immediately following a Meeting of the States Parties or a Review Conference unless a majority of the States Parties request that it be held earlier.
4. Any amendment to this Convention shall be adopted by a majority of two-thirds of the States Parties present and voting at the Amendment Conference. The Depositary shall communicate any amendment so adopted to the States Parties.

5. An amendment to this Convention shall enter into force for all States Parties to this Convention which have accepted it, upon the deposit with the Depositary of instruments of acceptance by a majority of States Parties. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

Article 14. Costs

1. The costs of the Meetings of the States Parties, the Special Meetings of the States Parties, the Review Conferences and the Amendment Conferences shall be borne by the States Parties and States not parties to this Convention participating therein, in accordance with the United Nations scale of assessment adjusted appropriately.

2. The costs incurred by the Secretary-General of the United Nations under Articles 7 and 8 and the costs of any fact-finding mission shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted appropriately.

Article 15. Signature

This Convention, done at Oslo, Norway, on 18 September 1997, shall be open for signature at Ottawa, Canada, by all States from 3 December 1997 until 4 December 1997, and at the United Nations Headquarters in New York from 5 December 1997 until its entry into force.

Article 16. Ratification, Acceptance, Approval or Accession

1. This Convention is subject to ratification, acceptance or approval of the Signatories.

2. It shall be open for accession by any State which has not signed the Convention.

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

Article 17. Entry into Force

1. This Convention shall enter into force on the first day of the sixth month after the month in which the 40th instrument of ratification, acceptance, approval or accession has been deposited.

2. For any State which deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the 40th instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the sixth month after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

Article 18. Provisional Application

Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally paragraph 1 of Article 1 of this Convention pending its entry into force.

Article 19. Reservations

The Articles of this Convention shall not be subject to reservations.

Article 20. Duration and Withdrawal

1. This Convention shall be of unlimited duration.

2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating this withdrawal.

3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.

4. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law.

Article 21. Depositary

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention.

Article 22. Authentic Texts

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
Convention on Cluster Munitions, 2008
Mindful of the need to coordinate adequately efforts undertaken in various fora to address the rights and needs of victims of various types of weapons, and resolved to avoid discrimination among victims of various types of weapons,

Reaffirming that in cases not covered by this Convention or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law, derived from established custom, from the principles of humanity and from the dictates of public conscience,

Resolved also that armed groups distinct from the armed forces of a State shall not, under any circumstances, be permitted to engage in any activity prohibited to a State Party to this Convention,

Welcoming the very broad international support for the international norm prohibiting anti-personnel mines, enshrined in the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction,

Welcoming also the adoption of the Protocol on Explosive Remnants of War, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, and its entry into force on 12 November 2006, and wishing to enhance the protection of civilians from the effects of cluster munition remnants in post-conflict environments,


Welcoming further the steps taken nationally, regionally and globally in recent years aimed at prohibiting, restricting or suspending the use, stockpiling, production and transfer of cluster munitions,

Stressing the role of public conscience in furthering the principles of humanity as evidenced by the global call for an end to civilian suffering caused by cluster munitions and recognising the efforts to that end undertaken by the United Nations, the International Committee of the Red Cross, the Cluster Munition Coalition and numerous other non-governmental organisations around the world,

Reaffirming the Declaration of the Oslo Conference on Cluster Munitions, by which, inter alia, States recognised the grave consequences caused by the use of cluster munitions and committed themselves to conclude by 2008 a legally binding instrument that would prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians, and would establish a framework for cooperation and assistance that ensures adequate provision of care and rehabilitation for victims, clearance of contaminated areas, risk reduction education and destruction of stockpiles,
Emphasising the desirability of attracting the adherence of all States to this Convention, and determined to work strenuously towards the promotion of its universalisation and its full implementation,

Basing themselves on the principles and rules of international humanitarian law, in particular the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, and the rules that the parties to a conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations against military objectives only, that in the conduct of military operations constant care shall be taken to spare the civilian population, civilians and civilian objects and that the civilian population and individual civilians enjoy general protection against dangers arising from military operations,

HAVE AGREED as follows:

Article 1
General obligations and scope of application

1. Each State Party undertakes never under any circumstances to:
   (a) Use cluster munitions;
   (b) Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions;
   (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.

2. Paragraph 1 of this Article applies, mutatis mutandis, to explosive bomblets that are specifically designed to be dispersed or released from dispensers affixed to aircraft.

3. This Convention does not apply to mines.

Article 2
Definitions

For the purposes of this Convention:

1. “Cluster munition victims” means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities;

2. “Cluster munition” means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. It does not mean the following:
   (a) A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;
   (b) A munition or submunition designed to produce electrical or electronic effects;
   (c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
      (i) Each munition contains fewer than ten explosive submunitions;
      (ii) Each explosive submunition weighs more than four kilograms;
      (iii) Each explosive submunition is designed to detect and engage a single target object;
      (iv) Each explosive submunition is equipped with an electronic self-destruction mechanism;
      (v) Each explosive submunition is equipped with an electronic self-deactivating feature;

3. “Explosive submunition” means a conventional munition that in order to perform its task is dispersed or released by a cluster munition and is designed to function by detonating an explosive charge prior to, or after impact;

4. “Failed cluster munition” means a cluster munition that has been fired, dropped, launched, projected or otherwise delivered and which should have dispersed or released its explosive submunitions but failed to do so;

5. “Unexploded submunition” means an explosive submunition that has been dispersed or released by, or otherwise separated from, a cluster munition and has failed to explode as intended;

6. “Abandoned cluster munitions” means cluster munitions or explosive submunitions that have not been used and that have been left behind or dumped, and that are no longer under the control of the party that left them behind or dumped them. They may or may not have been prepared for use;

7. “Cluster munition remnants” means failed cluster munitions, abandoned cluster munitions, unexploded submunitions and unexploded bomblets;

8. “Transfer” involves, in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions, but does not involve the transfer of territory containing cluster munition remnants;

9. “Self-destruction mechanism” means an incorporated automatically-functioning mechanism which is in addition to the primary initiating mechanism of the munition and which secures the destruction of the munition into which it is incorporated;

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

11. “Cluster munition contaminated area” means an area known or suspected to contain cluster munition remnants;
12. “Mine” means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle;

13. “Explosive bomblet” means a conventional munition, weighing less than 20 kilograms, which is not self-propelled and which, in order to perform its task, is dispersed or released by a dispenser, and is designed to function by detonating an explosive charge prior to, on or after impact;

14. “Dispenser” means a container that is designed to disperse or release explosive bomblets and which is affixed to an aircraft at the time of dispersal or release;

15. “Unexploded bomblet” means an explosive bomblet that has been dispersed, released or otherwise separated from a dispenser and has failed to explode as intended.

Article 3
Storage and stockpile destruction

1. Each State Party shall, in accordance with national regulations, separate all cluster munitions under its jurisdiction and control from munitions retained for operational use and mark them for the purpose of destruction.

2. Each State Party undertakes to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 of this Article as soon as possible but not later than eight years after the entry into force of this Convention for that State Party. Each State Party undertakes to ensure that destruction methods comply with applicable international standards for protecting public health and the environment.

3. If a State Party believes that it will be unable to destroy or ensure the destruction of all cluster munitions referred to in paragraph 1 of this Article within eight years of entry into force of this Convention for that State Party it may submit a request to a Meeting of States Parties or a Review Conference for an extension of the deadline for completing the destruction of such cluster munitions by a period of up to four years. A State Party may, in exceptional circumstances, request additional extensions of up to four years. The requested extensions shall not exceed the number of years strictly necessary for that State Party to complete its obligations under paragraph 2 of this Article.

4. Each request for an extension shall set out:
   (a) The duration of the proposed extension;
   (b) A detailed explanation of the proposed extension, including the financial and technical means available to or required by the State Party for the destruction of all cluster munitions referred to in paragraph 1 of this Article and, where applicable, the exceptional circumstances justifying it;
   (c) A plan for how and when stockpile destruction will be completed;
   (d) The quantity and type of cluster munitions and explosive submunitions held at the entry into force of this Convention for that State Party and any additional cluster munitions or explosive submunitions discovered after such entry into force;
   (e) The quantity and type of cluster munitions and explosive submunitions destroyed during the period referred to in paragraph 2 of this Article; and
   (f) The quantity and type of cluster munitions and explosive submunitions remaining to be destroyed during the proposed extension and the annual destruction rate expected to be achieved.

5. The Meeting of States Parties or the Review Conference shall, taking into consideration the factors referred to in paragraph 4 of this Article, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension. The States Parties may decide to grant a shorter extension than that requested and may propose benchmarks for the extension, as appropriate. A request for an extension shall be submitted a minimum of nine months prior to the Meeting of States Parties or the Review Conference at which it is to be considered.

6. Notwithstanding the provisions of Article 1 of this Convention, the retention or acquisition of a limited number of cluster munitions and explosive submunitions for the development of and training in cluster munition and explosive submunition detection, clearance or destruction techniques, or for the development of cluster munition counter-measures, is permitted. The amount of explosive submunitions retained or acquired shall not exceed the minimum number absolutely necessary for these purposes.

7. Notwithstanding the provisions of Article 1 of this Convention, the transfer of cluster munitions to another State Party for the purpose of destruction, as well as for the purposes described in paragraph 6 of this Article, is permitted.

8. States Parties retaining, acquiring or transferring cluster munitions or explosive submunitions for the purposes described in paragraphs 6 and 7 of this Article shall submit a detailed report on the planned and actual use of these cluster munitions and explosive submunitions and their type, quantity and lot numbers. If cluster munitions or explosive submunitions are transferred to another State Party for these purposes, the report shall include reference to the receiving party. Such a report shall be prepared for each year during which a State Party retained, acquired or transferred cluster munitions or explosive submunitions and shall be submitted to the Secretary-General of the United Nations no later than 30 April of the following year.

Article 4
Clearance and destruction of cluster munition remnants and risk reduction education

1. Each State Party undertakes to clear and destroy, or ensure the clearance and destruction of, cluster munition remnants located in cluster munition contaminated areas under its jurisdiction or control, as follows:
   (a) Where cluster munition remnants are located in areas under its jurisdiction or control at the date of entry into force of this Convention...
for that State Party, such clearance and destruction shall be completed as soon as possible but not later than ten years from that date;

(b) Where, after entry into force of this Convention for that State Party, cluster munitions have become cluster munition remnants located in areas under its jurisdiction or control, such clearance and destruction must be completed as soon as possible but not later than ten years after the end of the active hostilities during which such cluster munitions became cluster munition remnants; and

(c) Upon fulfilling either of its obligations set out in sub-paragraphs (a) and (b) of this paragraph, that State Party shall make a declaration of compliance to the next Meeting of States Parties.

2. In fulfilling its obligations under paragraph 1 of this Article, each State Party shall take the following measures as soon as possible, taking into consideration the provisions of Article 6 of this Convention regarding international cooperation and assistance:

(a) Survey, assess and record the threat posed by cluster munition remnants, making every effort to identify all cluster munition contaminated areas under its jurisdiction or control;

(b) Assess and prioritise needs in terms of marking, protection of civilians, clearance and destruction, and take steps to mobilise resources and develop a national plan to carry out these activities, building, where appropriate, upon existing structures, experiences and methodologies;

(c) Take all feasible steps to ensure that all cluster munition contaminated areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means to ensure the effective exclusion of civilians. Warning signs based on methods of marking readily recognisable by the affected community should be utilised in the marking of suspected hazardous areas. Signs and other hazardous area boundary markers should, as far as possible, be visible, legible, durable and resistant to environmental effects and should clearly identify which side of the marked boundary is considered to be within the cluster munition contaminated areas and which side is considered to be safe;

(d) Clear and destroy all cluster munition remnants located in areas under its jurisdiction or control; and

(e) Conduct risk reduction education to ensure awareness among civilians living in or around cluster munition contaminated areas of the risks posed by such remnants.

3. In conducting the activities referred to in paragraph 2 of this Article, each State Party shall take into account international standards, including the International Mine Action Standards (IMAS).

4. This paragraph shall apply in cases in which cluster munitions have been used or abandoned by one State Party prior to entry into force of this Convention for that State Party and have become cluster munition remnants that are located in areas under the jurisdiction or control of another State Party at the time of entry into force of this Convention for the latter.

5. If a State Party believes that it will be unable to clear and destroy or ensure the clearance and destruction of all cluster munition remnants referred to in paragraph 1 of this Article within ten years of the entry into force of this Convention for that State Party, it may submit a request to a Meeting of States Parties or a Review Conference for an extension of the deadline for completing the clearance and destruction of such cluster munition remnants by a period of up to five years. The requested extension shall not exceed the number of years strictly necessary for that State Party to complete its obligations under paragraph 1 of this Article.

6. A request for an extension shall be submitted to a Meeting of States Parties or a Review Conference prior to the expiry of the time period referred to in paragraph 1 of this Article for that State Party. Each request shall be submitted a minimum of nine months prior to the Meeting of States Parties or Review Conference at which it is to be considered. Each request shall set out:

(a) The duration of the proposed extension;

(b) A detailed explanation of the reasons for the proposed extension, including the financial and technical means available to and required by the State Party for the clearance and destruction of all cluster munition remnants during the proposed extension;

(c) The preparation of future work and the status of work already conducted under national clearance and demining programmes during the initial ten year period referred to in paragraph 1 of this Article and any subsequent extensions;

(d) The total area containing cluster munition remnants at the time of entry into force of this Convention for that State Party and any additional areas containing cluster munition remnants discovered after such entry into force;

(e) The total area containing cluster munition remnants cleared since entry into force of this Convention;

(f) The total area containing cluster munition remnants remaining to be cleared during the proposed extension;

(g) The circumstances that have impeded the ability of the State Party to destroy all cluster munition remnants located in areas under its jurisdiction or control during the initial ten year period referred to in paragraph 1 of this Article, and those that may impede this ability during the proposed extension;

(h) The humanitarian, social, economic and environmental implications of the proposed extension; and
Article 6

International cooperation and assistance

1. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance.

2. Each State Party in a position to do so shall provide technical, material and financial assistance to States Parties affected by cluster munitions, aimed at the implementation of the obligations of this Convention. Such assistance may be provided, inter alia, through the United Nations system, international, regional or national organisations or institutions, non-governmental organisations or institutions, or on a bilateral basis.

3. Each State Party undertakes to facilitate and shall have the right to participate in the fullest possible exchange of equipment and scientific and technological information concerning the implementation of this Convention. The States Parties shall not impose undue restrictions on the provision and receipt of clearance and other equipment and related technological information for humanitarian purposes.

4. In addition to any obligations it may have pursuant to paragraph 4 of Article 4 of this Convention, each State Party in a position to do so shall provide assistance for the clearance and destruction of cluster munition remnants and information concerning various means and technologies related to clearance of cluster munitions, as well as lists of experts, expert agencies or national points of contact on clearance and destruction of cluster munition remnants and related activities.

5. Each State Party in a position to do so shall provide assistance for the destruction of stockpiled cluster munitions, and shall also provide assistance to identify, assess and prioritise needs and practical measures in terms of marking, risk reduction education, protection of civilians and clearance and destruction as provided in Article 4 of this Convention.

6. Where, after entry into force of this Convention, cluster munitions have become cluster munition remnants located in areas under the jurisdiction or control of a State Party, each State Party in a position to do so shall urgently provide emergency assistance to the affected State Party.

7. Each State Party in a position to do so shall provide assistance for the implementation of the obligations referred to in Article 5 of this Convention to adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for social and economic inclusion of cluster munition victims. Such assistance may be provided, inter alia, through the United Nations system, international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent Societies and their International Federation, non-governmental organisations or on a bilateral basis.

8. Each State Party in a position to do so shall provide assistance to contribute to the economic and social recovery needed as a result of cluster munition use in affected States Parties.

(i) Any other information relevant to the request for the proposed extension.

7. The Meeting of States Parties or the Review Conference shall, taking into consideration the factors referred to in paragraph 6 of this Article, including, inter alia, the quantities of cluster munition remnants reported, assess the request and decide by a majority of votes of States Parties present and voting whether to grant the request for an extension. The States Parties may decide to grant a shorter extension than that requested and may propose benchmarks for the extension, as appropriate.

8. Such an extension may be renewed by a period of up to five years upon the submission of a new request, in accordance with paragraphs 5, 6 and 7 of this Article. In requesting a further extension a State Party shall submit relevant additional information on what has been undertaken during the previous extension granted pursuant to this Article.

Article 5

Victim assistance

1. Each State Party with respect to cluster munition victims in areas under its jurisdiction or control shall, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion. Each State Party shall make every effort to collect reliable relevant data with respect to cluster munition victims.

2. In fulfilling its obligations under paragraph 1 of this Article each State Party shall:

(a) Assess the needs of cluster munition victims;
(b) Develop, implement and enforce any necessary national laws and policies;
(c) Develop a national plan and budget, including timeframes to carry out these activities, with a view to incorporating them within the existing national disability, development and human rights frameworks and mechanisms, while respecting the specific role and contribution of relevant actors;
(d) Take steps to mobilise national and international resources;
(e) Not discriminate against or among cluster munition victims, or between cluster munition victims and those who have suffered injuries or disabilities from other causes; differences in treatment should be based only on medical, rehabilitative, psychological or socio-economic needs;
(f) Closely consult with and actively involve cluster munition victims and their representative organisations;
(g) Designate a focal point within the government for coordination of matters relating to the implementation of this Article; and
(h) Strive to incorporate relevant guidelines and good practices including in the areas of medical care, rehabilitation and psychological support, as well as social and economic inclusion.
The status and progress of programmes for the clearance of cluster munition remnants shall be in accordance with Article 5 of this Convention.

12. States Parties giving and receiving assistance under the provisions of this Article shall cooperate with a view to ensuring the full and prompt implementation of agreed assistance programmes.

Article 7

Transparency measures

1. Each State Party shall report to the Secretary-General of the United Nations as soon as possible and, in any event not later than 180 days after the entry into force of this Convention for it:

(a) The national implementation measures referred to in Article 9 of this Convention.
(b) The total of all cluster munitions, including explosive submunitions, discovered after the entry into force of this Convention.
(c) The name and contact details of the institutions mandated to provide information and to carry out the measures described in this paragraph.
(d) The amounts, types and destinations of international cooperation and assistance provided under Article 6 of this Convention.
3. The Secretary-General of the United Nations shall transmit all such reports received to the States Parties.

Article 8
Facilitation and clarification of compliance

1. The States Parties agree to consult and cooperate with each other regarding the implementation of the provisions of this Convention and to work together in a spirit of cooperation to facilitate compliance by States Parties with their obligations under this Convention.

2. If one or more States Parties wish to clarify and seek to resolve questions relating to a matter of compliance with the provisions of this Convention by another State Party, it may submit, through the Secretary-General of the United Nations, a Request for Clarification of that matter to that State Party. Such a request shall be accompanied by all appropriate information. Each State Party shall refrain from unfounded Requests for Clarification, care being taken to avoid abuse. A State Party that receives a Request for Clarification shall provide, through the Secretary-General of the United Nations, within 28 days to the requesting State Party all information that would assist in clarifying the matter.

3. If the requesting State Party does not receive a response through the Secretary-General of the United Nations within that time period, or deems the response to the Request for Clarification to be unsatisfactory, it may submit the matter through the Secretary-General of the United Nations to the next Meeting of States Parties. The Secretary-General of the United Nations shall transmit the submission, accompanied by all appropriate information pertaining to the Request for Clarification, to all States Parties. All such information shall be presented to the requested State Party which shall have the right to respond.

4. Pending the convening of any Meeting of States Parties, any of the States Parties concerned may request the Secretary-General of the United Nations to exercise his or her good offices to facilitate the clarification requested.

5. Where a matter has been submitted to it pursuant to paragraph 3 of this Article, the Meeting of States Parties shall first determine whether to consider that matter further, taking into account all information submitted by the States Parties concerned. If it does so determine, the Meeting of States Parties may suggest to the States Parties concerned ways and means further to clarify or resolve the matter under consideration, including the initiation of appropriate procedures in conformity with international law. In circumstances where the issue at hand is determined to be due to circumstances beyond the control of the requested State Party, the Meeting of States Parties may recommend appropriate measures, including the use of cooperative measures referred to in Article 6 of this Convention.

6. In addition to the procedures provided for in paragraphs 2 to 5 of this Article, the Meeting of States Parties may decide to adopt such other general procedures or specific mechanisms for clarification of compliance, including facts, and resolution of instances of non-compliance with the provisions of this Convention as it deems appropriate.

Article 9
National implementation measures

Each State Party shall take all appropriate legal, administrative and other measures to implement this Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.

Article 10
Settlement of disputes

1. When a dispute arises between two or more States Parties relating to the interpretation or application of this Convention, the States Parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of their choice, including recourse to the Meeting of States Parties and referral to the International Court of Justice in conformity with the Statute of the Court.

2. The Meeting of States Parties may contribute to the settlement of the dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties concerned to start the settlement procedure of their choice and recommending a time-limit for any agreed procedure.

Article 11
Meetings of States Parties

1. The States Parties shall meet regularly in order to consider and, where necessary, take decisions in respect of any matter with regard to the application or implementation of this Convention, including:

(a) The operation and status of this Convention;
(b) Matters arising from the reports submitted under the provisions of this Convention;
(c) International cooperation and assistance in accordance with Article 6 of this Convention;
(d) The development of technologies to clear cluster munition remnants;
(e) Submissions of States Parties under Articles 8 and 10 of this Convention; and
(f) Submissions of States Parties as provided for in Articles 3 and 4 of this Convention.

2. The first Meeting of States Parties shall be convened by the Secretary-General of the United Nations within one year of entry into force of this Convention. The subsequent meetings shall be convened by the Secretary-General of the United Nations annually until the first Review Conference.
3. States not party to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organisations may be invited to attend these meetings as observers in accordance with the agreed rules of procedure.

**Article 12**

**Review Conferences**

1. A Review Conference shall be convened by the Secretary-General of the United Nations five years after the entry into force of this Convention. Further Review Conferences shall be convened by the Secretary-General of the United Nations if so requested by one or more States Parties, provided that the interval between Review Conferences shall in no case be less than five years. All States Parties to this Convention shall be invited to each Review Conference.

2. The purpose of the Review Conference shall be:
   (a) To review the operation and status of this Convention;
   (b) To consider the need for and the interval between further Meetings of States Parties referred to in paragraph 2 of Article 11 of this Convention; and
   (c) To take decisions on submissions of States Parties as provided for in Articles 3 and 4 of this Convention.

3. States not party to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organisations may be invited to attend each Review Conference as observers in accordance with the agreed rules of procedure.

**Article 13**

**Amendments**

1. At any time after its entry into force any State Party may propose amendments to this Convention. Any proposal for an amendment shall be communicated to the Secretary-General of the United Nations, who shall circulate it to all States Parties and shall seek their views on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notify the Secretary-General of the United Nations no later than 90 days after its circulation that they support further consideration of the proposal, the Secretary-General of the United Nations shall convene an Amendment Conference to which all States Parties shall be invited.

2. States not party to this Convention, as well as the United Nations, other relevant international organisations or institutions, regional organisations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organisations may be invited to attend each Amendment Conference as observers in accordance with the agreed rules of procedure.

3. The Amendment Conference shall be held immediately following a Meeting of States Parties or a Review Conference unless a majority of the States Parties request that it be held earlier.

4. Any amendment to this Convention shall be adopted by a majority of two-thirds of the States Parties present and voting at the Amendment Conference. The Depositary shall communicate any amendment so adopted to all States.

5. An amendment to this Convention shall enter into force for States Parties that have accepted the amendment on the date of deposit of acceptances by a majority of the States which were Parties at the date of adoption of the amendment. Thereafter it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

**Article 14**

**Costs and administrative tasks**

1. The costs of the Meetings of States Parties, the Review Conferences and the Amendment Conferences shall be borne by the States Parties and States not party to this Convention participating therein, in accordance with the United Nations scale of assessment adjusted appropriately.

2. The costs incurred by the Secretary-General of the United Nations under Articles 7 and 8 of this Convention shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted appropriately.

3. The performance by the Secretary-General of the United Nations of administrative tasks assigned to him or her under this Convention is subject to an appropriate United Nations mandate.

**Article 15**

**Signature**

This Convention, done at Dublin on 30 May 2008, shall be open for signature at Oslo by all States on 3 December 2008 and thereafter at United Nations Headquarters in New York until its entry into force.

**Article 16**

**Ratification, acceptance, approval or accession**

1. This Convention is subject to ratification, acceptance or approval by the Signatories.

2. It shall be open for accession by any State that has not signed the Convention.

3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.
Article 17

Entry into force

1. This Convention shall enter into force on the first day of the sixth month after the month in which the thirtieth instrument of ratification, acceptance, approval or accession has been deposited.

2. For any State that deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the sixth month after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

Article 18

Provisional application

Any State may, at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally Article 1 of this Convention pending its entry into force for that State.

Article 19

Reservations

The Articles of this Convention shall not be subject to reservations.

Article 20

Duration and withdrawal

1. This Convention shall be of unlimited duration.

2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention. It shall give notice of such withdrawal to all other States Parties, to the Depositary and to the United Nations Security Council. Such instrument of withdrawal shall include a full explanation of the reasons motivating withdrawal.

3. Such withdrawal shall only take effect six months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.

Article 21

Relations with States not party to this Convention

1. Each State Party shall encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting the adherence of all States to this Convention.

2. Each State Party shall notify the governments of all States not party to this Convention, referred to in paragraph 3 of this Article, of its obligations under this Convention, shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions.

3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.

4. Nothing in paragraph 3 of this Article shall authorise a State Party:
   (a) To develop, produce or otherwise acquire cluster munitions;
   (b) To itself stockpile or transfer cluster munitions;
   (c) To itself use cluster munitions; or
   (d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

Article 22

Depositary

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention.

Article 23

Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of this Convention shall be equally authentic.
International Court of Justice

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction of the Court and Admissibility of the Application Judgment

I.C.J. Reports 1984
INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING MILITARY AND
PARAMILITARY ACTIVITIES IN AND
AGAINST NICARAGUA
(NICARAGUA v. UNITED STATES OF AMERICA)

JURISDICTION OF THE COURT AND
ADMISSIBILITY OF THE APPLICATION

JUDGMENT OF 26 NOVEMBER 1984

1984

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES ACTIVITÉS MILITAIRES
ET PARAMILITAIRES AU NICARAGUA
ET CONTRE CELUI-CI
(NICARAGUA c. ÉTATS-UNIS D'AMÉRIQUE)

COMPÉTENCE DE LA COUR
ET RECEVABILITÉ DE LA REQUÊTE

ARRÊT DU 26 NOVEMBRE 1984

Official citation:
Military and Paramilitary Activities in and against Nicaragua
(Nicaragua v. United States of America), Jurisdiction and

Mode officiel de citation:
Activités militaires et paramilitaires au Nicaragua et contre celui-ci
(Nicaragua c. États-Unis d'Amérique), compétence et recevabilité,
INTERNATIONAL COURT OF JUSTICE

YEAR 1984

26 November 1984

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(NICARAGUA v. UNITED STATES OF AMERICA)

JURISDICTION OF THE COURT AND ADMISSIBILITY OF THE APPLICATION

Jurisdiction of the Court — Article 36, paragraphs 2 and 5, of the Statute — Declaration under Article 36 of Permanent Court Statute by State which did not ratify Protocol of Signature of that Statute — Declaration valid but not binding — Effect of Article 36, paragraph 5, of International Court of Justice Statute — Significance of travaux préparatoires — Conduct of States concerned — Significance of publications of the Court and of the United Nations.

Claim of estoppel barring invocation of jurisdiction under Article 36, paragraph 2, of the Statute.

Nature and effect of Optional-Clause declarations — Modification or termination of Optional-Clause declarations containing proviso for six months’ notice of termination — Effect of reciprocity on declarations containing differing provisions for termination — Declaration made without limit of time — Reasonable notice of termination required.

Reservation attached to Optional-Clause declaration excluding disputes arising under multilateral treaty unless “all parties to the treaty affected by the decision are before the Court” — Meaning — Impossibility of identification of States “affected” at jurisdictional phase — Application of Article 79, paragraph 7, of Rules of Court.

Bilateral treaty conferring jurisdiction over “dispute not satisfactorily settled by diplomacy” — Reliance on compromissory clause not necessarily preceded by negotiations.

Admissibility of application — Alleged requirement that all “indispensable parties” must be before the Court — Claim alleged to be one of unlawful use of armed force — Competence of United Nations Security Council — Right of individual or collective self-defence — Pursuance of proceedings before the Court and Security Council pari passu — Judicial function claimed to be unable to deal with situations involving ongoing conflict — Proof of facts and possibility of implementation of Judgment — Prior exhaustion of negotiating processes not a precondition for seising the Court.

JUDGMENT

Present: President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Agó, El Khani, Schwebel, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; Judge ad hoc Colliard; Registrar Torres Barnárdez.

In the case concerning military and paramilitary activities in and against Nicaragua,

between

the Republic of Nicaragua,

represented by

H.E. Mr. Carlos Argüello Gómez, Ambassador,

as Agent and Counsel,

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

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

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

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

as Counsel and Advocates,

Mr. Augusto Zamora Rodríguez, Legal Adviser to the Foreign Ministry of the Republic of Nicaragua,

Miss Judith C. Appelbaum, Reichler and Appelbaum, Washington, D.C.; Member of the Bars of the District of Columbia and the State of California,

Mr. Paul W. Khan, Reichler and Appelbaum, Washington, D.C., Member of the Bar of the District of Columbia

as Counsel

and
the United States of America,
represented by
Hon. Davis R. Robinson, Legal Adviser, United States Department of State,
as Agent and Counsel,
Mr. Daniel W. McGovern, Principal Deputy Legal Adviser, United States Department of State,
Mr. Patrick M. Norton, Assistant Legal Adviser, United States Department of State,
as Deputy-Agents and Counsel,
Mr. Ted A. Borek, Assistant Legal Adviser, United States Department of State,
Mr. Myres S. McDougal, Sterling Professor of Law Emeritus, Yale University, Yale Law School, New Haven, Connecticut; Distinguished Visiting Professor of Law, New York Law School, New York, New York,
Mr. John Norton Moore, Walter L. Brown Professor of Law, University of Virginia School of Law, Charlottesville, Virginia,
Mr. Fred L. Morrison, Professor of Law, the Law School of the University of Minnesota, Minneapolis, Minnesota,
Mr. Stefan A. Riesenfeld, Professor of Law, University of California, School of Law, Berkeley, California, and Hastings College of the Law, San Francisco, California,
Mr. Louis B. Sohn, Woodruff Professor of International Law, University of Georgia School of Law, Athens, Georgia; Bemis Professor of International Law Emeritus, Harvard Law School, Cambridge, Massachusetts,
as Counsel,
Ms. Frances A. Armstrong, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Mr. Michael J. Danaher, Member of the Bar of the State of California,
Ms. Joan E. Donoghue, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Ms. Mary W. Ennis, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Mr. Peter M. Olson, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Mr. Jonathan B. Schwartz, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Ms. Jamison M. Selby, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Mr. George Taft, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
Ms. Gayle R. Teicher, Attorney-Adviser, Office of the Legal Adviser, United States Department of State,
as Attorney-Advisers.

The Court,
composed as above,
delivers the following Judgment:

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

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of the United States of America. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. At the same time as the Application was filed, the Republic of Nicaragua also filed a request for the indication of provisional measures under Article 41 of the Statute. By a letter from the United States Ambassador at The Hague to the Registrar dated 13 April 1984, and in the course of the oral proceedings held on the request by Nicaragua for the indication of provisional measures, the United States of America contended (inter alia) that the Court was without jurisdiction to deal with the Application, and requested that the proceedings be terminated by the removal of the case from the list. By an Order dated 10 May 1984, the Court, on the request of the United States for removal of the case from the list, indicated, pending its final decision in the proceedings, certain provisional measures, and decided that, until the Court delivers its final judgment in the case, it would keep the matters covered by the Order continuously under review.

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

5. In the Memorial, the Republic of Nicaragua contended that, in addition to the basis of jurisdiction relied on in the Application, a Treaty of Friendship, Commerce and Navigation signed by the Parties in 1956 provides an independent basis for jurisdiction under Article 36, paragraph 1, of the Statute of the Court.

6. On 15 August 1984, prior to the closure of the written proceedings on the questions of jurisdiction and admissibility, the Republic of El Salvador filed a Declaration of Intervention in the case under Article 63 of the Statute. In a letter from the Agent of El Salvador dated 10 September 1984, which El Salvador requested should be considered as a part of its Declaration of Intervention, El Salvador stated that, if the Court were to find that it has jurisdiction and that the Application is admissible, it reserved the right "in a later substantive phase of the case to address the interpretation and application of the conventions to which it is a party relevant to that phase". Having been supplied with the written obser-
nations of the Parties on the Declaration pursuant to Article 83 of the Rules of Court, the Court, by an Order dated 4 October 1984, decided not to hold a hearing on the Declaration of Intervention, and decided that that Declaration was inadmissible inasmuch as it related to the current phase of the proceedings.

7. On 8-10 and 15-18 October 1984 the Court held public sittings at which it was addressed by the following representatives of the Parties:

For Nicaragua:
H.E. Mr. Carlos Argüello Gómez,
Hon. Abram Chayes,
Mr. Ian Brownlie,
Mr. Paul S. Reichler,
Mr. Alain Pellet.

For the United States of America:
Hon. Davis R. Robinson,
Mr. Patrick M. Norton,
Mr. Myres McDougal,
Mr. Louis B. Sohn,
Mr. John Norton Moore.

8. In the course of the written proceedings the following Submissions were presented by the Parties:

On behalf of Nicaragua,
at the end of the Memorial:

"Nicaragua submits that:

A. The jurisdiction of the Court to entertain the dispute presented in the Application is established by the terms of the Declaration of Nicaragua of 24 September 1929 under Article 36 (5) and the declaration of the United States of 14 August 1946 under Article 36 (2) of the Statute of the International Court of Justice.

B. Nicaragua's declaration of 24 September 1929 is in force as a valid and binding acceptance of the compulsory jurisdiction of the Court.

C. The attempt by the United States to modify or terminate the terms of its declaration of 14 August 1946 by a letter dated 6 April 1984 from Secretary of State George Shultz to the Secretary-General of the United Nations was ineffective to accomplish either result.

D. The Court has jurisdiction under Article XXIV (2) of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 24 May 1958 over claims presented by this Application falling within the scope of the Treaty.

E. The Court is not precluded from adjudicating the legal dispute presented in the Application by any considerations of admissibility and the Application is admissible."

On behalf of the United States of America,
at the end of the Counter-Memorial:

"May it please the Court, on behalf of the United States of America, to adjudge and declare, for each and all of the foregoing reasons, that the

claims set forth in Nicaragua's Application of 9 April 1984 (1) are not within the jurisdiction of this Court and (2) are inadmissible."

9. In the course of the oral proceedings the following Submissions were presented by the Parties:

On behalf of Nicaragua
(hearing of 10 October 1984):

"Maintaining the arguments and submissions contained in the Memorial presented on 30 June 1984 and also the arguments advanced in the oral hearings on behalf of Nicaragua:

The Government of Nicaragua requests the Court to declare that jurisdiction exists in respect of the Application of Nicaragua filed on 9 April 1984, and that the subject-matter of the Application is admissible in its entirety."

On behalf of the United States of America,
(hearing of 16 October 1984):

"May it please the Court, on behalf of the United States of America, to adjudge and declare, for each and all of the reasons presented in the oral argument of the United States and in the Counter-Memorial of the United States of 17 August 1984, that the claims set forth in Nicaragua's Application of 9 April 1984, (1) are not within the jurisdiction of the Court and (2) are inadmissible."

10. In accordance with Article 60, paragraph 2, of the Rules of Court, the two Parties communicated to the Court the written text of their final submissions as set out above.

* * *

11. The present case concerns a dispute between the Government of the Republic of Nicaragua and the Government of the United States of America occasioned, Nicaragua contends, by certain military and paramilitary activities conducted in Nicaragua and in the waters off its coasts. Responsibility for which is attributed by Nicaragua to the United States. In the present phase the case concerns the jurisdiction of the Court to entertain and pronounce upon this dispute, and the admissibility of the Application by which it was brought before the Court. The issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudge or appear to prejudice any eventual decision on the merits.

12. To found the jurisdiction of the Court in the present proceedings, Nicaragua in its Application relied on Article 36 of the Statute of the Court and the declarations, described below, made by the Parties accepting compulsory jurisdiction pursuant to that Article. In its Memorial, Nicaragua, relying on a reservation contained in its Application (para. 26) of the right to "supplement or to amend this Application", also contended that
the Court has jurisdiction under Article XXIV, paragraph 2, of a Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956.

13. Article 36, paragraph 2, of the Statute of the Court provides that:

“The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation.”

The United States made a declaration, pursuant to this provision, on 14 August 1946, containing certain reservations, to be examined below, and expressed to

“remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration”.

On 6 April 1984 the Government of the United States of America deposited with the Secretary-General of the United Nations a notification, signed by the United States Secretary of State, Mr. George Shultz, referring to the Declaration deposited on 26 August 1946, and stating that:

“the aforesaid declaration shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.

Notwithstanding the terms of the aforesaid declaration, this provision shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America.”

This notification will be referred to, for convenience, as the “1984 notification”.

14. In order to be able to rely upon the United States Declaration of 1946 to found jurisdiction in the present case, Nicaragua has to show that it is a “State accepting the same obligation” within the meaning of Article 36, paragraph 2, of the Statute. For this purpose, Nicaragua relies on a

Declaration made by it on 24 September 1929 pursuant to Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice. That Article provided that:

“The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court”

in any of the same categories of dispute as listed in paragraph 2 of Article 36 of the Statute of the postwar Court, set out above. Nicaragua relies further on paragraph 5 of Article 36 of the Statute of the present Court, which provides that:

“Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.”

15. The circumstances of Nicaragua’s Declaration of 1929 were as follows. The Members of the League of Nations (and the States mentioned in the Annex to the League of Nations Covenant) were entitled to sign the Protocol of Signature of the Statute of the Permanent Court of International Justice, which was drawn up at Geneva on 16 December 1920. That Protocol provided that it was subject to ratification, and that instruments of ratification were to be sent to the Secretary-General of the League of Nations. On 24 September 1929, Nicaragua, as a Member of the League, signed this Protocol and made a declaration under Article 36, paragraph 2, of the Statute of the Permanent Court which read:

[Translation from the French]

“On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice.

Geneva, 24 September 1929.

(Signed) T. F. Medina.”

16. According to the documents produced by both Parties before the Court, on 4 December 1934, a proposal for the ratification of (inter alia) the Statute of the Permanent Court of International Justice and of the Protocol of Signature of 16 December 1920 was approved by the “Ejecutivo” (executive power) of Nicaragua. On 14 February 1935, the Senate of Nicaragua decided to ratify these instruments, its decision being published in La Gaceta, the Nicaraguan official journal, on 12 June 1935, and on 11 July 1935 the Chamber of Deputies of Nicaragua adopted a similar deci-
tion, similarly published on 18 September 1935. On 29 November 1939, the Ministry of External Relations of Nicaragua sent the following telegram to the Secretary-General of the League of Nations:

“ESTATUTO Y PROTOCOLO CORTE PERMANENTE JUSTICIA INTERNACIONAL LA HAYA YA FUERON RATIFICADOS PUNTO ENVIARSELE OPORTUNAMENTE INSTRUMENTO RATIFICACIÓN-REACCIONES.”

[Translation]
(Statute and Protocol Permanent Court International Justice The Hague have already been ratified. Will send you in due course Instrument Ratification. Relations.)

The files of the League of Nations however contain no record of an instrument of ratification ever having been received. No evidence has been adduced before the Court to show that such an instrument of ratification was ever despatched to Geneva. On 16 December 1942, the Acting Legal Adviser of the Secretariat of the League of Nations wrote to the Foreign Minister of Nicaragua to point out that he had not received the instrument of ratification “dont le dépôt est nécessaire pour faire naître effectivement l’obligation” (the deposit of which is necessary to cause the obligation to come into effect existence). In the Nicaraguan Memorial, it was stated that “Nicaragua never completed ratification of the old Protocol of Signature”; at the hearings, the Agent of Nicaragua explained that the records are very scanty, and he was therefore unable to certify the facts one way or the other. He added however that if instruments of ratification were sent, they would most likely have been sent by sea, and, the Second World War being then in progress, the attacks on commercial shipping may explain why the instruments appear never to have arrived. After the war, Nicaragua took part in the United Nations Conference on International Organization at San Francisco and became an original Member of the United Nations, having ratified the Charter on 6 September 1945; on 24 October 1945 the Statute of the International Court of Justice, which is an integral part of the Charter, came into force.

17. On the basis of these facts, the United States contends, first, that Nicaragua never became a party to the Statute of the Permanent Court of International Justice, and that accordingly it could not and did not make an effective acceptance of the compulsory jurisdiction of the Permanent Court; the 1929 acceptance was therefore not “still in force” within the meaning of the English version of Article 36, paragraph 5, of the Statute of the present Court. In the contention of the United States, the expression in the French version of the Statute corresponding to “still in force” in the English text, namely “pour une durée qui n’est pas encore expirée”, also requires that a declaration be binding under the Statute of the Permanent Court in order to be deemed an acceptance of the jurisdiction of the present Court under Article 36, paragraph 5, of its Statute.

18. Nicaragua does not contend that its 1929 Declaration was in itself sufficient to establish a binding acceptance of the compulsory jurisdiction of the Permanent Court of International Justice, for which it would have been necessary that Nicaragua complete the ratification of the Protocol of Signature of the Statute of that Court. It rejects however the interpretation of Article 36, paragraph 5, of the Statute of the present Court advanced by the United States: Nicaragua argues that the phrase “which are still in force” or “pour une durée qui n’est pas encore expirée” was designed to exclude from the operation of the Article only declarations that had already expired, and has no bearing whatever on a declaration, like Nicaragua’s, that had not expired, but which, for some reason or another, had not been perfected. Consistently with the intention of the provision, which in Nicaragua’s view was to continue the pre-existing situation as regards declarations of acceptance of compulsory jurisdiction, Nicaragua was in exactly the same situation under the new Statute as it was under the old. In either case, ratification of the Statute of the Court would perfect its Declaration of 1929. Nicaragua contends that the fact that this is the correct interpretation of the Statute is borne out by the way in which the Nicaraguan declaration was handled in the publications of the Court and of the United Nations Secretariat; by the conduct of the Parties to the present case, and of the Government of Honduras, in relation to the dispute in 1957-1960 between Honduras and Nicaragua in connection with the arbitral award made by the King of Spain in 1906, which dispute was eventually determined by the Court; by the opinions of publicists; and by the practice of the United States itself.

19. With regard to Nicaragua’s reliance on the publications of the Court, it may first be noted that in the Sixteenth Report (the last) of the Permanent Court of International Justice, covering the period 15 June 1939 to 31 December 1945, Nicaragua was included in the “List of States having signed the Optional Clause” (p. 358), but it was recorded on another page (p. 50) that Nicaragua had not ratified the Protocol of Signature of the Statute, and Nicaragua was not included in the list of “States bound by the Clause” (i.e., the Optional Clause) on the same page. The first Yearbook, that for 1946-1947, of the present Court contained (p. 110) a list entitled “Members of the United Nations, other States parties to the Statute and States to which the Court is open. (An asterisk denotes a State bound by the compulsory jurisdiction clause)”, and Nicaragua was included in that list, with an asterisk against it, and with a footnote (common to several States listed) reading “Declaration made under Article 36 of the Statute of the Permanent Court and deemed to be still in force (Article 36. 5, of Statute of the present Court)”. On another page (p. 210), the text of Nicaragua’s 1929 Declaration was reproduced, with the following footnote:

“According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice
(December 16th, 1920), and the instrument of ratification was to follow. Notification concerning the deposit of the said instrument has not, however, been received in the Registry."

The Yearbook 1946-1947 also includes a list (p. 221) entitled "List of States which have recognized the compulsory jurisdiction of the International Court of Justice or which are still bound by their acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice (Article 36 of the Statute of the International Court of Justice)" and this list includes Nicaragua (with a footnote cross-reference to the page where its 1929 Declaration is reproduced).

20. Subsequent Yearbooks of the Court, up to and including I.C.J. Yearbook 1954-1955, list Nicaragua among the States with regard to which there were "in force" declarations of acceptance of the compulsory jurisdiction of the Court, made in accordance with the terms either of the Permanent Court of International Justice Statute or of the Statute of the present Court (see, e.g., Yearbook 1954-1955, p. 39); however, a reference was also given to the page of the Yearbook 1946-1947 at which the text of Nicaragua's 1929 Declaration was printed (ibid., p. 187). Nicaragua also continued to be included in the list of States recognizing compulsory jurisdiction (ibid., p. 195). In the Yearbook 1955-1956, the reference to Nicaragua in this list (p. 195) had a footnote appended to it reading as follows:

"According to a telegram dated November 29th, 1939, addressed to the League of Nations, Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court of International Justice (December 16th, 1920), and the instrument of ratification was to follow. It does not appear, however, that the instrument of ratification was ever received by the League of Nations."

A note to the same effect has been included in subsequent Yearbooks up to the present time.

21. In 1968 the Court began the practice, which has continued up to the present time, of transmitting a Report to the General Assembly of the United Nations for the past year. Each of these Reports has included a paragraph recording the number of States which recognize the jurisdiction of the Court as compulsory, and Nicaragua has been mentioned among these. For a number of years the paragraph referred to such States as having so recognized the Court's jurisdiction "in accordance with declarations filed under Article 36, paragraph 2, of the Statute". No reference has been made in these Reports to the issue of ratification of the Protocol of Signature of the Statute of the Permanent Court.

22. Nicaragua also places reliance on the references made to it in a number of publications issued by the Secretariat of the United Nations, all of which include it as a State whose declaration of acceptance of the jurisdiction of the Permanent Court has attracted the operation of Article 36, paragraph 5, of the Statute of the present Court. These publications are

the Second Annual Report of the Secretary-General to the General Assembly; the annual volume entitled Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depositary; the Yearbook of the United Nations; and certain ancillary official publications.

23. The United States contention as to these publications is, as to those issued by the Registry of the Court, that the Registry took great care not to represent any of its listings as authoritative; the United States draws attention to the caveat in the Preface to the I.C.J. Yearbook that it "in no way involves the responsibility of the Court", to the footnotes quoted in paragraphs 19 and 20 above, and to a disclaimer appearing for the first time in the Yearbook 1956-1957 (p. 207) reading as follows:

"The texts of declarations set out in this Chapter are reproduced for convenience of reference only. The inclusion of a declaration made by any State should not be regarded as an indication of the view entertained by the Registry or, a fortiori, by the Court, regarding the nature, scope or validity of the instrument in question."

It concludes that it is clear that successive Registrars and the Yearbooks of the Court never adopted, and indeed expressly rejected, Nicaragua's contention as to the effect of Article 36, paragraph 5, of the Statute. So far as the United Nations publications are concerned, the United States points out that where they cite their source of information, they invariably refer to the I.C.J. Yearbook, and none of them purport to convey any authority.

24. In order to determine whether the provisions of Article 36, paragraph 5, can have applied to Nicaragua's Declaration of 1929, the Court must first establish the legal characteristics of that declaration and then compare with them the conditions laid down by the text of that paragraph.

25. So far as the characteristics of Nicaragua's declaration are concerned, the Court notes that, at the time when the question of the applicability of the new Statute arose, that is, on its coming into force, that declaration was certainly valid, for under the system of the Permanent Court of International Justice a declaration was valid on condition that it had been made by a State "either when signing or ratifying" the Protocol of Signature of the Statute "or at a later moment", whereas under the present Statute, declarations under Article 36, paragraph 2, can only be made by "States parties to the present Statute". Since Nicaragua had signed that Protocol, its declaration concerning the compulsory jurisdiction of the Permanent Court, which was not subject to ratification, was undoubtedly
26. The Court therefore notes that Nicaragua, having failed to deposit its instrument of ratification of the Protocol of Signature of the Statute of the Permanent Court, was not a party to that treaty. Consequently the Declaration made by Nicaragua in 1929 had not acquired binding force prior to such effect as Article 36, paragraph 5, of the Statute of the International Court of Justice might produce.

27. However, while the declaration had not acquired binding force, it is not disputed that it could have done so, for example at the beginning of 1945, if Nicaragua had ratified the Protocol of Signature of the Statute of the Permanent Court. The correspondence brought to the Court’s attention by the Parties, between the Secretariat of the League of Nations and various Governments including the Government of Nicaragua, leaves no doubt as to the fact that, at any time between the making of Nicaragua’s declaration and the day on which the new Court came into existence, if not later, ratification of the Protocol of Signature would have sufficed to transform the content of the 1929 Declaration into a binding commitment; no one would have asked Nicaragua to make a new declaration. It follows that such a declaration as that made by Nicaragua had a certain potential effect which could be maintained indefinitely. This durability of potential effect flowed from a certain characteristic of Nicaragua’s declaration: being made “unconditionally”, it was valid for an unlimited period. Had it provided, for example, that it would apply for only five years to disputes arising after its signature, its potential effect would admittedly have disappeared as from 24 September 1934. In sum, Nicaragua’s 1929 Declaration was valid at the moment when Nicaragua became a party to the Statute of the new Court; it had retained its potential effect because Nicaragua, which could have limited the duration of that effect, had expressly refrained from doing so.

28. The characteristics of Nicaragua’s declaration have now to be compared with the conditions of applicability of Article 36, paragraph 5, as laid down in that provision. The first condition concerns the relationship between the declarations and the Statute. Article 36, paragraph 5, refrains from stipulating that declarations must have been made by States parties to the Statute of the Permanent Court: it is sufficient for them to have been made “under” (in French, “en application de”) Article 36 of that Statute. But those who framed the new text were aware that under that Article, a State could make such a declaration “either when signing or ratifying the Protocol . . . or at a later moment”, i.e., that a State could make a declaration when it had not ratified the Protocol of Signature of the Statute, but only signed it. The chosen wording therefore does not exclude but, on the contrary, covers a declaration made in the circumstances of Nicaragua’s declaration. Apart from this relationship with the Statute of the Permanent Court, the only condition which declarations have to fulfil is that they should be “still in force” (in English) or “faites pour une durée qui n’est pas encore expirée” (in French). The Parties have devoted much argument to this apparent discrepancy between the two versions, its real meaning and the interpretation which the Court should adopt as correct. Drawing opposite conclusions from the jurisprudence of the Court, as contained in particular in the case concerning the Aerial Incident of 27 July 1955 (Israel v. Bulgaria), they have expatiated on the respective arguments by which, they allege, it supports their own case.

29. The Court must in the first place observe that this is the first time that it has had to take a position on the question whether a declaration which did not have binding force at the time of the Permanent Court is or is not to be numbered among those to which Article 36, paragraph 5, of the Statute of the International Court of Justice applies. The case of the Aerial Incident of 27 July 1955 featured quite a different issue – in a nutshell, whether the effect of a declaration that had unquestionably become binding at the time of the Permanent Court could be transposed to the International Court of Justice when the declaration in question had been made by a State which had not been represented at the San Francisco Conference and had not become a party to the Statute of the present Court until long after the extinction of the Permanent Court. In view of this difference in the issues, the Court does not consider that its decision in the Aerial Incident case, whatever may be its relevance in other respects, provides any pointers to precise conclusions on the limited point now in issue. The most that could be pointed out on the basis of the discussions surrounding the Aerial Incident case is that, at that time, the United States took a particularly broad view of the separability of an Optional-Clause declaration and its institutional foundation by contending that an Optional-Clause declaration (of a binding character) could have outlived by many years the court to which it related. But the present case also involves a problem of separability, since the question to be decided is the extent to which an Optional-Clause declaration (without binding force) can be separated
from the institutional foundation which it ought originally to have possessed, so as to be grafted onto a new institutional foundation.

30. Having thus stressed the novelty of the problem, the Court will refer to the following considerations in order to reach a solution. First, it does not appear possible to reconcile the two versions of Article 36, paragraph 5, by considering that both versions refer to binding declarations. According to this interpretation, upheld by the United States, Article 36, paragraph 5, should be read as if it mentioned “binding” declarations. The French text, in this view, would be the equivalent of the English text, for logically it would imply that declarations *d*ont *la* durée n’est pas encore expirée are solely those which have acquired binding force. The Court, however, considers that it must interpret Article 36, paragraph 5, on the basis of the actual terms used, which do not include the word “binding”. According to the *travaux préparatoires* the word “binding” was never suggested; and if it had been suggested for the English text, there is no doubt that the drafters would never have let the French text stand as finally worded. Furthermore, the Court does not consider the French text to imply that *la* durée *non expirée* (the unexpired period) is that of a commitment of a binding character. It may be granted that, for a period to continue or expire, it is necessary for some legal effect to have come into existence. But this effect does not necessarily have to be of a binding nature. A declaration validly made under Article 36 of the Statute of the Permanent Court had a certain validity which could be preserved or destroyed, and it is perfectly possible to read the French text as implying only this validity.

31. Secondly, the Court cannot but be struck by the fact that the French Delegation at the San Francisco Conference called for the expression “still in force” to be translated, not by “encore en vigueur” but by the term: “pour une durée qui n’est pas encore expirée”. In view of the excellent equivalence of the expressions “encore en vigueur” and “still in force”, the deliberate choice of the expression “pour une durée qui n’est pas encore expirée” seems to denote an intention to widen the scope of Article 36, paragraph 5, so as to cover declarations which have not acquired binding force. Other interpretations of this proposal are not excluded, but it may be noted that both “encore en vigueur” and “pour une durée qui n’est pas encore expirée” would exclude a declaration, like that of France, which had been binding but which had expired by lapse of time. It can only be said, on the other hand, that the English version does not require (any more than does the French version) that the declarations concerned should have been made by States parties to the Statute of the Permanent Court and does not mention the necessity of declarations having any binding character for the provision to be applicable to them. It is therefore the Court’s opinion that the English version in no way expressly excludes a valid declaration of unexpired duration, made by a State not party to the Protocol of Signature of the Statute of the Permanent Court, and therefore not of a binding character.

32. The Court will therefore, before deciding on its interpretation, have to examine to what extent the general considerations governing the transfer of the powers of the former Court to the new one, and thus serving to define the object and the purpose of the provisions adopted, throw light upon the correct interpretation of the paragraph in question. As the Court has already had occasion to state in the case of the *Aerial Incident of 27 July 1935 (Israel v. Bulgaria)*, the primary concern of those who drafted the Statute of the present Court was to maintain the greatest possible continuity between it and its predecessor. As the Court then observed:

“the clear intention which inspired Article 36, paragraph 5, was to continue in being something which was in existence, to preserve existing acceptances, to avoid that the creation of a new Court should frustrate progress already achieved” (*I.C.J. Reports 1959*, p. 145).

33. In the present case, the Parties, in their pleadings and in the course of the hearings, have drawn attention to certain statements bearing witness to this general preoccupation; for example the report to his Government of the Chairman of the New Zealand delegation to the San Francisco Conference, who stressed that the primary concern had been “to maintain so far as possible the progress towards compulsory jurisdiction”. If, for a number of circumstantial reasons, it seemed necessary to abolish the former Court and to put the new one in its place, at least the delegates to the San Francisco Conference were determined to see that this operation should not result in a step backwards in relation to the progress accomplished towards adopting a system of compulsory jurisdiction. That being so, the question is whether this intention sheds any light upon the present problem of interpretation of Article 36, paragraph 5.

34. In this connection it is undeniable that a declaration by which a State recognizes the compulsory jurisdiction of the Court is “in existence”, in the sense given above, and that each such declaration does constitute a certain progress towards extending to the world in general the system of compulsory judicial settlement of international disputes. Admittedly, this progress has not yet taken the concrete form of a commitment having binding force, but nonetheless, it is by no means negligible. There are no grounds for maintaining that those who drafted the Statute meant to go back on this progress and place it in a category in opposition to the progress achieved by declarations having binding force. No doubt their main aim was to safeguard these latter declarations, but the intention to wipe out the progress evidenced by a declaration such as that of Nicaragua would certainly not square well with their general concern. As the Court said in the very similar matter of the already existing field of conventional compulsory jurisdiction, it was “a natural element of this compromise’’.
(then accepted by comparison with the ideal of universal compulsory jurisdiction) “that the maximum, and not some merely quasi optimum preservation of this field should be aimed at” (Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1964, p. 32). Furthermore, if the highly experienced drafters of the Statute had had a restrictive intention on this point, in contrast to their overall concern, they would certainly have translated it into a very different formula from the one which they in fact adopted.

35. On the other hand, the logic of a system substituting a new Court for the former one without the cause of compulsory jurisdiction in any way suffering in the process resulted in the ratification of the new Statute having exactly the same effects as the ratification of the Protocol of Signature of the former one would have had, that is to say, in the case of Nicaragua, the step from potential to effective commitment. The general system of devolution from the old Court to the new thus lends support to the interpretation whereby Article 36, paragraph 5, even covers declarations that had not previously acquired binding force. In this connection, it should not be overlooked that Nicaragua was represented at the San Francisco Conference, and duly signed and ratified the Charter of the United Nations. At that time, the consent which it had given in 1929 to the jurisdiction of the Permanent Court had not become fully effective in the absence of ratification of the Protocol of Signature; but taking into account the interpretation given above, the Court may apply to Nicaragua what it stated in the case of the Aerial Incident of 27 July 1955:

“Consent to the transfer to the International Court of Justice of a declaration accepting the jurisdiction of the Permanent Court may be regarded as effectively given by a State which, having been represented at the San Francisco Conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears.” (I.C.J. Reports 1959, p. 142.)

36. This finding as regards the interpretation of Article 36, paragraph 5, must, finally, be compared to the conduct of States and international organizations in regard to this interpretation. In that respect, particular weight must be ascribed to certain official publications, namely the I.C.J. Yearbook (since 1946-1947), the Reports of the Court to the General Assembly of the United Nations (since 1968) and the annually published collection of Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depositary. The Court notes that, ever since they first appeared, all these publications have regularly placed Nicaragua on the list of those States that have recognized the compulsory jurisdiction of the Court by virtue of Article 36, paragraph 5, of the Statute. Even if the I.C.J. Yearbook has, in the issue for 1946-1947 and as from the issue for 1955-1956 onwards, contained a note recalling certain facts concerning Nicaragua’s ratification of the Protocol of Signature of the Statute of the Permanent Court of International Justice, this publication has never modi-

fied the classification of Nicaragua or the binding character attributed to its 1929 Declaration — indeed the Yearbooks list Nicaragua among the States “still bound by” their declarations under Article 36 of the Statute of the Permanent Court (see paragraph 19, above). The same observation is valid for the Secretariat publication Signatures, Ratifications, Acceptances, Accessions, etc., which derived its data, including footnotes, from the I.C.J. Yearbook. As for the reports of the Court, they are quite categorical in stating that Nicaragua had accepted compulsory jurisdiction, even if the distinction between acceptances made under Article 36, paragraph 2, and those “deemed” to be such acceptances, is not spelled out.

37. The Court has no intention of assigning these publications any role that would be contrary to their nature but will content itself with noting that they attest a certain interpretation of Article 36, paragraph 5 (whereby that provision would cover the declaration of Nicaragua), and the rejection of an opposite interpretation (which would refuse to classify Nicaragua among the States covered by that Article). Admittedly, this testimony concerns only the result and not the legal reasoning that leads to it. However, the inclusion of Nicaragua in the “List of States which have recognized the compulsory jurisdiction of the International Court of Justice, or which are still bound by their acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice”, as from the appearance of the first I.C.J. Yearbook (1946-1947), contrasts with its exclusion from the list in the last Report of the Permanent Court of International Justice of “States bound by the [optional] clause”. It is therefore difficult to escape the conclusion that the basis of this innovation was to be found in the possibility that a declaration which, though not of binding character, was still valid, and was so for a period that had not yet expired, permitted the application of Article 36, paragraph 5, so long as the State in question, by ratifying the Statute of the International Court of Justice, provided it with the institutional foundation that it had hitherto lacked. From that moment on, Nicaragua would have become “bound” by its 1929 Declaration, and could, for practical purposes, appropriately be included in the same Yearbook list as the States which had been bound even prior to the coming into force of the post-war Statute.

38. The importance of this lies in the significance to be attached to the conduct of the States concerned, which is dependent on the testimony thus furnished by these publications. The point is not that the Court in its administrative capacity took a decision as to Nicaragua’s status which would be binding upon it in its judicial capacity, since this clearly could not be so. It is that the listing found appropriate for Nicaragua amounted over the years to a series of attestations which were entirely official and public, and extremely numerous, and ranged over a period of nearly 40 years; and that hence the States concerned — first and foremost, Nicaragua — had every opportunity of accepting or rejecting the thus-proclaimed applicability of Article 36, paragraph 5, to the Nicaraguan Declaration of 1929.
39. Admittedly, Nicaragua itself, according to the information furnished to the Court, did not at any moment explicitly recognize that it was bound by its recognition of the Court’s compulsory jurisdiction, but neither did it deny the existence of this undertaking. The Court notes that Nicaragua, even if its conduct in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* was not unambiguous, did not at any time declare that it was not bound by its 1929 Declaration. Having regard to the public and unchanging nature of the official statements concerning Nicaragua’s commitment under the Optional-Clause system, the silence of its Government can only be interpreted as an acceptance of the classification thus assigned to it. It cannot be supposed that that Government could have believed that its silence would be tantamount to anything other than acquiescence. Besides, the Court would remark that if proceedings had been instituted against Nicaragua at any time in these recent years, and it had sought to deny that, by the operation of Article 36, paragraph 5, it had recognized the compulsory jurisdiction of the Court, the Court would probably have rejected that argument. But the Court’s jurisdiction in regard to a particular State does not depend on whether that State is in the position of an Applicant or a Respondent in the proceedings. If the Court considers that it would have decided that Nicaragua would have been bound in a case in which it was the Respondent, it must conclude that its jurisdiction is identically established in a case where Nicaragua is the Applicant.

40. As for States other than Nicaragua, including those which could be supposed to have the closest interest in that State’s legal situation in regard to the Court’s jurisdiction, they have never challenged the interpretation to which the publications of the United Nations bear witness and whereby the case of Nicaragua is covered by Article 36, paragraph 5. Such States as themselves publish lists of States bound by the compulsory jurisdiction of the Court have placed Nicaragua on their lists. Of course, the Court is well aware that such national publications simply reproduce those of the United Nations where that particular point is concerned. Nevertheless, it would be difficult to interpret the fact of such reproduction as signifying an objection to the interpretation thus given; on the contrary, this reproduction contributes to the generality of the opinion which appears to have been cherished by States parties to the Statute as regards the applicability to Nicaragua of Article 36, paragraph 5.

41. Finally, what States believe regarding the legal situation of Nicaragua so far as the compulsory jurisdiction of the Court is concerned may emerge from the conclusions drawn by certain governments as regards the possibility of obliging Nicaragua to appear before the Court or of escaping any proceedings it may institute. The Court would therefore recall that in the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* Honduras founded its application both on a special agreement, the Washington Agreement, and on Nicaragua’s Optional-Clause declaration. It is also difficult for the Court not to consider that the United States letter of 6 April 1984 implies that at that date the United States, like other States, believed that Nicaragua was bound by the Court’s jurisdiction in accordance with the terms of its 1929 Declaration.

42. The Court thus finds that the interpretation whereby the provisions of Article 36, paragraph 5, cover the case of Nicaragua has been confirmed by the subsequent conduct of the parties to the treaty in question, the Statute of the Court. However, the conduct of States which has been considered has been in relation to publications of the Court and of the United Nations Secretariat which, as noted in paragraph 37 above, do not indicate the legal reasoning leading to the conclusion that Nicaragua fell within the category of States to whose declarations Article 36, paragraph 5, applied. The view might have been taken that that paragraph applied because the Nicaraguan telegram of 29 November 1929 in itself constituted ratification of the Protocol of Signature. It should therefore be observed that the conduct of Nicaragua in relation to the publications in question also supports a finding of jurisdiction under Article 36, paragraph 2, of the Statute independently of the interpretation and effect of paragraph 5 of that Article.

43. Nicaragua has in fact also contended that the validity of Nicaragua’s recognition of the compulsory jurisdiction of the Court finds an independent basis in the conduct of the Parties. The argument is that Nicaragua’s conduct over a period of 38 years unequivocally constitutes consent to be bound by the compulsory jurisdiction of the Court by way of a recognition of the application of Article 36, paragraph 5, of the Statute to the Nicaraguan Declaration of 1929. Likewise the conduct of the United States over a period of 38 years unequivocally constitutes its recognition of the essential validity of the Declaration of Nicaragua of 1929 as a result of the application of Article 36, paragraph 5, of the Statute. As a consequence it was recognized by both Parties that any formal defect in Nicaragua’s ratification of the Protocol of Signature of the Statute of the Permanent Court did not in any way affect the essential validity of Nicaragua’s consent to the compulsory jurisdiction. The essential validity of the Nicaraguan declaration, as an acceptance of the compulsory jurisdiction is confirmed by the evidence of a long series of public documents, by the general opinion of States and by the general opinion of qualified publicists.

44. The United States however objects that this contention of Nicaragua is flatly inconsistent with the Statute of the Court, which provides only for consent to jurisdiction to be manifested in specified ways; an “independent title of jurisdiction, as Nicaragua calls it, is an impossibility”. The Statute provides the sole bases on which the Court can exercise jurisdiction, under Articles 36 and 37. In the particular case of Article 36, paragraph 5, the Statutes of the two Courts provide a means for States to express their consent, and Nicaragua did not use them. The United States urges what it describes as policy considerations of fundamental importance: that compulsory jurisdiction, being a major obligation, must be based on the clearest manifestation of the State’s intent to accept it; that
Nicaragua's thesis introduces intolerable uncertainty into the system; and that that thesis entails the risk of consenting to compulsory jurisdiction through silence, with all the harmful consequences that would ensue. The United States also disputes the significance of the publications and conduct on which Nicaragua bases this contention.

45. The Court would first observe that, as regards the requirement of consent as a basis of its jurisdiction, and more particularly as regards the formalities required for that consent to be expressed in accordance with the provisions of Article 36, paragraph 2, of the Statute, the Court has already made known its view in, *inter alia*, the case concerning the *Temple of Preah Vihear*. On that occasion it stated: "The only formality required is the deposit of the acceptance with the Secretary-General of the United Nations under paragraph 4 of Article 36 of the Statute." (I.C.J. Reports 1961, p. 31.)

46. The Court must enquire whether Nicaragua's particular circumstances afford any reason for it to modify the conclusion it then reached. After all, the reality of Nicaragua's consent to be bound by its 1929 Declaration is, as pointed out above, attested by the absence of any protest against the legal situation ascribed to it by the publications of the Court, the Secretary-General of the United Nations and major States. The question is therefore whether, even if the consent of Nicaragua is real, the Court can decide that it has been given valid expression even on the hypothesis that the 1929 Declaration was without validity, and given that no other declaration has been deposited by Nicaragua since it became a party to the Statute of the International Court of Justice. In this connection the Court notes that Nicaragua's situation has been wholly unique, in that it was the publications of the Court itself (since 1947, the *I.C.J. Yearbook*; since 1968, the *Reports* to the General Assembly of the United Nations), and those of the Secretary-General (as depository of the declarations under the Statute of the present Court) which affirmed (and still affirm today, for that matter) that Nicaragua had accomplished the formality in question. Hence, if the Court were to object that Nicaragua ought to have made a declaration under Article 36, paragraph 2, it would be penalizing Nicaragua for having attached undue weight to the information given on that point by the Court and the Secretary-General of the United Nations and, in sum, having (on account of the authority of their sponsors) regarded them as more reliable than they really were.

47. The Court therefore recognizes that, so far as the accomplishment of the formality of depositing an optional declaration is concerned, Nicaragua was placed in an exceptional position, since the international organs empowered to handle such declarations declared that the formalities in question had been accomplished by Nicaragua. The Court finds that this exceptional situation cannot be without effect on the requirements obtaining as regards the formalities that are indispensable for the consent of a State to its compulsory jurisdiction to have been validly given. It considers therefore that, having regard to the origin and generality of the statements to the effect that Nicaragua was bound by its 1929 Declaration, it is right to conclude that the constant acquiescence of that State in those affirmations constitutes a valid mode of manifestation of its intent to recognize the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, and that accordingly Nicaragua is, *vis-à-vis* the United States, a State accepting "the same obligation" under that Article.

* * *

48. The United States, however, further contends that even if Nicaragua is otherwise entitled to invoke against the United States the jurisdiction of the Court under Article 36, paragraphs 2 and 5, of the Statute, Nicaragua's conduct in relation to the United States over the course of many years estops Nicaragua from doing so. Having, it is argued, represented to the United States that it was not itself bound under the system of the Optional Clause, Nicaragua is estopped from invoking compulsory jurisdiction under that clause against the United States. The United States asserts that since 1943 Nicaragua has consistently represented to the United States of America that Nicaragua was not bound by the Optional Clause, and when the occasion arose that this was material to the United States diplomatic activities, the United States relied upon those Nicaraguan representations.

49. The representations by Nicaragua relied on by the United States were as follows. First, in 1943, the United States Ambassador to Nicaragua consulted the Nicaraguan Foreign Minister on the question whether the Protocol of Signature of the Statute of the Permanent Court had been ratified by Nicaragua. According to a despatch from the Ambassador to Washington, a decree of July 1935 signed by the President of Nicaragua, mentioning the approval of the ratification by the Senate and Chamber of Deputies, was traced, as was a copy of the telegram to the Secretariat of the League of Nations dated 29 November 1939 (see paragraph 16, above). The decree stated that it was to become effective on the date of its publication in *La Gaceta*. The Ambassador informed his Government that:

"The Foreign Minister informs me that the decree was never published in *La Gaceta*. He also declared that there is no record to the instrument of ratification having been transmitted to Geneva. It would appear that, while appropriate legislative action was taken in Nicaragua to approve adherence to the Protocol, Nicaragua is not legally bound thereby, in as much as it did not deposit its official document of ratification with the League of Nations."

According to the United States, the United States and Nicaragua could
only have understood at that point in time that Nicaragua was not bound by the Optional Clause, and that understanding never changed.

50. Secondly, in 1955-1958 there was diplomatic contact between Honduras, Nicaragua and the United States over the dispute which was eventually determined by the Court as the case of the Arbitral Award Made by the King of Spain on 23 December 1906 (I.C.J. Reports 1960, p. 192). One of the questions then under examination was whether Honduras would be entitled to institute proceedings against Nicaragua in reliance upon the 1929 Declaration and Article 36, paragraph 5, of the Statute, and in this connection the Government of Honduras requested the good offices of the Government of the United States. In a conversation between the Nicaraguan Ambassador in Washington and United States officials on 21 December 1955, “reference was made to the fact that the matter had not been previously referred to the Court because Nicaragua had never agreed to submit to compulsory jurisdiction”, and the Ambassador was recorded to have “indicated that an agreement between the two countries would have to be reached to overcome this difficulty”. The United States interprets this as a statement of Nicaragua’s understanding that it was not bound by the Optional Clause. Further, on 2 March 1956 the Ambassador is alleged to have observed that there was

“some doubt as to whether Nicaragua would be officially obligated to submit to the International Court because an instrument of ratification of the Court’s jurisdiction was never sent”.

It is contended that the United States relied on these representations by Nicaragua; the United States has produced documents to support the claims that the entire premise of United States diplomatic efforts was that Nicaragua was not a party to the Optional Clause, and observes that in the eventual proceedings before the Court between Nicaragua and Honduras, Nicaragua manifested its hostility to the compulsory jurisdiction of the Court. Nicaragua has made no direct reply to the United States argument of estoppel, which was only fully developed during the oral proceedings; however, the position of Nicaragua as to its own conduct is, as indicated above, that so far from having represented that it was not bound by the Optional Clause, on the contrary its conduct unequivocally constituted consent to be so bound.

51. For the same reason, the Court does not need to deal at length with the contention based on estoppel. The Court has found that the conduct of Nicaragua, having regard to the very particular circumstances in which it was placed, was such as to evince its consent to be bound in such a way as to constitute a valid mode of acceptance of jurisdiction (paragraph 47, above). It is thus evident that the Court cannot regard the information obtained by the United States in 1943, or the doubts expressed in diplomatic contacts in 1955, as sufficient to overturn that conclusion, let alone to support an estoppel. Nicaragua’s contention that since 1946 it has consistently maintained that it is subject to the jurisdiction of the Court, is supported by substantial evidence. Furthermore, as the Court pointed out in the North Sea Continental Shelf cases (I.C.J. Reports 1969, p. 26), estoppel may be inferred from the conduct, declarations and the like made by a State which not only clearly and consistently evinced acceptance by that State of a particular régime, but also had caused another State or States, in reliance on such conduct, detrimentally to change position or suffer some prejudice. The Court cannot regard Nicaragua’s reliance on the optional clause as in any way contrary to good faith or equity: nor can Nicaragua be taken to come within the criterion of the North Sea Continental Shelf case, and the invocation of estoppel by the United States of America cannot be said to apply to it.

* * *

52. The acceptance of jurisdiction by the United States which is relied on by Nicaragua is, as noted above, that dated 14 August 1946. The United States contends however that effect must also be given to the “1984 notification” – the declaration deposited with the Secretary-General of the United Nations on 6 April 1984. It is conceded by Nicaragua that if this declaration is effective as a modification or termination of the Declaration of 14 August 1946, and valid as against Nicaragua at the date of its filing of the Application instituting the present proceedings (9 April 1984), then the Court is without jurisdiction to entertain those proceedings, at least under Article 36, paragraphs 2 and 5, of the Statute. It is however contended by Nicaragua that the 1984 notification is ineffective because international law provides no basis for unilateral modification of declarations made under Article 36 of the Statute of the Court, unless a right to do so has been expressly reserved.

53. The United States insists that the effect of the 1984 notification was a modification and not a termination of its 1946 Declaration. It argues that, notwithstanding the fact that its 1946 Declaration did not expressly reserve a right of modification (as do the declarations made under Article 36 by a number of other States), the 1984 notification effected a valid modification of the 1946 Declaration temporarily suspending the consent of the United States to the adjudication of the claims of Nicaragua. For the United States, declarations under Article 36 are sui generis, are not treaties, and are not governed by the law of treaties, and States have the sovereign right to qualify an acceptance of the Court’s compulsory jurisdiction, which is an inherent feature of the Optional-Clause system as reflected in, and developed by, State practice. It is suggested that the Court has recognized the existence of an inherent, extra-statutory, right to modify declarations in any manner not inconsistent with the Statute at any time until the date of filing of an Application. The United States also draws attention to the fact that its declaration dates from 1946, since when, it
asserts, fundamental changes have occurred in State practice under the Optional Clause, and argues that to deny a right of modification to a State which had, in such an older declaration, not expressly reserved such a right would be inequitable and unjustified in the light of those changes in State practice.

54. Nicaragua argues further, in the alternative, that the 1984 notification may be construed as a purported termination of the United States Declaration of 1946 and, in effect, the substitution of a new declaration, and that such an attempt at termination is likewise ineffective. As noted in paragraph 13 above, the 1946 Declaration was to remain in force "for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration". Accordingly, if the 1984 notification constituted a termination of the 1946 Declaration (whether or not accompanied in effect by the making of a revised declaration) it could only take effect on 6 October 1984, and was as yet ineffective when the Application of Nicaragua was filed on 9 April 1984. Both Parties apparently recognize that a modification of a declaration which only takes effect after the Court has been validly seized does not affect the Court’s jurisdiction: as the Court found in the Nottebohm case:

"Once the Court has been regularly seized, the Court must exercise its powers, as these are defined in the Statute. After that, the expiry of the period fixed for one of the Declarations on which the Application was founded is an event which is unrelated to the exercise of the powers conferred on the Court by the Statute, which the Court must exercise whenever it has been regularly seized and whenever it has not been shown, on some other ground, that it lacks jurisdiction or that the claim is inadmissible" (I.C.J. Reports 1953, p. 122),

and the same reasoning applies to a supervening withdrawal or modification of a declaration.

55. The first answer given by the United States to this contention of Nicaragua is that the 1984 notification was, on its face, not a "termination", and the six months’ notice proviso was accordingly inapplicable. However, in the view of the United States, even if it be assumed for the sake of argument that the six months’ notice proviso was applicable to the 1984 notification, the modification made by that letter was effective vis-à-vis Nicaragua, even if not effective erga omnes. As already explained, one contention of the United States in relation to its own Declaration of 1946 is that States have a sovereign, inherent, extra-statutory right to modify at any time declarations made under Article 36 of the Statute in any manner not inconsistent with the Statute (paragraph 53, above). Similarly Nicaragua’s 1929 Declaration, being indefinite in duration, not unlimited, is subject to a right of immediate termination, without previous notice by Nicaragua. The United States, on the other hand, while enjoying the inherent right of unilateral modification of its declaration, has bound itself by the proviso in its 1946 Declaration to terminate that declaration only on six months’ notice. On this basis, the United States argues that Nicaragua has not accepted "the same obligation" (for the purposes of Art. 36, para. 2, of the Statute) as the United States six months’ notice proviso, and may not therefore oppose that proviso as against the United States. According to the United States contention, the principles of reciprocity, mutuality and equality of States before the Court permit the United States to exercise the right of termination with the immediate effect implicitly enjoyed by Nicaragua, regardless of the six months’ notice proviso in the United States Declaration. The United States does not claim on this ground to exercise such a right of immediate termination erga omnes, but it does claim to exercise it vis-à-vis Nicaragua.

56. Nicaragua first denies that declarations under Article 36 are always inherently terminable; the general view is said to be that declarations which contain no provision for termination continue in force indefinitely, in contractual terms; the question how far they may be terminable is governed by the principles of the law of treaties applicable to consensual legal relations arising within the system of the Optional Clause. Nicaragua concludes that its declaration was made without limit of time, and that there can be no legal justification for the view that it is subject to unilateral modification. The thesis that Nicaragua has not accepted "the same obligation" as the United States is, Nicaragua suggests, completely baseless. So far as reciprocity is concerned, Nicaragua concludes from its examination of the views of publicists that reciprocity is in hypothesis inapplicable to time-limits, as opposed to express reservations reserving the power to modify or terminate declarations, and that in respect of such express reservations reciprocity can only operate when a specific act of modification or termination is notified by virtue of the express reservation.

57. The terms of the 1984 notification, introducing substantial changes in the United States Declaration of Acceptance of 1946, have been quoted above; they constitute an important element for the development of the Court’s reasoning. The 1984 notification has two salient aspects: on the one hand it states that the 1946 Declaration of acceptance shall not apply to disputes with any Central American State or arising out of or related to events in Central America; on the other hand it states that it is to take effect immediately, notwithstanding the terms of the 1946 Declaration, and is to remain in force for two years.

58. The argument between the Parties as to whether the 1984 notification should be categorized as a modification or as a termination of the 1946 Declaration appears in fact to be without consequence for the purpose of this Judgment. The truth is that it is intended to secure a partial and temporary termination, namely to exempt, with immediate effect, the United States from the obligation to subject itself to the Court’s jurisdiction with regard to any application concerning disputes with Central
American States, and disputes arising out of events in Central America. Counsel for the United States during the hearings claimed that the notification was equally valid against Nicaragua whether it was regarded as a “modification” or as a “termination” of the Acceptance Declaration.

59. Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations. In particular, it may limit its effect to disputes arising after a certain date; or it may specify how long the declaration itself shall remain in force, or what notice (if any) will be required to terminate it. However, the unilateral nature of declarations does not signify that the State making the declaration is free to amend the scope and the contents of its solemn commitments as it pleases. In the Nuclear Tests cases the Court expressed its position on this point very clearly:

“It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become binding according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.” (I.C.J. Reports 1974, p. 267, para. 43; p. 472, para. 46.)

60. In fact, the declarations, even though they are unilateral acts, establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations and time-limit clauses are taken into consideration. In the establishment of this network of engagements, which constitutes the Optional-Clause system, the principle of good faith plays an important role: the Court has emphasized the need in international relations for respect for good faith and confidence in particularly unambiguous terms, also in the Nuclear Tests cases:

“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.” (Ibid., p. 268, para. 46; p. 473, para. 49.)

61. The most important question relating to the effect of the 1984 notification is whether the United States was free to disregard the clause of six months’ notice which, freely and by its own choice, it had appended to its 1946 Declaration. In so doing the United States entered into an obligation which is binding upon it vis-à-vis other States parties to the Optional-Clause system. Although the United States retained the right to modify the contents of the 1946 Declaration or to terminate it, a power which is inherent in any unilateral act of a State, it has, nevertheless assumed an inescapable obligation towards other States accepting the Optional Clause, by stating formally and solemnly that any such change should take effect only after six months have elapsed as from the date of notice.

62. The United States has argued that the Nicaraguan 1929 Declaration, being of undefined duration, is liable to immediate termination, without previous notice, and that therefore Nicaragua has not accepted “the same obligation” as itself for the purposes of Article 36, paragraph 2, and consequently may not rely on the six months’ notice proviso against the United States. The Court does not however consider that this argument entitles the United States validly to act in non-application of the time-limit proviso included in the 1946 Declaration. The notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction. It appears clearly that reciprocity cannot be invoked in order to excuse departure from the terms of a State’s own declaration, whatever its scope, limitations or conditions. As the Court observed in the Interhandel case:

“Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other party. There the effect of reciprocity ends. It cannot justify a State, in this instance, the United States, in relying upon a restriction which the other party, Switzerland, has not included in its own Declaration.” (I.C.J. Reports 1959, p. 23.)

The maintenance in force of the United States Declaration for six months after notice of termination is a positive undertaking, flowing from the time-limit clause, but the Nicaraguan Declaration contains no express restriction at all. It is therefore clear that the United States is not in a position to invoke reciprocity as a basis for its action in making the 1984 notification which purported to modify the content of the 1946 Declaration. On the contrary it is Nicaragua that can invoke the six months’ notice against the United States – not of course on the basis of reciprocity, but because it is an undertaking which is an integral part of the instrument that contains it.

63. Moreover, since the United States purported to act on 6 April 1984 in such a way as to modify its 1946 Declaration with sufficiently immediate effect to bar an Application filed on 9 April 1984, it would be necessary, if
reciprocity is to be relied on, for the Nicaraguan Declaration to be terminable with immediate effect. But the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity. Since Nicaragua has in fact not manifested any intention to withdraw its own declaration, the question of what reasonable period of notice would legally be required does not need to be further examined: it need only be observed that from 6 to 9 April would not amount to a "reasonable time".

64. The Court would also recall that in previous cases in which it has had to examine the reciprocal effect of declarations made under the Optional Clause, it has determined whether or not the "same obligation" was in existence at the moment of seising of the Court, by comparing the effect of the provisions, in particular the reservations, of the two declarations at that moment. The Court is not convinced that it would be appropriate, or possible, to try to determine whether a State against which proceedings had not yet been instituted could rely on a provision in another State's declaration to terminate or modify its obligations before the Court was seised.

The United States argues that the concept of reciprocity, as embodied in Article 36 of the Statute, especially in paragraphs 2 and 3, a meaning that goes beyond the way in which it has been interpreted by the Court, according to its consistent jurisprudence. That jurisprudence supports the view that a determination of the existence of the "same obligation" requires the presence of two parties to a case, and a defined issue between them, which conditions can only be satisfied when proceedings have been instituted. In the case of Right of Passage over Indian Territory, the Court observed that "when a case is submitted to the Court, it is always possible to ascertain what are, at that moment, the reciprocal obligations of the Parties in accordance with their respective Declarations" (I.C.J. Reports 1957, p. 143).

"It is not necessary that the 'same obligation' should be irrevocably defined at the time of the deposit of the Declaration of Acceptance for the entire period of its duration. That expression means no more than that, as between States adhering to the Optional Clause, each and all of them are bound by such identical obligations as may exist at any time during which the Acceptance is mutually binding." (Ibid., p. 144.)

The coincidence or interrelation of those obligations thus remain in a state of flux until the moment of the filing of an application instituting proceedings. The Court has then to ascertain whether, at that moment, the two States accepted "the same obligation" in relation to the subject-matter of the proceedings; the possibility that, prior to that moment, the one enjoyed a wider right to modify its obligation than did the other, is without incidence on the question.

65. In sum, the six months' notice clause forms an important integral part of the United States Declaration and it is a condition that must be complied with in case of either termination or modification. Consequently, the 1984 notification, in the present case, cannot override the obligation of the United States to submit to the compulsory jurisdiction of the Court vis-à-vis Nicaragua, a State accepting the same obligation.

* * *

66. The conclusion just reached renders it unnecessary for the Court to pass upon a further reason advanced by Nicaragua for the ineffectiveness of the 1984 notification. An acceptance of the compulsory jurisdiction of the Court, governed in many respects by the principles of treaty law, cannot, Nicaragua argues, be contracted or varied by a mere letter from the United States Secretary of State. Drawing attention to the provisions of the Constitution of the United States as to the power of making treaties, Nicaragua contends that the 1984 notification is, as a matter of United States law, a nullity, and is equally invalid under the principles of the law of treaties, because it was issued in manifest violation of an internal rule of law of fundamental importance (cf. Art. 46 of the Vienna Convention on the Law of Treaties). However, since the Court has found that, even assuming that the 1984 notification is otherwise valid and effective, its operation remains subject to the six months' notice stipulated in 1946, and hence it is inapplicable in this case, the question of the effect of internal constitutional procedures on the international validity of the notification does not have to be determined.

* * *

67. The question remains to be resolved whether the United States Declaration of 1946, though not suspended in its effects vis-à-vis Nicaragua by the 1984 notification, constitutes the necessary consent of the United States to the jurisdiction of the Court in the present case, taking into account the reservations which were attached to the declaration. Specifically, the United States has invoked proviso (c) to that declaration, which provides that the United States acceptance of the Court's compulsory jurisdiction shall not extend to

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

This reservation will be referred to for convenience as the “multilateral treaty reservation”. Of the two remaining provisos to the declaration, it has not been suggested that proviso (a), referring to disputes the solution of which is entrusted to other tribunals, has any relevance to the present case. As for proviso (b), excluding jurisdiction over “disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America”, the United States has informed the Court that it has determined not to invoke this proviso, but “without prejudice to the rights of the United States under that proviso in relation to any subsequent pleadings, proceedings, or cases before this Court”.

68. The United States points out that Nicaragua relies in its Application on four multilateral treaties, namely the Charter of the United Nations, the Charter of the Organization of American States, the Montevideo Convention on Rights and Duties of States of 26 December 1933, and the Havana Convention on the Rights and Duties of States in the Event of Civil Strife of 20 February 1928. In so far as the dispute brought before the Court is thus one “arising under” those multilateral treaties, since the United States has not specially agreed to jurisdiction here, the Court may, it is claimed, exercise jurisdiction only if all treaty parties affected by a prospective decision of the Court are also parties to the case. The United States explains the rationale of its multilateral treaty reservation as being that it protects the United States and third States from the inherently prejudicial effects of partial adjudication of complex multiparty disputes. Emphasizing that the reservation speaks only of States “affected by” a decision, and not of States having a legal right or interest in the proceedings, the United States identifies, as States parties to the four multilateral treaties above mentioned which would be “affected”, in a legal and practical sense, by adjudication of the claims submitted to the Court, Nicaragua’s three Central American neighbours, Honduras, Costa Rica and El Salvador.

69. The United States recognizes that the multilateral treaty reservation applies in terms only to “disputes arising under a multilateral treaty”, and notes that Nicaragua in its Application asserts also that the United States has “violated fundamental rules of general and customary international law”. However, it is nonetheless the submission of the United States that all the claims set forth in Nicaragua’s Application are outside the jurisdiction of the Court. According to the argument of the United States, Nicaragua’s claims styled as violations of general and customary international law merely restate or paraphrase its claims and allegations based expressly on the multilateral treaties mentioned above, and Nicaragua in its Memorial itself states that its “fundamental contention” is that the conduct of the United States is a violation of the United Nations Charter and the Charter of the Organization of American States. The evidence of customary law offered by Nicaragua consists of General Assembly resolutions that merely reiterate or elucidate the United Nations Charter; nor can the Court determine the merits of Nicaragua’s claims formulated under customary and general international law without interpreting and applying the United Nations Charter and the Organization of American States Charter, and since the multilateral treaty reservation bars adjudication of claims based on those treaties, it bars all Nicaragua’s claims.

70. Nicaragua on the other hand contends that if the multilateral treaty reservation is given its correct interpretation, taking into account in particular the travaux préparatoires leading to the insertion by the United States Senate of the reservation into the draft text of the 1946 Declaration, the reservation cannot preclude jurisdiction over any part of Nicaragua’s Application. According to Nicaragua, the record demonstrates that the reservation is pure surplusage and does not impose any limitation on acceptance of compulsory jurisdiction by the United States. The amendment whereby the reservation was introduced was conceived, intended and enacted to deal with a specific situation: a multiparty suit against the United States that included parties that had not accepted the Court’s compulsory jurisdiction. Nicaragua contends, not that the reservation is a nullity, but that when its meaning is properly understood, it turns out to be redundant. The United States interpretation of the reservation finds no support, according to Nicaragua, in its legislative history, and would establish a thoroughly unworkable standard inasmuch as it would be necessary to ascertain in what circumstances a State not party to a case should be deemed “affected” by the decision which is yet to be taken by the Court. Nicaragua argues that the supposed interests of those States that the United States alleges might be affected by a decision in this case are either non-existent or plainly beyond the scope of any such decision, and that the communications sent by those States to the Court fail to establish that they would be so affected.

71. Furthermore, Nicaragua denies that its claims based on customary law are no more than paraphrases of its allegations of violation of the United Nations Charter, and emphasizes that the same facts may justify invocation of distinct causes of action. Specifically, the provisions of the United Nations Charter relating to the use of force by States, while they may still rank as provisions of a treaty for certain purposes, are now within
the realm of general international law and their applicability is not a question exclusively of interpreting a multilateral treaty. The law relating to the use of force is not contained wholly in the Charter, and in the practice of States claims of State responsibility involving violence may be and frequently are formulated without relying on the Charter. Accordingly, Nicaragua submits that the multilateral treaty reservation, even if it has any relevance or validity, has no application to the claims of Nicaragua based upon customary international law.

72. The multilateral treaty reservation in the United States Declaration has some obscure aspects, which have been the subject of comment since its making in 1946. There are two interpretations of the need for the presence of the parties to the multilateral treaties concerned in the proceedings before the Court as a condition for the validity of the acceptance of the compulsory jurisdiction by the United States. It is not clear whether what are “affected”, according to the terms of the proviso, are the treaties themselves or the parties to them. Similar reservations to be found in certain other declarations of acceptance, such as those of India, El Salvador and the Philippines, refer clearly to “all parties” to the treaties. The phrase “all parties to the treaty affected by the decision” is at the centre of the present doubts. The United States interprets the reservation in the present case as referring to the States parties affected by the decision of the Court, merely mentioning the alternative interpretation, whereby it is the treaty which is “affected”, so that all parties to the treaty would have to be before the Court, as “an a fortiori case”. This latter interpretation need not therefore be considered. The argument of the United States relates specifically to El Salvador, Honduras and Costa Rica, the neighbour States of Nicaragua, which allegedly would be affected by the decision of the Court.

73. It may first be noted that the multilateral treaty reservation could not bar adjudication by the Court of all Nicaragua’s claims, because Nicaragua, in its Application, does not confine those claims only to violations of the four multilateral conventions referred to above (paragraph 68). On the contrary, Nicaragua invokes a number of principles of customary and general international law that, according to the Application, have been violated by the United States. The Court cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated. Therefore, since

the claim before the Court in this case is not confined to violation of the multilateral conventional provisions invoked, it would not in any event be barred by the multilateral treaty reservation in the United States 1946 Declaration.

74. The Court would observe, further, that all three States have made declarations of acceptance of the compulsory jurisdiction of the Court, and are free, at any time, to come before the Court, on the basis of Article 36, paragraph 2, with an application instituting proceedings against Nicaragua – a State which is also bound by the compulsory jurisdiction of the Court by an unconditional declaration without limit of duration –, if they should find that they might be affected by the future decision of the Court. Moreover, these States are also free to resort to the incidental proceedings of intervention under Articles 62 and 63 of the Statute, to the second of which El Salvador has already unsuccessfully resorted in the jurisdictional phase of the proceedings, but to which it may revert in the merits phase of the case. There is therefore no question of these States being defenceless against any consequences that may arise out of adjudication by the Court, or of their needing the protection of the multilateral treaty reservation of the United States.

75. The United States Declaration uses the word “affected”, without making it clear who is to determine whether the States referred to are, or are not, affected. The States themselves would have the choice of either instituting proceedings or intervening for the protection of their interests, so far as these are not already protected by Article 59 of the Statute. As for the Court, it is only when the general lines of the judgment to be given become clear that the States “affected” could be identified. By way of example we may take the hypothesis that if the Court were to decide to reject the Application of Nicaragua on the facts, there would be no third State’s claim to be affected. Certainly the determination of the States “affected” could not be left to the parties but must be made by the Court.

76. At any rate, this is a question concerning matters of substance relating to the merits of the case: obviously the question of what States may be “affected” by the decision on the merits is not in itself a jurisdictional problem. The present phase of examination of jurisdictional questions was opened by the Court itself by its Order of 10 May 1984, not by a formal preliminary objection submitted by the United States; but it is appropriate to consider the grounds put forward by the United States for alleged lack of jurisdiction in the light of the procedural provisions for such objections. That being so, and since the procedural technique formerly available of joinder of preliminary objections to the merits has been done away with since the 1972 revision of the Rules of Court, the Court has no choice but to avail itself of Article 79, paragraph 7, of the present Rules of Court, and declare that the objection based on the multilateral treaty reservation of the States Declaration of Acceptance does not possess, in the circumstances of the case, an exclusively preliminary character, and that consequently it does not constitute an obstacle for the Court
to entertain the proceedings instituted by Nicaragua under the Application of 9 April 1984.

***

77. It is in view of this finding on the United States multilateral treaty reservation that the Court has to turn to the other ground of jurisdiction relied on by Nicaragua, even though it is prima facie narrower in scope than the jurisdiction deriving from the declarations of the two Parties under the Optional Clause. As noted in paragraphs 1 and 12 above, Nicaragua in its Application relies on the declarations of the Parties accepting the compulsory jurisdiction of the Court in order to found jurisdiction, but in its Memorial it invokes also a 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States as a complementary foundation for the Court’s jurisdiction. Since the multilateral treaty reservation obviously does not affect the jurisdiction of the Court under the 1956 Treaty, it is appropriate to ascertain the existence of such jurisdiction, limited as it is.

78. The United States objects to this invocation of a jurisdictional basis not specified in the Application instituting proceedings: it argues that in proceedings instituted by means of an application, the jurisdiction of the Court is founded upon the legal grounds specified in that application. An Applicant is not permitted, in the view of the United States, to assert in subsequent pleadings jurisdictional grounds of which it was presumably aware at the time it filed its Application. While Nicaragua in its Application purports to reserve the right to amend that Application, and invokes that reservation to justify adding an alternative jurisdictional basis, the United States contends that it is ineffective, as it cannot alter the requirements of the Statute and Rules of Court.

79. Nicaragua has not advanced any arguments to refute the United States contention that the belated invocation of the 1956 Treaty is impermissible. During the oral proceedings the Agent of Nicaragua merely explained that in order to respect the Court’s indications regarding the necessity of being as concise as possible, Nicaragua had omitted from the oral arguments presented on its behalf a number of arguments developed in the Memorial, and still asserted by Nicaragua. The Agent stated that Nicaragua does maintain that the 1956 Treaty constitutes a “subsidiary basis” for the Court’s jurisdiction in the present proceedings, and the final submissions of Nicaragua incorporated by reference Submission D in the Memorial of Nicaragua, asserting jurisdiction under the Treaty.

80. The Court considers that the fact that the 1956 Treaty was not invoked in the Application as a title of jurisdiction does not in itself constitute a bar to reliance being placed upon it in the Memorial. Since the Court must always be satisfied that it has jurisdiction before proceeding to examine the merits of a case, it is certainly desirable that “the legal grounds upon which the jurisdiction of the Court is said to be based” should be indicated at an early stage in the proceedings, and Article 38 of the Rules of Court therefore provides for these to be specified “as far as possible” in the application. An additional ground of jurisdiction may however be brought to the Court’s attention later, and the Court may take it into account provided the Applicant makes it clear that it intends to proceed upon that basis (Certain Norwegian Loans, I.C.J. Reports 1957, p. 25), and provided also that the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character (Société Commerciale de Belgique, P.C.I.J., Series A/B, No. 78, p. 173). Both these conditions are satisfied in the present case.

81. Article XXIV, paragraph 2, of the Treaty of Friendship, Commerce and Navigation between the United States of America and Nicaragua, signed at Managua on 21 January 1956, reads as follows:

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

The treaty entered into force on 24 May 1958 on exchange of ratifications: it was registered with the Secretariat of the United Nations by the United States on 11 July 1960. The provisions of Article XXIV, paragraph 2, are in terms which are very common in bilateral treaties of amity or of establishment, and the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court in the absence of agreement to employ some other pacific means of settlement (cf. United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 27, para. 52). In the present case, the United States does not deny either that the Treaty is in force, or that Article XXIV is in general capable of conferring jurisdiction on the Court. It contends however that if the basis of jurisdiction is limited to the Treaty, since Nicaragua’s Application presents no claims of any violations of it, there are no claims properly before the Court for adjudication. In order to establish the Court’s jurisdiction over the present dispute under the Treaty, Nicaragua must establish a reasonable connection between the Treaty and the claims submitted to the Court; but according to the United States, Nicaragua cannot establish such a connection. Furthermore, the United States has drawn attention to the reference in Article XXIV to disputes “not satisfactorily adjusted by diplomacy”, and argues that an attempt so to adjust the dispute is thus a prerequisite of its submission to the Court. Since, according to the United States, Nicaragua has never even raised in negotiations with the United States the application or interpretation of the Treaty to any of the factual or legal allegations in its Application, Nicaragua has
failed to satisfy the Treaty’s own terms for invoking the compromissory clause.

82. Nicaragua in its Memorial submits that the 1956 Treaty has been and was being violated by the military and paramilitary activities of the United States in and against Nicaragua, as described in the Application; specifically, it is submitted that these activities directly violate the following Articles:

Article XIX: providing for freedom of commerce and navigation, and for vessels of either party to have liberty “to come with their cargoes to all ports, places and waters of such other party open to foreign commerce and navigation”, and to be accorded national treatment and most-favored-nation treatment within those ports, places and waters.

Article XIV: forbidding the imposition of restrictions or prohibitions on the importation of any product of the other party, or on the exportation of any product to the territories of the other party.

Article XVII: forbidding any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either party.

Article XX: providing for freedom of transit through the territories of each party.

Article I: providing that each party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other party.

83. Taking into account these Articles of the Treaty of 1956, particularly the provision in, inter alia, Article XIX, for the freedom of commerce and navigation, and the references in the Preamble to peace and friendship, there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, inter alia, as to the “interpretation or application” of the Treaty. That dispute is also clearly one which is not “satisfactorily adjusted by diplomacy” within the meaning of Article XXIV of the 1956 Treaty (cf. United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, pp. 26-28, paras. 50 to 54). In the view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceed-

ings based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed,

“the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned” (Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.J., Series A, No. 6, p. 14).

Accordingly, the Court finds that, to the extent that the claims in Nicaragua’s Application constitute a dispute as to the interpretation or the application of the Articles of the Treaty of 1956 described in paragraph 82 above, the Court has jurisdiction under that Treaty to entertain such claims.

* * *

84. The Court now turns to the question of the admissibility of the Application of Nicaragua. The United States of America contends in its Counter-Memorial that Nicaragua’s Application is inadmissible on five separate grounds, each of which, it is said, is sufficient to establish such inadmissibility, whether considered as a legal bar to adjudication or as “a matter requiring the exercise of prudential discretion in the interest of the integrity of the judicial function”. Some of these grounds have in fact been presented in terms suggesting that they are matters of competence or jurisdiction rather than admissibility, but it does not appear to be of critical importance how they are classified in this respect. These grounds will now be examined; but for the sake of clarity it will first be convenient to recall briefly what are the allegations of Nicaragua upon which it bases its claims against the United States.

85. In its Application instituting proceedings, Nicaragua asserts that:

“The United States of America is using military force against Nicaragua and intervening in Nicaragua’s internal affairs, in violation of Nicaragua’s sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law. The United States has created an ‘army’ of more than 10,000 mercenaries ... installed them in more than ten base camps in Honduras along the border with Nicaragua, trained them, paid them, supplied them with arms, ammunition, food and medical supplies, and directed their attacks against human and economic targets inside Nicaragua”,

and that Nicaragua has already suffered and is now suffering grievous consequences as a result of these activities. The purpose of these activities is claimed to be

“to harass and destabilize the Government of Nicaragua so that ultimately it will be overthrown, or, at a minimum, compelled to change those of its domestic and foreign policies that displease the United States”.

40
86. The first ground of inadmissibility relied on by the United States is that Nicaragua has failed to bring before the Court parties whose presence and participation is necessary for the rights of those parties to be protected and for the adjudication of the issues raised in the Application. The United States first asserts that adjudication of Nicaragua’s claim would necessarily implicate the rights and obligations of other States, in particular those of Honduras, since it is alleged that Honduras has allowed its territory to be used as a staging ground for unlawful uses of force against Nicaragua, and the adjudication of Nicaragua’s claims would necessarily involve the adjudication of the rights of third States with respect to measures taken to protect themselves, in accordance with Article 51 of the United Nations Charter, against unlawful uses of force employed, according to the United States, by Nicaragua. Secondly, it is claimed by the United States that it is fundamental to the jurisprudence of the Court that it cannot determine the rights and obligations of States without their express consent or participation in the proceedings before the Court. Nicaragua questions whether the practice of the Court supports the contention that a case cannot be allowed to go forward in the absence of “indispensable parties”, and emphasizes that in the present proceedings Nicaragua asserts claims against the United States only, and not against any other State, so that the Court is not required to exercise jurisdiction over any such State. Nicaragua’s Application does not put in issue the right of a third State to receive military or economic assistance from the United States (or from any other source). As another basis for the indispensable status of third States, the United States contends that facts concerning relevant activities by or against them may not be in the possession or control of a Party. Nicaragua refers to the powers of the Court under Article 44 of the Statute and Article 66 of the Rules of Court, and observes that it would be in the third States’ interest to provide the United States with factual material under their control.

87. This contention was already raised by the United States at the stage of the proceedings on the request for provisional measures when it argued that “the other States of Central America have stated their view that Nicaragua’s request for the indication of provisional measures directly implicates their rights and interests, and that an indication of such measures would interfere with the Contadora negotiations. These other Central American States are indispensable parties in whose absence this Court cannot properly proceed.” (I.C.J. Reports 1984, p. 184, para. 35.)

The United States then referred to communications addressed to the Court by the Governments of Costa Rica and El Salvador, and a telex message to the United Nations Secretary-General addressed by the Government of Honduras which, according to the United States, “make it quite clear that Nicaragua’s claims are inextricably linked to the rights and interests of those other States”, and added “Any decision to indicate the interim measures requested, or a decision on the merits, would necessarily affect the rights of States not party to the proceedings” (ibid.). It should be pointed out, however, that in none of the communications from the three States mentioned by the United States was there any indication of an intention to intervene in the proceedings before the Court between Nicaragua and the United States of America, and one (Costa Rica) made it abundantly clear that it was not to be regarded as indicating such an intention. At a later date El Salvador did of course endeavour to intervene.

88. There is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning Monetary Gold Removed from Rome in 1943, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings “would not only be affected by a decision, but would form the very subject-matter of the decision” (I.C.J. Reports 1954, p. 32). Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and 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.

89. Secondly, the United States regards the Application as inadmissible because each of Nicaragua’s allegations constitutes no more than a reformulation and restatement of a single fundamental claim, that the United States is engaged in an unlawful use of armed force, or breach of the peace, or acts of aggression against Nicaragua, a matter which is committed by the Charter and by practice to the competence of other organs, in particular the United Nations Security Council. All allegations of this kind are confined to the political organs of the Organization for consideration and determination; the United States quotes Article 24 of the Charter, which confers upon the Security Council “primary responsibility for the maintenance of international peace and security”. The provisions of the Charter
dealing with the ongoing use of armed force contain no recognition of the possibility of settlement by judicial, as opposed to political, means. Under Article 52 of the Charter there is also a commitment of responsibility for the maintenance of international peace and security to regional agencies and arrangements, and in the view of the United States the Contadora process is precisely the sort of regional arrangement or agency that Article 52 contemplates.

90. Nicaragua contends that the United States argument fails to take account of the fundamental distinction between Article 2, paragraph 4, of the Charter which defines a legal obligation to refrain from the threat or use of force, and Article 39, which establishes a political process. The responsibility of the Security Council under Article 24 of the Charter for the maintenance of international peace and security is “primary”, not exclusive. Until the Security Council makes a determination under Article 39, a dispute remains to be dealt with by the methods of peaceful settlement provided under Article 33, including judicial settlement; and even after a determination under Article 39, there is no necessary inconsistency between Security Council action and adjudication by the Court. From a jurisdictional standpoint, the decisions of the Court and the actions of the Security Council are entirely separate.

91. It will be convenient to deal with this alleged ground of inadmissibility together with the third ground advanced by the United States namely that the Court should hold the Application of Nicaragua to be inadmissible in view of the subject-matter of the Application, and the position of the Court within the United Nations system, including the impact of proceedings before the Court on the ongoing exercise of the “inherent right of individual or collective self-defence” under Article 51 of the Charter. This is, it is argued, a reason why the Court may not properly exercise “subject-matter jurisdiction” over Nicaragua’s claims. Under this head, the United States repeats its contention that the Nicaraguan Application requires the Court to determine that the activities complained of constitute a threat to the peace, a breach of the peace, or an act of aggression, and proceeds to demonstrate that the political organs of the United Nations, to which such matters are entrusted by the Charter, have acted, and are acting, in respect of virtually identical claims placed before them by Nicaragua. The United States points to the approach made by Nicaragua to the Security Council on 4 April 1984, a few days before the institution of the present proceedings: the draft resolution then presented, corresponding to the claims submitted by Nicaragua to the Court, failed to achieve the requisite majority under Article 27, paragraph 3, of the Charter. However, this fact, it is argued, and the perceived likelihood that similar claims in future would fail to secure the required majority, does not vest the Court with subject-matter jurisdiction over the Application. Since Nicaragua’s Application in effect asks the Court for a judgment in all material respects identical to the decision which the Security Council did not take, it amounts to an appeal to the Court from an adverse consid-
eration in the Security Council. Furthermore, in order to reach a determination on what amounts to a claim of aggression the Court would have to decide whether the actions of the United States, and the other States not before the Court, are or are not unlawful: more specifically, it would have to decide on the application of Article 51 of the Charter, concerning the right of self-defence. Any such action by the Court cannot be reconciled with the terms of Article 51, which provides a role in such matters only for the Security Council. Nor would it be only in case of a decision by the Court that the inherent right of self-defence would be impaired: the fact that such claims are being subjected to judicial examination in the midst of the conflict that gives rise to them may alone be sufficient to constitute such impairment.

92. Nicaragua observes in this connection that there is no generalized right of self-defence: Article 51 of the Charter refers to the inherent right of self-defence “if an armed attack occurs against a Member of the United Nations”. The factual allegations made against Nicaragua by the United States, even if true, fall short of an “armed attack” within the meaning of Article 51. While that Article requires that actions under it “must be immediately reported to the Security Council” — and no such report has been made — it does not support the claim that the question of the legitimacy of actions assertedly taken in self-defence is committed exclusively to the Security Council. The argument of the United States as to the powers of the Security Council and of the Court is an attempt to transfer municipal-law concepts of separation of powers to the international plane, whereas these concepts are not applicable to the relations among international institutions for the settlement of disputes.

93. The United States is thus arguing that the matter was essentially one for the Security Council since it concerned a complaint by Nicaragua involving the use of force. However, having regard to the United States Diplomatic and Consular Staff in Tehran case, the Court is of the view that the fact that a matter is before the Security Council should not prevent it being dealt with by the Court and that both proceedings could be pursued pari passu. In that case the Court held:

“In the preamble to this second resolution the Security Council expressly took into account the Court’s Order of 15 December 1979 indicating provisional measures; and it does not seem to have occurred to any member of the Council that there was or could be anything irregular in the simultaneous exercise of their respective functions by the Court and the Security Council. Nor is there in this any cause for surprise.” (I.C.J. Reports 1980, p. 21, para. 40.)

The Court in fact went further, to say:

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

"In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court." *(I.C.J. Reports 1980, p. 22, para. 40.)*

94. The United States argument is also founded on a construction, which the Court is unable to share, of Nicaragua’s complaint about the United States use, or threat of the use, of force against its territorial integrity and national independence, in breach of Article 2, paragraph 4, of the United Nations Charter. The United States argues that Nicaragua has thereby invoked a charge of aggression and armed conflict envisaged in Article 39 of the United Nations Charter, which can only be dealt with by the Security Council in accordance with the provisions of Chapter VII of the Charter, and not in accordance with the provisions of Chapter VI. This presentation of the matter by the United States treats the present dispute between Nicaragua and itself as a case of armed conflict which must be dealt with only by the Security Council and not by the Court which, under Article 2, paragraph 4, and Chapter VI of the Charter, deals with pacific settlement of all disputes between member States of the United Nations. But, if so, it has to be noted that, while the matter has been discussed in the Security Council, no notification has been given to it in accordance with Chapter VII of the Charter, so that the issue could be tabled for full discussion before a decision were taken for the necessary enforcement measures to be authorized. It is clear that the complaint of Nicaragua is not about an ongoing armed conflict between it and the United States, but one requiring, and indeed demanding, the peaceful settlement of disputes between the two States. Hence, it is properly brought before the principal judicial organ of the Organization for peaceful settlement.

95. It is necessary to emphasize that Article 24 of the Charter of the United Nations provides that:

"In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security..."

The Charter accordingly does not confer exclusive responsibility upon the Security Council for the purpose. While in Article 12 there is a provision for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendations with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.

96. It must also be remembered that, as the *Corfu Channel case* *(I.C.J. Reports 1949, p. 4)* shows, the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force. The Court was concerned with a question of a "demonstration of force" *(cf. loc. cit., p. 31)* or "violation of a country’s sovereignty" *(ibid.)*; the Court, indeed, found that

"Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself." *(Ibid., p. 35.)*

What is also significant is that the Security Council itself in that case had "undoubtedly intended that the whole dispute should be decided by the Court" *(p. 26).*

97. It is relevant also to observe that while the United States is arguing today that because of the alleged ongoing armed conflict between the two States the matter could not be brought to the International Court of Justice but should be referred to the Security Council, in the 1950s the United States brought seven cases to the Court involving armed attacks by military aircraft of other States against United States military aircraft; the only reason the cases were not dealt with by the Court was that each of the Respondent States indicated that it had not accepted the jurisdiction of the Court, and was not willing to do so for the purposes of the case. The United States did not contradict Nicaragua’s argument that the United States indeed brought these suits against the Respondents in this Court, rather than in the Security Council. It has argued further that in both the *Corfu Channel case* and the *Aerial Incident cases,* the Court was asked to adjudicate the rights and duties of the parties with respect to a matter that was fully in the past. To a considerable extent this is a question relevant to the fourth ground of inadmissibility advanced by the United States, to be examined below. However the United States also contends that the *Corfu Channel case,* at least, shows that it was the fact that the incident in question was not part of an ongoing use of armed force that led the Security Council to conclude that its competence was not engaged. In the view of the Court, this argument is not relevant.
98. Nor can the Court accept that the present proceedings are objectionable as being in effect an appeal to the Court from an adverse decision of the Security Council. The Court is not asked to say that the Security Council was wrong in its decision, nor that there was anything inconsistent with law in the way in which the members of the Council employed their right to vote. The Court is asked to pass judgment on certain legal aspects of a situation which has also been considered by the Security Council, a procedure which is entirely consonant with its position as the principal judicial organ of the United Nations. As to the inherent right of self-defence, the fact that it is referred to in the Charter as a “right” is indicative of a legal dimension; if in the present proceedings it becomes necessary for the Court to judge in this respect between the Parties — for the rights of no other State may be adjudicated in these proceedings — it cannot be debarred from doing so by the existence of a procedure for the States concerned to report to the Security Council in this connection.

* *

99. The fourth ground of inadmissibility put forward by the United States is that the Application should be held inadmissible in consideration of the inability of the judicial function to deal with situations involving ongoing conflict. The allegation, attributed by the United States to Nicaragua, of an ongoing conflict involving the use of armed force contrary to the Charter is said to be central to, and inseparable from, the Application as a whole, and is one with which a court cannot deal effectively without overstepping proper judicial bounds. The resort to force during ongoing armed conflict lacks the attributes necessary for the application of the judicial process, namely a pattern of legally relevant facts discernible by the means available to the adjudicating tribunal, establishable in conformity with applicable norms of evidence and proof, and not subject to further material evolution during the course of, or subsequent to, the judicial proceedings. It is for reasons of this nature that ongoing armed conflict must be entrusted to resolution by political processes. The situation alleged in the Nicaraguan Application, in particular, cannot be judicially managed or resolved; continuing practical guidance to the Parties in respect of the measures required of them is critical to the effective control of situations of armed conflict such as is there alleged to exist. But the Court has, it is said, recognized that giving such practical guidance to the Parties lies outside the scope of the judicial function. The United States does not argue that the Application must be dismissed because it presents a “political” question rather than a “legal” question, but rather that an allegation of an ongoing use of unlawful armed force was never intended by the drafters of the Charter to be encompassed by Article 36, paragraph 2, of the Statute. It is also recalled that the circumstances alleged in the Application involve the activities of “groups indigenous to Nicaragua” that have their own motivations and are beyond the control of any State. The United States emphasizes, however, that to conclude that the Court cannot adjudicate the merits of the complaints alleged does not require the conclusion that international law is neither directly relevant nor of fundamental importance in the settlement of international disputes, but merely that in this respect the application of international legal principles is the responsibility of other organs set up under the Charter.

100. Nicaragua contends that, inasmuch as the United States questions whether the Court would have at its disposal vital evidence necessary to resolve the dispute, the problem is not so much the nature of the dispute as the willingness of the Respondent fully to inform the Court about the activities of which it is accused. Nicaragua also points to the Corfu Channel case as showing, as the Court has noted above (paragraph 96), that the Court does exercise its judicial functions in situations of armed conflict. The Court will decide in the light of the evidence produced by the Parties, and enjoys considerable powers in the obtaining of evidence. Nicaragua disputes that the judicial function, being governed by the principle of res judicata, is “inherently retrospective”, and therefore inapplicable to a fluid situation. Nicaragua concedes that a judgment delivered by the Court must be capable of execution, but points out that such a judgment does not by itself resolve — and is not intended to resolve — all the difficulties between the parties. The Court is not being asked to bring an armed conflict to an end by nothing more than the power of words.

101. The Court is bound to observe that any judgment on the merits in the present case will be limited to upholding such submissions of the Parties as have been supported by sufficient proof of relevant facts, and are regarded by the Court as sound in law. A situation of armed conflict is not the only one in which evidence of fact may be difficult to come by, and the Court has in the past recognized and made allowance for this (Corfu Channel, I.C.J. Reports 1949, p. 18; United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 10, para. 13). Ultimately, however, it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not to be ruled out as inadmissible in limine on the basis of an anticipated lack of proof. As to the possibility of implementation of the judgment, the Court will have to assess this question also on the basis of each specific submission, and in the light of the facts as then established; it cannot at this stage rule out a priori any judicial contribution to the settlement of the dispute by declaring the Application inadmissible. It should be observed however that the Court “never can nor should contemplate the contingency of the judgment not being complied with” (Factory at Chorzów, P.C.I.J., Series A, No. 17, p. 63). Both the Parties have undertaken to comply with the decisions of the Court, under Article 94 of the Charter; and

“Once the Court has found that a State has entered into a com-
mitment concerning its future conduct it is not the Court’s function to contemplate that it will not comply with it.” (Nuclear Tests, I.C.J. Reports 1974, p. 272, para. 60; p. 477, para. 63.)

*  

102. The fifth and final contention of the United States under this head is that the Application should be held inadmissible because Nicaragua has failed to exhaust the established processes for the resolution of the conflicts occurring in Central America. In the contention of the United States, the Contadora process, to which Nicaragua is party, is recognized both by the political organs of the United Nations and by the Organization of American States, as the appropriate method for the resolution of the issues of Central America. That process has achieved agreement among the States of the region, including Nicaragua, on aims which go to the very hear of the claims and issues raised by the Application. The United States repeats its contention (paragraph 89, above) that the Contadora process is a “regional arrangement” within the meaning of Article 52, paragraph 2, of the Charter, and contends that under that Article, Nicaragua is obliged to make every effort to achieve a solution to the security problems of Central America through the Contadora process. The exhaustion of such regional processes is laid down in the Charter as a precondition to the reference of a dispute to the Security Council only, in view of its primary responsibility in this domain, but such a limitation must a fortiori apply with even greater force with respect to the Court, which has no specific responsibility under the Charter for dealing with such matters. Nicaragua, it is claimed, under a similar obligation under Articles 20 and 21 of the Charter of the Organization of American States. Furthermore, Nicaragua is asking the Court to adjudicate only certain of the issues involved in the Contadora process, and this would have the inevitable effect of rendering those issues largely immune to further adjustment in the course of the negotiations, thus disrupting the balance of the negotiating process. The Nicaraguan Application is incompatible with the Contadora process and, given the commitment of both Parties to that process, the international endorsement of it, and its comprehensive, integrated nature, the Court should, it is contended, refrain from adjudicating the merits of the Nicaraguan allegations and hold the Application to be inadmissible.

103. Nicaragua points out that the United States is not taking part in the Contadora process, and cannot shelter behind negotiations between third States in a forum in which it is not participating. The support given by the international community to the Contadora process does not constitute an obstacle to the exercise by the Court of its jurisdiction; and the United Nations Charter and the Charter of the Organization of American States do not require the exhaustion of prior regional negotiations. In reply to this objection of the United States as well as to the third ground of inadmissibility (paragraphs 91 et seq., above), Nicaragua emphasizes the parallel competence of the political organs of the United Nations. The Court may pronounce on a dispute which is examined by other political organs of the United Nations, for it exercises different functions.

104. This issue also was raised at the stage of the request by Nicaragua for provisional measures, when the Court noted that

“The United States notes that the allegations of the Government of Nicaragua comprise but one facet of a complex of interrelated political, social, economic and security matters that confront the Central American region. Those matters are the subject of a regional diplomatic effort, known as the ‘Contadora Process’, which has been endorsed by the Organization of American States, and in which the Government of Nicaragua participates.” (I.C.J. Reports 1984, p. 183, para. 33.)

To this Nicaragua then replied that, while it was

“actively participating in the Contadora Process, and will continue to do so, our legal claims against the United States cannot be resolved, or even addressed, through that Process” (ibid., p. 185, para. 38).

Nicaragua further denied that the present proceedings could prejudice the legitimate rights of any other States or disrupt the Contadora Process, and referred to previous decisions of the Court as establishing the principle that the Court is not required to decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects and that the Court should not decline its essentially judicial task merely because the question before the Court is intertwined with political questions.

105. On this latter point, the Court would recall that in the United States Diplomatic and Consular Staff in Tehran case it stated:

“The Court, at the same time, pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important.” (I.C.J. Reports 1980, p. 19, para. 36.)

And, a little later, added:

“Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court’s functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and
unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.” (I.C.J. Reports 1980, p. 20, para. 37.)

106. With regard to the contention of the United States of America that the matter raised in the Nicaraguan Application was part of the Contadora Process, the Court considers that even the existence of active negotiations in which both parties might be involved should not prevent both the Security Council and the Court from exercising their separate functions under the Charter and the Statute of the Court. It may further be recalled that in the Aegaean Sea Continental Shelf case the Court said:

“The Turkish Government’s attitude might thus be interpreted as suggesting that the Court ought not to proceed with the case while the parties continue to negotiate and that the existence of active negotiations in progress constitutes an impediment to the Court’s exercise of jurisdiction in the present case. The Court is unable to share this view. Negotiation and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes. The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued pari passu. Several cases, the most recent being that concerning the Trial of Pakistani Prisoners of War (I.C.J. Reports 1973, p. 347), show that judicial proceedings may be discontinued when such negotiations result in the settlement of the dispute. Consequently, the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function.” (I.C.J. Reports 1978, p. 12, para. 29.)

107. The Court does not consider that the Contadora process, whatever its merits, can properly be regarded as a “regional arrangement” for the purposes of Chapter VIII of the Charter of the United Nations. Furthermore, it is also important always to bear in mind that all regional, bilateral, and even multilateral, arrangements that the Parties to this case may have made, touching on the issue of settlement of disputes or the jurisdiction of the International Court of Justice, must be made always subject to the provisions of Article 103 of the Charter which reads as follows:

“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

108. In the light of the foregoing, the Court is unable to accept either that there is any requirement of prior exhaustion of regional negotiating processes as a precondition to seising the Court; or that the existence of the Contadora process constitutes in this case an obstacle to the examination by the Court of the Nicaraguan Application and judicial determination in due course of the submissions of the Parties in the case. The Court is therefore unable to declare the Application inadmissible, as requested by the United States, on any of the grounds it has advanced as requiring such a finding.

* * *

109. The Court thus has found that Nicaragua, as authorized by the second paragraph of Article 36 of the Statute of the Permanent Court of International Justice, made, on 24 September 1929, following its signature of the Protocol to which the Statute was adjoined, an unconditional Declaration recognizing the compulsory jurisdiction of the Permanent Court, in particular without conditions as to ratification and without limit of time, though it has not been established that the instrument of ratification of that Protocol ever reached the Secretariat of the League. Nevertheless, the Court has not been convinced by the arguments addressed to it that the absence of such formality excluded the operation of Article 36, paragraph 5, of the Statute of the present Court, and prevented the transfer to the present Court of the Declaration as a result of the consent thereto given by Nicaragua which, having been represented at the San Francisco Conference, signed and ratified the Charter and thereby accepted the Statute in which Article 36, paragraph 5, appears. It has also found that the constant acquiescence of Nicaragua in affirmations, to be found in United Nations and other publications, of its position as bound by the optional clause constitutes a valid manifestation of its intent to recognize the compulsory jurisdiction of the Court.

110. Consequently, the Court finds that the Nicaraguan Declaration of 24 September 1929 is valid, and that Nicaragua accordingly was, for the purposes of Article 36, paragraph 2, of the Statute of the Court, a “State accepting the same obligation” as the United States of America at the date of filing of the Application, so as to be able to rely on the United States Declaration of 26 August 1946. The Court also finds that despite the United States notification of 6 April 1984, the present Application is not excluded from the scope of the acceptance by the United States of America of the compulsory jurisdiction of the Court. Accordingly the Court finds that the two Declarations do afford a basis for the jurisdiction of the Court.

111. Furthermore, it is quite clear for the Court that, on the basis alone of the Treaty of Friendship, Commerce and Navigation of 1956, Nicaragua and the United States of America are bound to accept the compulsory jurisdiction of this Court over claims presented by the Application of Nicaragua in so far as they imply violations of provisions of this treaty.

* * *
112. In its above-mentioned Order of 10 May 1984, the Court indicated provisional measures “pending its final decision in the proceedings instituted on 9 April 1984 by the Republic of Nicaragua against the United States of America”. It follows that the Order of 10 May 1984, and the provisional measures indicated therein, remain operative until the delivery of the final judgment in the present case.

* * *

113. For these reasons,

THE COURT,

(1) (a) finds, by eleven votes to five, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court;

IN FAVOUR: President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Ruda, El-Khani, de Lacharrière, Mbaye, Bedjaoui; Judge ad hoc Colliard;

AGAINST: Judges Mosler, Oda, Ago, Schwebel and Sir Robert Jennings.

(b) finds, by fourteen votes to two, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, in so far as that Application relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956, on the basis of Article XXIV of that Treaty;

IN FAVOUR: President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; Judge ad hoc Colliard;

AGAINST: Judges Ruda and Schwebel.

(c) finds, by fifteen votes to one, that it has jurisdiction to entertain the case;

IN FAVOUR: President Elias; Vice-President Sette-Camara; Judges Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Oda, Ago, El-Khani, Sir Robert Jennings, de Lacharrière, Mbaye, Bedjaoui; Judge ad hoc Colliard;

AGAINST: Judge Schwebel.

(2) finds, unanimously, that the said Application is admissible.

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

(Signed) Taslim O. Elias,
President.

(Signed) Santiago Torres Bernárdez,
Registrar.


Judge Schwebel appends a dissenting opinion to the Judgment of the Court.

(Initialled) T.O.E.

(Initialled) S.T.B.
International Court of Justice

Legality of the Threat or Use of Nuclear Weapons
Advisory Opinion

_I.C.J. Reports 1996_
Official citation:

Legality of the Threat or Use of Nuclear Weapons,

Mode officiel de citation:

Licéité de la menace ou de l'emploi d'armes nucléaires,
avis consultatif, C.I.J. Recueil 1996, p. 226

---

LEGALITY OF THE THREAT OR USE
OF NUCLEAR WEAPONS

ADVISORY OPINION OF 8 JULY 1996

ICJ 1996

1996

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARÊTES

AVIS CONSULTATIFS ET ORDONNANCES

LICÉITÉ DE LA MENACE OU DE L'EMPLOI
D'ARMES NUCLEAIRES

AVIS CONSULTATIF DU 8 JUILLET 1996
INTERNATIONAL COURT OF JUSTICE

YEAR 1996

8 July 1996

LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

Jurisdiction of the Court to give the advisory opinion requested — Article 65, paragraph 1, of the Statute — Body authorized to request an opinion — Article 96, paragraphs 1 and 2, of the Charter — Activities of the General Assembly — "Legal question" — Political aspects of the question posed — Motives said to have inspired the request and political implications that the opinion might have.

Discretion of the Court as to whether or not it will give an opinion — Article 65, paragraph 1, of the Statute — Compelling reasons — Vague and abstract question — Purposes for which the opinion is sought — Possible effects of the opinion on current negotiations — Duty of the Court not to legislate.

Formulation of the question posed — English and French texts — Clear objective — Burden of proof.

Applicable law — International Covenant on Civil and Political Rights — Arbitrary deprivation of life — Convention on the Prevention and Punishment of the Crime of Genocide — Intent against a group as such — Existing norms relating to the safeguarding and protection of the environment — Environmental considerations as an element to be taken into account in the implementation of the law applicable in armed conflict — Application of most directly relevant law: law of the Charter and law applicable in armed conflict.

Unique characteristics of nuclear weapons.

Provisions of the Charter relating to the threat or use of force — Article 2, paragraph 4 — The Charter neither expressly prohibits, nor permits, the use of any specific weapon — Article 51 — Conditions of necessity and proportionality.

The notions of "threat" and "use" of force stand together — Possession of nuclear weapons, deterrence and threat.

Specific rules regulating the lawfulness or unlawfulness of the recourse to nuclear weapons as such — Absence of specific prescription authorizing the threat or use of nuclear weapons — Unlawfulness per se: treaty law — Instruments prohibiting the use of poisoned weapons — Instruments expressly prohibiting the use of certain weapons of mass destruction — Treaties concluded in order to limit the acquisition, manufacture and possession of nuclear weapons, the deployment and testing of nuclear weapons — Treaty of Tlatelolco — Treaty of Rarotonga — Declarations made by nuclear-weapon States on the occasion of the extension of the Non-Proliferation Treaty — Absence of comprehensive and universal conventional prohibition of the use or threat of use of nuclear weapons as such — Unlawfulness per se: customary law — Consistent practice of non-utilization of nuclear weapons — Policy of deterrence — General Assembly resolutions affirming the illegality of nuclear weapons — Continuing tensions between the nascent opinio juris and the still strong adherence to the practice of deterrence.

Principles and rules of international humanitarian law — Prohibition of methods and means of warfare precluding any distinction between civilian and military targets or resulting in unnecessary suffering to combatants — Martens Clause — Principle of neutrality — Applicability of these principles and rules to nuclear weapons — Conclusions.

Right of a State to survival and right to resort to self-defence — Policy of deterrence — Reservations to undertakings given by certain nuclear-weapon States not to resort to such weapons.

Current state of international law and elements of fact available to the Court — Use of nuclear weapons in an extreme circumstance of self-defence in which the very survival of a State is at stake.

Article VI of the Non-Proliferation Treaty — Obligation to negotiate in good faith and to achieve nuclear disarmament in all its aspects.

ADVISORY OPINION

Present: President Bedjaoui; Vice-President Schwebel; Judges Oda, Gullaume, Shahabuddeen, Weeramantry, Ranjiv, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins; Registrar Valencia-Ospina.

On the legality of the threat or use of nuclear weapons,
The Court,
composed as above,
gives the following Advisory Opinion:

1. The question upon which the advisory opinion of the Court has been requested is set forth in resolution 49/75 K adopted by the General Assembly of the United Nations (hereinafter called the "General Assembly") on 15 December 1994. By a letter dated 19 December 1994, received in the Registry by facsimile on 20 December 1994 and filed in the original on 6 January 1995, the Secretary-General of the United Nations officially communicated to the Registrar the decision taken by the General Assembly to submit the question to the Court for an advisory opinion. Resolution 49/75 K, the English text of which was enclosed with the letter, reads as follows:

"The General Assembly,

Conscious that the continuing existence and development of nuclear weapons pose serious risks to humanity,

Mindful that States have an obligation under the Charter of the United..."
Nations to refrain from the threat or use of force against the territorial integrity or political independence of any State.


Welcoming the progress made on the prohibition and elimination of weapons of mass destruction, including the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction1 and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction2,

Convinced that the complete elimination of nuclear weapons is the only guarantee against the threat of nuclear war,

Noting the concerns expressed in the Fourth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons that insufficient progress had been made towards the complete elimination of nuclear weapons at the earliest possible time,

Recalling that, convinced of the need to strengthen the rule of law in international relations, it has declared the period 1990-1999 the United Nations Decade of International Law3,

Noting that Article 96, paragraph 1, of the Charter empowers the General Assembly to “request the International Court of Justice to give an advisory opinion on any legal question,”

Recalling the recommendation of the Secretary-General, made in his report entitled ‘An Agenda for Peace’4, that United Nations organs that are authorized to take advantage of the advisory competence of the International Court of Justice turn to the Court more frequently for such opinions,

Welcoming resolution 46/40 of 14 May 1993 of the Assembly of the World Health Organization, in which the organization requested the International Court of Justice to give an advisory opinion on whether the use of nuclear weapons by a State in war or other armed conflict would be a breach of its obligations under international law, including the Constitution of the World Health Organization,

Decides, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice urgently to render its advisory opinion on the following question: ‘Is the threat or use of nuclear weapons in any circumstance permitted under international law?’

1 Resolution 2326 (XXVI), annex.
3 Resolution 44/23.
4 A/47/277-S/24111."
in a document entitled "Response to submissions of other States". The Court granted the request and, by letters dated 30 October 1995, the Deputy-Registrar notified the States to which the document had been communicated, specifying that the document consequently did not form part of the record before the Court.

8. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and comments submitted to the Court accessible to the public, with effect from the opening of the oral proceedings.

9. In the course of public sittings held from 30 October 1995 to 15 November 1995, the Court heard oral statements in the following order by:

**for the Commonwealth of Australia:** Mr. Gavan Griffith, Q.C., Solicitor-General of Australia, Counsel, The Honourable Gareth Evans, Q.C., Senator, Minister for Foreign Affairs, Counsel;

**for the Arab Republic of Egypt:** Mr. George Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law;

**for the French Republic:** Mr. Marc Perrin de Brichambaut, Director of Legal Affairs, Ministry of Foreign Affairs, Mr. Alain Pellet, Professor of International Law, University of Paris X and Institute of Political Studies, Paris;

**for the Federal Republic of Germany:** Mr. Hartmut Hillgenberg, Director-General of Legal Affairs, Ministry of Foreign Affairs;

**for Indonesia:** H.E. Mr. Johannes Berchmans Soedarmanto Kadarisman, Ambassador of Indonesia to the Netherlands;

**for Mexico:** H.E. Mr. Sergio González Gámez, Ambassador, Under-Secretary of Foreign Relations;

**for the Islamic Republic of Iran:** H.E. Mr. Mohammad J. Zarif, Deputy Minister, Legal and International Affairs, Ministry of Foreign Affairs;

**for Italy:** Mr. Umberto Leanza, Professor of International Law at the Faculty of Law at the University of Rome "Tor Vergata", Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs;

**for Japan:** H.E. Mr. Takekazu Kawamura, Ambassador, Director General for Arms Control and Scientific Affairs, Ministry of Foreign Affairs, Mr. Takashi Hiraoka, Mayor of Hiroshima, Mr. Iecho Itoh, Mayor of Nagasaki;

**for Malaysia:** H.E. Mr. Tan Sri Razali Ismail, Ambassador, Permanent Representative of Malaysia to the United Nations, Dato’ Mohtar Abdullah, Attorney-General;

**for New Zealand:** The Honourable Paul East, Q.C., Attorney-General of New Zealand, Mr. Allan Brucegirdle, Deputy Director of Legal Division of the New Zealand Ministry for Foreign Affairs and Trade;

**for the Philippines:** H.E. Mr. Rodolfo S. Sanchez, Ambassador of the Philippines to the Netherlands, Professor Merlin N. Magallona, Dean, College of Law, University of the Philippines;

**for Qatar:** H.E. Mr. Nujeeb ibn Mohammed Al-Nauimi, Minister of Justice;

**for the Russian Federation:** Mr. A. G. Khodakov, Director, Legal Department, Ministry of Foreign Affairs;

**for San Marino:** Mrs. Federica Bigi, Embassy Counsellor, Official in Charge of Political Directorate, Department of Foreign Affairs;

**for Samoa:** H.E. Mr. Neroni Slade, Ambassador and Permanent Representative of Samoa to the United Nations, Miss Laurence Boisson de Chazoumes, Assistant Professor, Graduate Institute of International Studies, Geneva, Mr. Roger S. Clark, Distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey;

**for the Marshall Islands:** The Honourable Theodore G. Kronmiller, Legal Counsel, Embassy of the Marshall Islands to the United States of America, Mrs. Lijon Ekinlal, Council Member, Rongelap Atoll Local Government;

**for Solomon Islands:** The Honourable Victor Ngele, Minister of Police and National Security, Mr. Jean Salmon, Professor of Law, Université libre de Bruxelles, Mr. Eric David, Professor of Law, Université libre de Bruxelles, Mr. Philippe Sands, Lecturer in Law, School of Oriental and African Studies, London University, and Legal Director, Foundation for International Environmental Law and Development, Mr. James Crawford, Whewell Professor of International Law, University of Cambridge;
for Costa Rica: Mr. Carlos Vargas-Pizarro, Legal Counsel and Special Envoy of the Government of Costa Rica;


for the United States of America: Mr. Conrad K. Harper, Legal Adviser, United States Department of State, Mr. Michael J. Matheson, Principal Deputy Legal Adviser, United States Department of State, Mr. John H. McNeill, Senior Deputy General Counsel, United States Department of Defense; Mr. Jonathan Wutawunashe, Chargé d'affaires a.i., Embassy of the Republic of Zimbabwe in the Netherlands.

Questions were put by Members of the Court to particular participants in the oral proceedings, who replied in writing as requested, within the prescribed time-limits; the Court having decided that the other participants could also reply to those questions on the same terms, several of them did so. Other questions put by Members of the Court were addressed, more generally, to any participant in the oral proceedings; several of them replied in writing as requested, within the prescribed time-limits.

* * *

10. The Court must first consider whether it has the jurisdiction to give a reply to the request of the General Assembly for an advisory opinion and whether, should the answer be in the affirmative, there is any reason it should decline to exercise any such jurisdiction. The Court draws its competence in respect of advisory opinions from Article 65, paragraph 1, of its Statute. Under this Article, the Court “may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”.

11. For the Court to be competent to give an advisory opinion, it is thus necessary at the outset for the body requesting the opinion to be “authorized by or in accordance with the Charter of the United Nations to make such a request”. The Charter provides in Article 96, paragraph 1, that: “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”

Some States which oppose the giving of an opinion by the Court argued that the General Assembly and Security Council are not entitled to ask for opinions on matters totally unrelated to their work. They suggested that, as in the case of organs and agencies acting under Article 96, paragraph 2, of the Charter, and notwithstanding the difference in wording between that provision and paragraph 1 of the same Article, the General Assembly and Security Council may ask for an advisory opinion on a legal question only within the scope of their activities.

In the view of the Court, it matters little whether this interpretation of Article 96, paragraph 1, is or is not correct; in the present case, the General Assembly has competence in any event to seise the Court. Indeed, Article 10 of the Charter has conferred upon the General Assembly a competence relating to “any questions or any matters” within the scope of the Charter. Article 11 has specifically provided it with a competence to “consider the general principles ... in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments”. Lastly, according to Article 13, the General Assembly “shall initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification”.

12. The question put to the Court has a relevance to many aspects of the activities and concerns of the General Assembly including those relating to the threat or use of force in international relations, the disarmament process, and the progressive development of international law. The General Assembly has a long-standing interest in these matters and in their relation to nuclear weapons. This interest has been manifested in the annual First Committee debates, and the Assembly resolutions on nuclear weapons; in the holding of three special sessions on disarmament (1978, 1982 and 1988) by the General Assembly; and the annual meetings of the Disarmament Commission since 1978; and also in the commissioning of studies on the effects of the use of nuclear weapons. In this context, it does not matter that important recent and current activities relating to nuclear disarmament are being pursued in other fora.

Finally, Article 96, paragraph 1, of the Charter cannot be read as limiting the ability of the Assembly to request an opinion only in those circumstances in which it can take binding decisions. The fact that the Assembly’s activities in the above-mentioned field have led it only to the making of recommendations thus has no bearing on the issue of whether it had the competence to put to the Court the question of which it is seised.

13. The Court must furthermore satisfy itself that the advisory opinion requested does indeed relate to a “legal question” within the meaning of its Statute and the United Nations Charter.

The Court has already had occasion to indicate that questions “framed in terms of law and raising problems of international law ... are by their very nature susceptible of a reply based on law ...
[and] appear . . . to be questions of a legal character” (Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 18, para. 15).

The question put to the Court by the General Assembly is indeed a legal one, since the Court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law.

The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a “legal question” and to “deprive the Court of a competence expressly conferred on it by its Statute” (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, pp. 61-62; Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, pp. 6-7; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155).

Furthermore, as the Court said in the Opinion it gave in 1980 concerning the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt:

“This, indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate . . .” (I.C.J. Reports 1980, p. 87, para. 33.)

The Court moreover considers that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance to the establishment of its jurisdiction to give such an opinion.

* * *

14. Article 65, paragraph 1, of the Statute provides: “The Court may give an advisory opinion . . .” (Emphasis added.) This is more than an enabling provision. As the Court has repeatedly emphasized, the Statute leaves a discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so. In this context, the Court has previously noted as follows:


The Court has constantly been mindful of its responsibilities as “the principal judicial organ of the United Nations” (Charter, Art. 92). When considering each request, it is mindful that it should not, in principle, refuse to give an advisory opinion. In accordance with the consistent jurisprudence of the Court, only “compelling reasons” could lead it to such a refusal (Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956, p. 86; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 27; Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 183; Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 21; and Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, p. 191). There has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion in the history of the present Court; in the case concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, the refusal to give the World Health Organization the advisory opinion requested by it was justified by the Court’s lack of jurisdiction in that case. The Permanent Court of International Justice took the view on only one occasion that it could not reply to a question put to it, having regard to the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was
neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, object to the proceedings, and refused to take part in any way (Status of Eastern Carelia, P.C.I.J., Series B, No. 5).

15. Most of the reasons adduced in these proceedings in order to persuade the Court that in the exercise of its discretionary power it should decline to render the opinion requested by General Assembly resolution 49/75 K were summarized in the following statement made by one State in the written proceedings:

"The question presented is vague and abstract, addressing complex issues which are the subject of consideration among interested States and within other bodies of the United Nations which have an express mandate to address these matters. An opinion by the Court in regard to the question presented would provide no practical assistance to the General Assembly in carrying out its functions under the Charter. Such an opinion has the potential of undermining progress already made or being made on this sensitive subject and, therefore, is contrary to the interests of the United Nations Organization." (United States of America, Written Statement, pp. 1-2; cf. pp. 3-7, II. See also United Kingdom, Written Statement, pp. 9-20, paras. 2.23-2.45; France, Written Statement, pp. 13-20, paras. 5-9; Finland, Written Statement, pp. 1-2; Netherlands, Written Statement, pp. 3-4, paras. 6-13; Germany, Written Statement, pp. 3-6, para. 2 (b).)

In contending that the question put to the Court is vague and abstract, some States appeared to mean by this that there exists no specific dispute on the subject-matter of the question. In order to respond to this argument, it is necessary to distinguish between requirements governing contentious procedure and those applicable to advisory opinions. The purpose of the advisory function is not to settle — at least directly — disputes between States, but to offer legal advice to the organs and institutions requesting the opinion (cf. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71). The fact that the question put to the Court does not relate to a specific dispute should consequently not lead the Court to decline to give the opinion requested.

Moreover, it is the clear position of the Court that to contend that it should not deal with a question couched in abstract terms is "a mere affirmation devoid of any justification", and that "the Court may give an advisory opinion on any legal question, abstract or otherwise" (Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, p. 61; see also Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954, p. 51; and Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 27, para. 40).

16. Certain States have observed that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.

Equally, once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins of or to the political history of the request, or to the distribution of votes in respect of the adopted resolution.

17. It has also been submitted that a reply from the Court in this case might adversely affect disarmament negotiations and would, therefore, be contrary to the interest of the United Nations. The Court is aware that, no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation. The Court has heard contrary positions advanced and there are no evident criteria by which it can prefer one assessment to another. That being so, the Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

18. Finally, it has been contended by some States that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a law-making capacity. It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present corpus juris is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.
19. In view of what is stated above, the Court concludes that it has the authority to deliver an opinion on the question posed by the General Assembly, and that there exist no “compelling reasons” which would lead the Court to exercise its discretion not to do so.

An entirely different question is whether the Court, under the constraints placed upon it as a judicial organ, will be able to give a complete answer to the question asked of it. However, that is a different matter from a refusal to answer at all.

* * *

20. The Court must next address certain matters arising in relation to the formulation of the question put to it by the General Assembly. The English text asks: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” The French text of the question reads as follows: “Est-il permis en droit international de recourir à la menace ou à l’emploi d’armes nucléaires en toute circonstance?” It was suggested that the Court was being asked by the General Assembly whether it was permitted to have recourse to nuclear weapons in every circumstance, and it was contended that such a question would inevitably invite a simple negative answer.

The Court finds it unnecessary to pronounce on the possible divergences between the English and French texts of the question posed. Its real objective is clear: to determine the legality or illegality of the threat or use of nuclear weapons.

21. The use of the word “permitted” in the question put by the General Assembly was criticized before the Court by certain States on the ground that this implied that the threat or the use of nuclear weapons would only be permissible if authorization could be found in a treaty provision or in customary international law. Such a starting point, those States submitted, was incompatible with the very basis of international law, which rests upon the principles of sovereignty and consent; accordingly, and contrary to what was implied by use of the word “permitted”, States are free to threaten or use nuclear weapons unless it can be shown that they are bound not to do so by reference to a prohibition in either treaty law or customary international law. Support for this contention was found in dicta of the Permanent Court of International Justice in the “Lotus” case that “restrictions upon the independence of States cannot... be presumed” and that international law leaves to States “a wide measure of discretion which is only limited in certain cases by prohibitive rules” (P.C.I.J., Series A, No. 10, pp. 18 and 19). Reliance was also placed on the dictum of the present Court in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) that:

“in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby
25. The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then fails to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.

Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

26. Some States also contended that the prohibition against genocide, contained in the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, is a relevant rule of customary international law which the Court must apply. The Court recalls that in Article II of the Convention genocide is defined as

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.”

It was maintained before the Court that the number of deaths occasioned by the use of nuclear weapons would be enormous; that the victims could, in certain cases, include persons of a particular national, ethnic, racial or religious group; and that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would have omitted to take account of the well-known effects of the use of such weapons.

The Court would point out in that regard that the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by the provision quoted above. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.

27. In both their written and oral statements, some States furthermore argued that any use of nuclear weapons would be unlawful by reference to existing norms relating to the safeguarding and protection of the environment, in view of their essential importance.

Specific references were made to various existing international treaties and instruments. These included Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 35, paragraph 3, of which prohibits the employment of “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”; and the Convention of 18 May 1977 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which prohibits the use of weapons which have “widespread, long-lasting or severe effects” on the environment (Art. 1). Also cited were Principle 21 of the Stockholm Declaration of 1972 and Principle 2 of the Rio Declaration of 1992 which express the common conviction of the States concerned that they have a duty

“to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.

These instruments and other provisions relating to the protection and safeguarding of the environment were said to apply at all times, in war as well as in peace, and it was contended that they would be violated by the use of nuclear weapons whose consequences would be widespread and would have transboundary effects.

28. Other States questioned the binding legal quality of these precepts of environmental law; or, in the context of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, denied that it was concerned at all with the use of nuclear weapons in hostilities; or, in the case of Additional Protocol I, denied that they were generally bound by its terms, or recalled that they had reserved their position in respect of Article 35, paragraph 3, thereof.

It was also argued by some States that the principal purpose of environmental treaties and norms was the protection of the environment in time of peace. It was said that those treaties made no mention of nuclear weapons. It was also pointed out that warfare in general, and nuclear warfare in particular, were not mentioned in their texts and that it would be destabilizing to the rule of law and to confidence in international negotiations if those treaties were now interpreted in such a way as to prohibit the use of nuclear weapons.

29. The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The
existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

30. However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that:

"Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."

31. The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.

These are powerful constraints for all the States having subscribed to these provisions.

32. General Assembly resolution 47/37 of 25 November 1992 on the “Protection of the Environment in Times of Armed Conflict” is also of interest in this context. It affirms the general view according to which environmental considerations constitute one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict: it states that “destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law”. Addressing the reality that certain instruments are not yet binding on all States, the General Assembly in this resolution “[a]ppeals to all States that have not yet done so to consider becoming parties to the relevant international conventions”.

In its recent Order in the Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, the Court stated that its conclusion was “without prejudice to the obligations of States to respect and protect the natural environment” (Order of 22 September 1995, I.C.J. Reports 1995, p. 306, para. 64). Although that statement was made in the context of nuclear testing, it naturally also applies to the actual use of nuclear weapons in armed conflict.

33. The Court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.

34. In the light of the foregoing the Court concludes that the most directly relevant applicable law governing the question of which it was seised, relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant.

35. In applying this law to the present case, the Court cannot however fail to take into account certain unique characteristics of nuclear weapons.

The Court has noted the definitions of nuclear weapons contained in various treaties and accords. It also notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.

The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area.
Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

36. In consequence, in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.

**

37. The Court will now address the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the Charter relating to the threat or use of force.

38. The Charter contains several provisions relating to the threat and use of force. In Article 2, paragraph 4, the threat or use of force against the territorial integrity or political independence of another State is prohibited. That paragraph provides:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

This prohibition of the use of force is to be considered in the light of other relevant provisions of the Charter. In Article 51, the Charter recognizes the inherent right of individual or collective self-defence if an armed attack occurs. A further lawful use of force is envisaged in Article 42, whereby the Security Council may take military enforcement measures in conformity with Chapter VII of the Charter.

39. These provisions do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful per se, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.

40. The entitlement to resort to self-defence under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self-defence. Other requirements are specified in Article 51.

41. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America): there is a “specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law” (I.C.J. Reports 1986, p. 94, para. 176). This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.

42. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.

43. Certain States have in their written and oral pleadings suggested that in the case of nuclear weapons, the condition of proportionality must be evaluated in the light of still further factors. They contend that the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to enquire into the question whether tactical nuclear weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality.

44. Beyond the conditions of necessity and proportionality, Article 51 specifically requires that measures taken by States in the exercise of the right of self-defence shall be immediately reported to the Security Council; this article further provides that these measures shall not in any way affect the authority and responsibility of the Security Council under the Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. These requirements of Article 51 apply whatever the means of force used in self-defence.

45. The Court notes that the Security Council adopted on 11 April 1995, in the context of the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, resolution 984 (1995) by the terms of which, on the one hand, it

against the use of nuclear weapons to non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons”.

and, on the other hand, it

“[w]elcomes the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used”.

46. Certain States asserted that the use of nuclear weapons in the conduct of reprisals would be lawful. The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed inter alia by the principle of proportionality.

47. In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence. Whether a signalled intention to use force if certain events occur is or is not a “threat” within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of “threat” and “use” of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal — for whatever reason — the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no State — whether or not it defended the policy of deterrence — suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.

48. Some States put forward the argument that possession of nuclear weapons is itself an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence, by which those States possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible. Whether this is a “threat” contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.

49. Moreover, the Security Council may take enforcement measures under Chapter VII of the Charter. From the statements presented to it the Court does not consider it necessary to address questions which might, in a given case, arise from the application of Chapter VII.

50. The terms of the question put to the Court by the General Assembly in resolution 49/75 K could in principle also cover a threat or use of nuclear weapons by a State within its own boundaries. However, this particular aspect has not been dealt with by any of the States which addressed the Court orally or in writing in these proceedings. The Court finds that it is not called upon to deal with an internal use of nuclear weapons.

* * *

51. Having dealt with the Charter provisions relating to the threat or use of force, the Court will now turn to the law applicable in situations of armed conflict. It will first address the question whether there are specific rules in international law regulating the legality or illegality of recourse to nuclear weapons per se; it will then examine the question put to it in the light of the law applicable in armed conflict proper, i.e. the principles and rules of humanitarian law applicable in armed conflict, and the law of neutrality.

* * *

52. The Court notes by way of introduction that international customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self-defence. Nor, however, is there any principle or rule of international law which would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on a specific authorization. State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.
53. The Court must therefore now examine whether there is any prohibition of recourse to nuclear weapons as such; it will first ascertain whether there is a conventional prescription to this effect.

54. In this regard, the argument has been advanced that nuclear weapons should be treated in the same way as poisoned weapons. In that case, they would be prohibited under:

(a) the Second Hague Declaration of 29 July 1899, which prohibits “the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases”;

(b) Article 23 (a) of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention IV of 18 October 1907, whereby “it is especially forbidden: . . . to employ poison or poisoned weapons”; and

(c) the Geneva Protocol of 17 June 1925 which prohibits “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices”.

55. The Court will observe that the Regulations annexed to the Hague Convention IV do not define what is to be understood by “poison or poisoned weapons” and that different interpretations exist on the issue. Nor does the 1925 Protocol specify the meaning to be given to the term “analogous materials or devices”. The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.

56. In view of this, it does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of the above-mentioned provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Protocol (see paragraph 54 above).

57. The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments. The most recent such instruments are the Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction — which prohibits the possession of bacteriological and toxic weapons and reinforces the prohibition of their use — and the Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction — which prohibits all use of chemical weapons and requires the destruction of existing stocks. Each of these instruments has been negotiated and adopted in its own context and for its own reasons. The Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction.

58. In the last two decades, a great many negotiations have been conducted regarding nuclear weapons; they have not resulted in a treaty of general prohibition of the same kind as for bacteriological and chemical weapons. However, a number of specific treaties have been concluded in order to limit:

(a) the acquisition, manufacture and possession of nuclear weapons (Peace Treaties of 10 February 1947; State Treaty for the Re-establishment of an Independent and Democratic Austria of 15 May 1955; Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America, and its Additional Protocols; Treaty of 1 July 1968 on the Non-Proliferation of Nuclear Weapons; Treaty of Rarotonga of 6 August 1985 on the Nuclear-Weapon-Free Zone of the South Pacific, and its Protocols; Treaty of 12 September 1990 on the Final Settlement with respect to Germany); and

(b) the deployment of nuclear weapons (Antarctic Treaty of 1 December 1959; Treaty of 27 January 1967 on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies; Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America, and its Additional Protocols; Treaty of 11 February 1971 on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof; Treaty of Rarotonga of 6 August 1985 on the Nuclear-Weapon-Free Zone of the South Pacific, and its Protocols); and


59. Recourse to nuclear weapons is directly addressed by two of these Conventions and also in connection with the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons of 1968:

(a) the Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America prohibits, in Article 1, the use of nuclear weapons by the Contracting Parties. It further includes an Additional Protocol II open to nuclear-weapon States outside the region, Article 3 of which provides:

“The Governments represented by the undersigned Plenipotentiaries also undertake not to use or threaten to use nuclear weapons against the Contracting Parties of the Treaty for the Prohibition of Nuclear Weapons in Latin America.”
The Protocol was signed and ratified by the five nuclear-weapon States. Its ratification was accompanied by a variety of declarations. The United Kingdom Government, for example, stated that “in the event of any act of aggression by a Contracting Party to the Treaty in which that Party was supported by a nuclear-weapon State”, the United Kingdom Government would “be free to reconsider the extent to which they could be regarded as committed by the provisions of Additional Protocol II”. The United States made a similar statement. The French Government, for its part, stated that it “interprets the undertaking made in article 3 of the Protocol as being without prejudice to the full exercise of the right of self-defence confirmed by Article 51 of the Charter”. China reaffirmed its commitment not to be the first to make use of nuclear weapons. The Soviet Union reserved “the right to review” the obligations imposed upon it by Additional Protocol II, particularly in the event of an attack by a State party either “in support of a nuclear-weapon State or jointly with that State”. None of these statements drew comment or objection from the parties to the Treaty of Tlatelolco.

(b) the Treaty of Rarotonga of 6 August 1985 establishes a South Pacific Nuclear Free Zone in which the Parties undertake not to manufacture, acquire or possess any nuclear explosive device (Art. 3). Unlike the Treaty of Tlatelolco, the Treaty of Rarotonga does not expressly prohibit the use of such weapons. But such a prohibition is for the States parties the necessary consequence of the prohibitions stipulated by the Treaty. The Treaty has a number of protocols. Protocol 2, open to the five nuclear-weapon States, specifies in its Article 1 that:

“Each Party undertakes not to use or threaten to use any nuclear explosive device against:

(a) Parties to the Treaty; or
(b) any territory within the South Pacific Nuclear Free Zone for which a State that has become a Party to Protocol 1 is internationally responsible.”

China and Russia are parties to that Protocol. In signing it, China and the Soviet Union each made a declaration by which they reserved the “right to reconsider” their obligations under the said Protocol; the Soviet Union also referred to certain circumstances in which it would consider itself released from those obligations. France, the United Kingdom and the United States, for their part, signed Protocol 2 on 25 March 1996, but have not yet ratified it. On that occasion, France declared, on the one hand, that no provision in that Protocol “shall impair the full exercise of the inherent right of self-defence provided for in Article 51 of the . . . Charter” and, on the other hand, that “the commitment set out in Article 1 of [that] Protocol amounts to the negative security assurances given by France to non-nuclear-weapon States which are parties to the Treaty on . . . Non-Proliferation”, and that “these assurances shall not apply to States which are not parties” to that Treaty. For its part, the United Kingdom made a declaration setting out the precise circumstances in which it “will not be bound by [its] undertaking under Article 1” of the Protocol.

(c) as to the Treaty on the Non-Proliferation of Nuclear Weapons, at the time of its signing in 1968 the United States, the United Kingdom and the USSR gave various security assurances to the non-nuclear-weapon States that were parties to the Treaty. In resolution 255 (1968) the Security Council took note with satisfaction of the intention expressed by those three States to

“provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State party to the Treaty on the Non-Proliferation . . . that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used”.

On the occasion of the extension of the Treaty in 1995, the five nuclear-weapon States gave their non-nuclear-weapon partners, by means of separate unilateral statements on 5 and 6 April 1995, positive and negative security assurances against the use of such weapons. All the five nuclear-weapon States first undertook not to use nuclear weapons against non-nuclear-weapon States that were parties to the Treaty on the Non-Proliferation of Nuclear Weapons. However, these States, apart from China, made an exception in the case of an invasion or any other attack against them, their territories, armed forces or allies, or on a State towards which they had a security commitment, carried out or sustained by a non-nuclear-weapon State party to the Non-Proliferation Treaty in association or alliance with a nuclear-weapon State. Each of the nuclear-weapon States further undertook, as a permanent member of the Security Council, in the event of an attack with the use of nuclear weapons, or threat of such attack, against a non-nuclear-weapon State, to refer the matter to the Security Council without delay and to act within it in order that it might take immediate measures with a view to supplying, pursuant to the Charter, the necessary assistance to the victim State (the commitments assumed comprising minor variations in wording). The Security Council, in unanimously adopting resolution 984 (1995) of 11 April 1995, cited above, took note of those statements with appreciation. It also recognized

“that the nuclear-weapon State permanent members of the Security Council will bring the matter immediately to the attention of the Council and seek Council action to provide, in accordance with the Charter, the necessary assistance to the State victim”;

28 29
and welcomed the fact that
“the intention expressed by certain States that they will provide or
support immediate assistance, in accordance with the Charter, to
any non-nuclear-weapon State Party to the Treaty on the Non-
Proliferation of Nuclear Weapons that is a victim of an act of, or
an object of a threat of, aggression in which nuclear weapons are
used”.

60. Those States that believe that recourse to nuclear weapons is illegal
stress that the conventions that include various rules providing for the
limitation or elimination of nuclear weapons in certain areas (such as the
Antarctic Treaty of 1959 which prohibits the deployment of nuclear
weapons in the Antarctic, or the Treaty of Tlatelolco of 1967 which
creates a nuclear-weapon-free zone in Latin America) or the conventions
that apply certain measures of control and limitation to the existence of
nuclear weapons (such as the 1963 Partial Test-Ban Treaty or the Treaty
on the Non-Proliferation of Nuclear Weapons) all set limits to the use of
nuclear weapons. In their view, these treaties bear witness, in their own
way, to the emergence of a rule of complete legal prohibition of all uses
of nuclear weapons.

61. Those States who defend the position that recourse to nuclear
weapons is legal in certain circumstances see a logical contradiction in
reaching such a conclusion. According to them, those treaties, such as
the Treaty on the Non-Proliferation of Nuclear Weapons, as well as
Security Council resolutions 255 (1968) and 984 (1995) which take note
of the security assurances given by the nuclear-weapon States to the non-
nuclear-weapon States in relation to any nuclear aggression against the
latter, cannot be understood as prohibiting the use of nuclear weapons,
and such a claim is contrary to the very text of those instruments. For
those who support the legality in certain circumstances of recourse to
nuclear weapons, there is no absolute prohibition against the use of such
weapons. The very logic and construction of the Treaty on the Non-Pro-
liferation of Nuclear Weapons, they assert, confirm this. This Treaty,
whereby, they contend, the possession of nuclear weapons by the five
nuclear-weapon States has been accepted, cannot be seen as a treaty ban-
nosing their use by those States; to accept the fact that States possess
nuclear weapons is tantamount to recognizing that such weapons may be
used in certain circumstances. Nor, they contend, could the security
assurances given by the nuclear-weapon States in 1968, and more recently
in connection with the Review and Extension Conference of the Parties
to the Treaty on the Non-Proliferation of Nuclear Weapons in 1995,
have been conceived without its being supposed that there were circum-
stances in which nuclear weapons could be used in a lawful manner. For
those who defend the legality of the use, in certain circumstances, of
nuclear weapons, the acceptance of those instruments by the different
non-nuclear-weapon States confirms and reinforces the evident logic
upon which those instruments are based.

62. The Court notes that the treaties dealing exclusively with acquisi-
tion, manufacture, possession, deployment and testing of nuclear
weapons, without specifically addressing their threat or use, certainly
point to an increasing concern in the international community with these
weapons; the Court concludes from this that these treaties could there-
fore be seen as foreshadowing a future general prohibition of the use of
such weapons, but they do not constitute such a prohibition by them-

 selves. As to the treaties of Tlatelolco and Rarotonga and their Protocols,
and also the declarations made in connection with the indefinite exten-
sion of the Treaty on the Non-Proliferation of Nuclear Weapons, it emerges
from these instruments that:

(a) a number of States have undertaken not to use nuclear weapons in
specific zones (Latin America; the South Pacific) or against certain
other States (non-nuclear-weapon States which are parties to the
Treaty on the Non-Proliferation of Nuclear Weapons);

(b) nevertheless, even within this framework, the nuclear-weapon States
have reserved the right to use nuclear weapons in certain circum-
stances; and

(c) these reservations met with no objection from the parties to the
Tlatelolco or Rarotonga Treaties or from the Security Council.

63. These two treaties, the security assurances given in 1995 by the
nuclear-weapon States and the fact that the Security Council took note of
them with satisfaction, testify to a growing awareness of the need to
liberate the community of States and the international public from the
dangers resulting from the existence of nuclear weapons. The Court
moreover notes the signing, even more recently, on 15 December 1995, at
Bangkok, of a Treaty on the Southeast Asia Nuclear-Weapon-Free Zone,
and on 11 April 1996, at Cairo, of a treaty on the creation of a nuclear-
weapons-free zone in Africa. It does not, however, view these elements as
amounting to a comprehensive and universal conventional prohibition
on the use, or the threat of use, of those weapons as such.

*

64. The Court will now turn to an examination of customary interna-
tional law to determine whether a prohibition of the threat or use of
nuclear weapons as such flows from that source of law. As the Court has
stated, the substance of that law must be “looked for primarily in the
actual practice and opinio juris of States” (Continental Shelf (Libyan
Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 29,
para. 27).

65. States which hold the view that the use of nuclear weapons is ille-
gal have endeavoured to demonstrate the existence of a customary rule
prohibiting this use. They refer to a consistent practice of non-utilization
of nuclear weapons by States since 1945 and they would see in that prac-
The expression of an *opinio juris* on the part of those who possess such weapons.

66. Some other States, which assert the legality of the threat and use of nuclear weapons in certain circumstances, invoked the doctrine and practice of deterrence in support of their argument. They recall that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests. In their view, if nuclear weapons have not been used since 1945, it is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen.

67. The Court does not intend to pronounce here upon the practice known as the "policy of deterrence". It notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*.

68. According to certain States, the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of 24 November 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons. According to other States, however, the resolutions in question have no binding character on their own account and are not declaratory of any customary rule of prohibition of nuclear weapons; some of these States have also pointed out: that this series of resolutions not only did not meet with the approval of all of the nuclear-weapon States but of many other States as well.

69. States which consider that the use of nuclear weapons is illegal indicated that those resolutions did not claim to create any new rules, but were confined to a confirmation of customary law relating to the prohibition of means or methods of warfare which, by their use, overstepped the bounds of what is permissible in the conduct of hostilities. In their view, the resolutions in question did no more than apply to nuclear weapons the existing rules of international law applicable in armed conflict; they were no more than the "envelope" or *instrumentum* containing certain pre-existing customary rules of international law. For those States it is accordingly of little importance that the *instrumentum* should have occasioned negative votes, which cannot have the effect of obliterating those customary rules which have been confirmed by treaty law.

70. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.

71. Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be "a direct violation of the Charter of the United Nations"; and in certain formulations that such use "should be prohibited". The focus of these resolutions has sometimes shifted to diverse related matters; however, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.

72. The Court further notes that the first of the resolutions of the General Assembly expressly proclaiming the illegality of the use of nuclear weapons, resolution 1653 (XVI) of 24 November 1961 (mentioned in subsequent resolutions), after referring to certain international declarations and binding agreements, from the Declaration of St. Petersburg of 1868 to the Geneva Protocol of 1925, proceeded to qualify the legal nature of nuclear weapons, determine their effects, and apply general rules of customary international law to nuclear weapons in particular. That application by the General Assembly of general rules of customary law to the particular case of nuclear weapons indicates that, in its view, there was no specific rule of customary law which prohibited the use of nuclear weapons; if such a rule had existed, the General Assembly could simply have referred to it and would not have needed to undertake such an exercise of legal qualification.

73. Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.

* *
74. The Court not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons per se, it will now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality.

75. A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The "laws and customs of war" — as they were traditionally called — were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This "Hague Law" and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the "Geneva Law" (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.

76. Since the turn of the century, the appearance of new means of combat has — without calling into question the longstanding principles and rules of international law — rendered necessary some specific prohibitions of the use of certain weapons, such as explosive projectiles under 400 grammes, dum-dum bullets and asphyxiating gases. Chemical and bacteriological weapons were then prohibited by the 1925 Geneva Protocol. More recently, the use of weapons producing "non-detectable fragments", of other types of "mines, booby traps and other devices", and of "incendiary weapons", was either prohibited or limited, depending on the case, by the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or to Have Indiscriminate Effects. The provisions of the Convention on "mines, booby traps and other devices" have just been amended, on 3 May 1996, and now regulate in greater detail, for example, the use of anti-personnel land mines.

77. All this shows that the conduct of military operations is governed by a body of legal prescriptions. This is so because "the right of belligerents to adopt means of injuring the enemy is not unlimited" as stated in Article 22 of the 1907 Hague Regulations relating to the laws and customs of war on land. The St. Petersburg Declaration had already condemned the use of weapons "which uselessly aggravate the suffering of disabled men or make their death inevitable". The aforementioned Regulations relating to the laws and customs of war on land, annexed to the Hague Convention IV of 1907, prohibit the use of "arms, projectiles, or material calculated to cause unnecessary suffering" (Art. 23).

78. The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

The Court would likewise refer, in relation to these principles, to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows:

"In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.

79. It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (I.C.J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.
80. The Nuremberg International Military Tribunal had already found in 1945 that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 "were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war" (Trial of the Major War Criminals, 14 November 1945-1 October 1946, Nuremberg, 1947, Vol. 1, p. 254).

81. The Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 508 (1993), with which he introduced the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and which was unanimously approved by the Security Council (resolution 827 (1993)), stated:

"In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law.

The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945."

82. The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States.

83. It has been maintained in these proceedings that these principles and rules of humanitarian law are part of jus cogens as defined in Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969. The question whether a norm is part of the jus cogens relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter.

84. Nor is there any need for the Court to elaborate on the question of the applicability of Additional Protocol I of 1977 to nuclear weapons. It need only observe that while, at the Diplomatic Conference of 1974-1977, there was no substantive debate on the nuclear issue and no specific solution concerning this question was put forward, Additional Protocol I in no way replaced the general customary rules applicable to all means and methods of combat including nuclear weapons. In particular, the Court recalls that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol I. The fact that certain types of weapons were not specifically dealt with by the 1974-1977 Conference does not permit the drawing of any legal conclusions relating to the substantive issues which the use of such weapons would raise.

85. Turning now to the applicability of the principles and rules of humanitarian law to a possible threat or use of nuclear weapons, the Court notes that doubts in this respect have sometimes been voiced on the ground that these principles and rules had evolved prior to the invention of nuclear weapons and that the Conferences of Geneva of 1949 and 1974-1977 which respectively adopted the four Geneva Conventions of 1949 and the two Additional Protocols thereto did not deal with nuclear weapons specifically. Such views, however, are only held by a small minority. In the view of the vast majority of States as well as writers there can be no doubt as to the applicability of humanitarian law to nuclear weapons.

86. The Court shares that view. Indeed, nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future. In this respect it seems significant that the thesis that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the latter, has not been advocated in the present proceedings. On the contrary, the newness of nuclear weapons has been expressly rejected as an argument against the application to them of international humanitarian law:

"In general, international humanitarian law bears on the threat or use of nuclear weapons as it does of other weapons."
International humanitarian law has evolved to meet contemporary circumstances, and is not limited in its application to weaponry of an earlier time. The fundamental principles of this law endure: to mitigate and circumscribe the cruelty of war for humanitarian reasons.” (New Zealand, Written Statement, p. 15, paras. 63-64.)

None of the statements made before the Court in any way advocated a freedom to use nuclear weapons without regard to humanitarian constraints. Quite the reverse; it has been explicitly stated,

“Restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons” (Russian Federation, CR 95/29, p. 52);

“So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the jus in bello” (United Kingdom, CR 95/34, p. 45);

and

“The United States has long shared the view that the law of armed conflict governs the use of nuclear weapons — just as it governs the use of conventional weapons” (United States of America, CR 95/35, p. 85).

87. Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons.

* *

88. The Court will now turn to the principle of neutrality which was raised by several States. In the context of the advisory proceedings brought before the Court by the WHO concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, the position was put as follows by one State:

“The principle of neutrality, in its classic sense, was aimed at preventing the incursion of belligerent forces into neutral territory, or attacks on the persons or ships of neutrals. Thus: ‘the territory of neutral powers is inviolable’ (Article 1 of the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, concluded on 18 October 1907); ‘belligerents are bound to respect the sovereign rights of neutral powers . . .’ (Article 1 to the Hague Convention (XIII) Respecting the Rights and Duties of Neutral Powers in Naval War, concluded on 18 October 1907), ‘neutral states have equal interest in having their rights respected by belligerents . . .’ (Preamble to Convention on Maritime Neutrality, concluded on 20 February 1928). It is clear, however, that the principle of neutrality applies with equal force to transborder incursions of armed forces and to the transborder damage caused to a neutral State by the use of a weapon in a belligerent State.” (Nauru, Written Statement (I), p. 35, IV E.)

The principle so circumscribed is presented as an established part of the customary international law.

89. The Court finds that as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.

* *

90. Although the applicability of the principles and rules of humanitarian law and of the principle of neutrality to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are, on the other hand, controversial.

91. According to one point of view, the fact that recourse to nuclear weapons is subject to and regulated by the law of armed conflict does not necessarily mean that such recourse is as such prohibited. As one State put it to the Court:

“Assuming that a State’s use of nuclear weapons meets the requirements of self-defence, it must then be considered whether it conforms to the fundamental principles of the law of armed conflict regulating the conduct of hostilities” (United Kingdom, Written Statement, p. 40, para. 3.44);

“the legality of the use of nuclear weapons must therefore be assessed in the light of the applicable principles of international law regarding the use of force and the conduct of hostilities, as is the case with other methods and means of warfare” (ibid., p. 75, para. 4.2 (3));

and

“The reality . . . is that nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties. It is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties.”
92. Another view holds that recourse to nuclear weapons could never be compatible with the principles and rules of humanitarian law and is therefore prohibited. In the event of their use, nuclear weapons would in all circumstances be unable to draw any distinction between the civilian population and combatants, or between civilian objects and military objectives, and their effects, largely uncontrollable, could not be restricted, either in time or in space, to lawful military targets. Such weapons would kill and destroy in a necessarily indiscriminate manner, on account of the blast, heat and radiation occasioned by the nuclear explosion and the effects induced; and the number of casualties which would ensue would be enormous. The use of nuclear weapons would therefore be prohibited in any circumstance, notwithstanding the absence of any explicit conventional prohibition. That view lay at the basis of the assertions by certain States before the Court that nuclear weapons are by their nature illegal under customary international law, by virtue of the fundamental principle of humanity.

93. A similar view has been expressed with respect to the effects of the principle of neutrality. Like the principles and rules of humanitarian law, that principle has therefore been considered by some to rule out the use of a weapon the effects of which simply cannot be contained within the territories of the contending States.

94. The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the “clean” use of smaller, low yield, tactical nuclear weapons, has indicated, what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view.

95. Nor can the Court make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict — at the heart of which is the overriding consideration of humanity — make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.

96. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.

Nor can it ignore the practice referred to as “policy of deterrence”, to which an appreciable section of the international community adhered for many years. The Court also notes the reservations which certain nuclear-weapon States have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, not to resort to such weapons.

97. Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

98. Given the eminently difficult issues that arise in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons, the Court considers that it now needs to examine one further aspect of the question before it, seen in a broader context.

In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.

99. In these circumstances, the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. This provision is worded as follows:

“Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”
The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.

100. This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community.

101. Even the very first General Assembly resolution, unanimously adopted on 24 January 1946 at the London session, set up a commission whose terms of reference included making specific proposals for, among other things, “the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction”. In a large number of subsequent resolutions, the General Assembly has reaffirmed the need for nuclear disarmament. Thus, in resolution 808 A (IX) of 4 November 1954, which was likewise unanimously adopted, it concluded

“that a further effort should be made to reach agreement on comprehensive and co-ordinated proposals to be embodied in a draft international disarmament convention providing for: . . . (b) The total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type, together with the conversion of existing stocks of nuclear weapons for peaceful purposes.”

The same conviction has been expressed outside the United Nations context in various instruments.

102. The obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons includes its fulfilment in accordance with the basic principle of good faith. This basic principle is set forth in Article 2, paragraph 2, of the Charter. It was reflected in the Declaration on Friendly Relations between States (resolution 2625 (XXV) of 24 October 1970) and in the Final Act of the Helsinki Conference of 1 August 1975. It is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969, according to which “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”.

Nor has the Court omitted to draw attention to it, as follows:

“One of the basic principles governing the creation and perform-
(2) **Replies** in the following manner to the question put by the General Assembly:

A. Unanimously,

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B. By eleven votes to three,

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

**in favour:** President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Ranjeva, Herzegh, Shi, Fleischhauer, Vereshchietin, Ferrari Bravo, Higgins;

**against:** Judges Shahabuddeen, Weeramantry, Koroma;

C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President's casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;

**in favour:** President Bedjaoui; Judges Ranjeva, Herzegh, Shi, Fleischhauer, Vereshchietin, Ferrari Bravo;

**against:** Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins;

F. Unanimously,

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighth day of July, one thousand nine hundred and ninety-six, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Mohammed **Bedjaoui,**

President.

(Signed) Eduardo **Valencia-Ospina,**

Registrar.

President **Bedjaoui,** Judges **Herzegh, Shi, Vereshchietin** and **Ferrari Bravo** append declarations to the Advisory Opinion of the Court.

Judges **Guillaume, Ranjeva and Fleischhauer** append separate opinions to the Advisory Opinion of the Court.

Vice-President **Schwebel,** Judges **Oda, Shahabuddeen, Weeramantry, Koroma** and **Higgins** append dissenting opinions to the Advisory Opinion of the Court.

(Initialled) M.B.

(Initialled) E.V.O.
International Criminal Tribunal for the former Yugoslavia

Prosecutor v. Duško Tadić
Judgment

Appeals Chamber, 15 July 1999
I. Introduction .......................................................................................................................... 1
    A. Procedural background ................................................................................................. 1
       1. The Appeals .............................................................................................................. 2
          (a) Notices of Appeal ............................................................................................. 2
          (b) Filing of Briefs ................................................................................................. 3
       2. Applications for Admission of Additional Evidence under Rule 115 .................. 4
       3. Contempt proceedings ........................................................................................... 6
    B. Grounds of Appeal ..................................................................................................... 7
       1. The Appeal against Judgement ............................................................................. 7
       2. The Cross-Appeal ................................................................................................ 7
       3. The Appeal against Sentencing Judgement ........................................................ 8
    C. Relief Requested ....................................................................................................... 9
       1. The Appeal against Judgement ............................................................................. 9
       2. The Cross-Appeal ................................................................................................ 9
       3. The Appeal against Sentencing Judgement ........................................................ 10
       3. The Appeal against Sentencing Judgement ........................................................ 9

II. First Ground of Appeal by the Defence:  Inequality of Arms Leading to Denial of Fair Trial ......................................................... 13
    A. Submissions of the Parties ........................................................................................ 13
       1. The Defence Case .................................................................................................. 13
       2. The Prosecution Case ........................................................................................... 16
    B. Discussion ................................................................................................................ 18
       1. Applicability of Articles 20(1) and 21(4)(b) of the Statute ................................. 18
       2. Conclusion ............................................................................................................ 25

III. Third Ground of Appeal by the Defence: Error of Fact Leading to a Miscarriage of Justice .......................................................... 26
    A. Submissions of the Parties ........................................................................................ 26
       1. The Defence Case .................................................................................................. 26
       2. The Prosecution Case ........................................................................................... 27
    B. Discussion ................................................................................................................ 27
       1. Applicability of Articles 20(1) and 21(4)(b) of the Statute ................................. 27
       2. Conclusion ............................................................................................................ 29

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) ......................................................... 30
    A. Submissions of the Parties ........................................................................................ 30
       1. The Prosecution Case ........................................................................................... 30
       2. The Defence Case ................................................................................................ 32
    B. Discussion ................................................................................................................ 33
       1. The Requirements for the Applicability of Article 2 of the Statute .................... 33
       2. The Nature of the Conflict ................................................................................... 34
       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 ......................................................... 35
VII. The Fourth Ground of Cross-Appeal By the Prosecution: the Trial Chamber’s Finding That All Crimes Against Humanity Require a Discriminatory Intent ......................................................... 123
A. Submissions of the Parties............................................................... 123
   1. The Prosecution Case ............................................................... 123
   2. The Defence Case ................................................................. 124
B. Discussion.................................................................................. 125
   1. The Interpretation of the Text of Article 5 of the Statute .......... 126
   2. Article 5 and Customary International Law ............................. 128
   3. The Report of the Secretary-General ..................................... 131
   4. The Statements Made by Some States in the Security Council .. 132
C. Conclusion.................................................................................. 135

VIII. The Fifth Ground of Cross-Appeal by the Prosecution: Denial of the Prosecution’s Motion for Disclosure of Defence Witness Statements ............................................................ 136
A. Submissions of the Parties............................................................... 136
   1. The Prosecution Case ............................................................... 136
   2. The Defence Case ................................................................. 138
B. Discussion.................................................................................. 139
   1. The Reason for Dealing with this Ground of the Cross-Appeal .... 139
   2. The Power to Order the Disclosure of Prior Defence Witness Statements 140
C. Conclusion.................................................................................. 143

IX. Disposition.................................................................................. 144

X. Declaration of Judge Nieto-Navia................................................... 146

XI. Separate Opinion of Judge Shahabuddin........................................ 150

ANNEX A - Glossary of Terms............................................................ 169
I. INTRODUCTION

A. Procedural background

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal" or "Tribunal") is seized of three appeals in relation to the Opinion and Judgment rendered by Trial Chamber II on 7 May 1997 in the case of The Prosecutor v. Duško Tadić, Case No.: IT-94-1-T ("Judgement"). With the exception of the Appeals Chamber's judgement 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 Tadić, 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 Tadić ("Defence" or "Appellant") and the Prosecutor ("Prosecution" or "Cross-Appellant") now appeal against separate aspects of the Judgement ("Appeal against Judgement" and "Cross-Appeal", respectively). Additionally, the Defence appeals against the Sentencing Judgement ("Appeal against Sentencing Judgement"). 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 Judgement was filed on behalf of Duško Tadić on 3 June 1997. Subsequently, on 8 January 1999, the Defence filed an amended notice of appeal ("Amended Notice of Appeal against Judgement"). 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 Judgement ("Notice of Cross-Appeal").

8. After the notices of appeal against the Judgement were filed, proceedings continued before the Trial Chamber in relation to sentencing, and on 14 July 1997 the Trial Chamber delivered its Sentencing Judgement. Sentences were imposed for each of the 11 counts on which the Appellant had been found guilty or guilty in part, to be served concurrently. On 11 August 1997, the Defence filed a notice of appeal against the Sentencing Judgement. The Prosecution has not appealed against the Sentencing Judgement.

---

1 Composed of Judge Gabrielle Kirk McDonald (Presiding), Judge Ninian Stephen and Judge Lal Chand Vohrah.
2 "Opinion and Judgment", The Prosecutor v. Duško Tadić, Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997. (For a list of designations and abbreviations used in this judgement, see Annex A - Glossary of Terms).
5 It should be observed that Duško Tadić in the present proceedings is appellant and cross-respondent. Conversely, the Prosecutor is respondent and cross-appellant. In the interest of clarity of presentation, however, the designations "Defence" or "Appellant" and "Prosecution" or "Cross-Appellant" will be employed throughout this judgement.
6 "Amended Notice of Appeal", Case No.: IT-94-1-A, 8 January 1999.
7 Transcript of hearing in The Prosecutor v Duško Tadić, Case No.: IT-94-1-A, 25 January 1999, p. 307 (T. 307 (25 January 1999). (All transcript page numbers referred to in the course of this judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public).
8 "Notice of Appeal", Case No.: IT-94-1-A, 6 June 1997.
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. In January 1998, the Appeals Chamber suspended the timetable for filings in the Appeals until the determination of the Appellant’s application. Following the Appeals Chamber’s decision of 15 October 1998 on the matter, 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. 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).

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.

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”). A response to the Prosecution’s brief was filed by the Defence on 24 July 1998. The Prosecution filed a brief in reply on 1 December 1998 (“Cross-Appellant’s Brief in Reply”). The Defence subsequently filed a further response to the Cross-Appellant’s Brief (“Defence’s Substituted Response to Cross-Appellant’s Brief”). The filing of this further brief was accepted by order of the Appeals Chamber on 4 March 1999.

13. Skeleton arguments consolidating and clarifying the parties’ respective positions in relation to the Appeals were filed by both parties on 19 March 1999.

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. 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.
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.

---

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.”


29 See “Scheduling Order Concerning Allegations against Prior Counsel”, Case No.: IT-94-1-A, 10 February 1998. 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 Bajic.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
(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 Tadi\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}

\section*{C. Relief Requested}

\subsection*{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 Be\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{i} 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}

\footnotesize
\begin{itemize}
\item \textsuperscript{40} T. 303 (21 April 1999).
\item \textsuperscript{41} Appellant's Brief on Sentencing Judgement, pp. 4-6; T. 304 (21 April 1999).
\item \textsuperscript{42} Appellant's Brief on Sentencing Judgement, pp. 9-10; T. 305 (21 April 1999).
\item \textsuperscript{43} Sentencing Judgement, para. 76. See Appellant's Brief on Sentencing Judgement, p. 10.
\item \textsuperscript{44} Ibid, p. 14.
\item \textsuperscript{45} Appellant's Amended Notice of Appeal against Judgement, p. 3.
\item \textsuperscript{46} Notice of Cross-Appeal, p. 3.
\item \textsuperscript{47} Ibid, p. 4.
\item \textsuperscript{48} Ibid.
\item \textsuperscript{49} Ibid.
\item \textsuperscript{50} Ibid.
\end{itemize}
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:

50 Ibid.

An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused in any pending case.

In the particular circumstances of the case, the Appeals Chamber considers that the rights of the Appellant would be prejudiced if his appeal were to be determined under the new Rule. The Appeals Chamber will therefore follow the previous procedure in respect of the counts on which the Appellant was acquitted by the Trial Chamber but on which he is now found guilty. Correspondingly, the Appeal against Sentencing Judgement will be determined at the separate sentencing stage.
II. FIRST GROUND OF APPEAL BY THE DEFENCE: INEQUALITY OF ARMS LEADING TO DENIAL OF FAIR TRIAL

A. Submissions of the Parties

1. The Defence Case

29. In the first ground of the Appeal against Judgement, the Defence alleges that the Appellant's right to a fair trial was prejudiced by the circumstances in which the trial was conducted. Specifically, it alleges that the lack of cooperation and the obstruction by certain external entities -- the Government of the Republika Srpska and the civic authorities in Prijedor -- prevented it from properly presenting its case at trial. 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. The Defence therefore, requests the Appeals Chamber to set aside the Trial Chamber's findings of guilt and to order a re-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.
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

58 T. 38-41 (19 April 1999).
59 T. 52-53 (19 April 1999).
60 T. 50-51 (19 April 1999).
61 T. 45-49 (19 April 1999).
62 Prosecution's Response to Appellant's Brief on Judgement, paras. 3.8–3.16, 3.30.
is a matter that goes beyond the concept of "equality of arms" as properly understood, and requires examination on a case-by-case basis. It is submitted that on the facts, no such injustice existed in the instant case.\footnote{Prosecution's Response to Appellant's Brief on Judgement, paras. 3.21-3.23; T. 88-89 (20 April 1999).}

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.\footnote{T. 90-91 (20 April 1999).} It submits that the Defence must prove that the result of such non-cooperation was to prevent the Defence from presenting its case at trial, and contends that the Defence has failed to meet this burden. It maintains that the Defence had a reasonable opportunity to defend the Appellant under the same procedural conditions and with the same procedural rights as were accorded to the Prosecution, and that it indeed put forward a vigorous defence by presenting the defences of alibi and mistaken identity.\footnote{T. 97 (20 April 1999).} 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.\footnote{T. 90, 98-99 (20 April 1999).} 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.\footnote{Skeleton Argument of the Prosecution, para. 10; Prosecution's Response to Appellant's Brief on Judgement, paras. 3.29, 6.9.}

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.\footnote{Skeleton Argument of the Prosecution, para. 6.}

41. In contrast to the view put forward by the Defence, the Prosecution denies that the Decision on Admissibility of Additional Evidence supports the position that the Appellant did not receive a fair trial. It notes that the majority of the proposed additional evidence was found by the Appeals Chamber to have been available to the Defence at trial. Furthermore, with respect to that portion of the proposed additional evidence which was found not to have been available at trial, it notes that the Appeals Chamber, after careful consideration, found that the interests of justice did not require it to be admitted on appeal. Thus, in the Prosecution's view, rather than showing a denial of fair trial, this decision is consistent with the view that the rights of the Appellant in this respect were not violated by any lack of cooperation on the part of the authorities of the Republika Srpska.\footnote{T. 96 (20 April 1999).}

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.\footnote{T. 100 (20 April 1999).}

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"),\footnote{Article 14(1) of the ICCPR provides in part: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[...]."} the European Convention on
Human Rights (1950), and the American Convention on Human Rights (1969). 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.

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 Morael v. France that a fair hearing under Article 14(1) of the ICCPR must at a minimum include inter alia, equality of arms. Similarly, in Robinson v. Jamaica and Wolf v. Panama 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. 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, 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". In Dombo Beheer B.V. v. The Netherlands, 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". The Court decided in a criminal proceeding, Delcourt v. Belgium, that the principle entitled both parties to full equality of treatment, maintaining that the conditions of trial must not "put the accused..."
It can safely be concluded from the ECHR jurisprudence, as cited by the Defence, that equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.

49. There is nothing in the ECHR case law that suggests that the principle is applicable to conditions, outside the control of a court, that prevented a party from securing the attendance of certain witnesses. All the cases considered applications that the judicial body had the power to grant.85

50. The HRC has interpreted the principle as designed to provide to a party rights and guarantees that are procedural in nature. The HRC observed in B.d.B et al. v. The Netherlands,86 a civil case, that Article 14 of the ICCPR “guarantees procedural equality” to ensure that the conduct of judicial proceedings is fair. Where applicants were sentenced to lengthy prison terms in judicial proceedings conducted in the absence of procedural guarantees, the HRC has found a violation of the right to fair trial under Article 14(1).87 The communications decided under the ICCPR are silent as to whether the principle extends to cover a party’s inability to secure the attendance at trial of certain witnesses where fault is attributable, not to the court, but to an external, independent entity.

51. The case law mentioned so far relates to civil or criminal proceedings before domestic courts. These courts have the capacity, if not directly, at least through the extensive enforcement powers of the State, to control matters that could materially affect the fairness of a trial. It is a different matter for the International Tribunal. The dilemma faced by this Tribunal is that, to hold trials, it must rely upon the cooperation of States without having the power to compel them to cooperate through enforcement measures.88 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.89

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 Neunreiter v. Austria, Eur. Court of H. R., judgement of 27 June 1968, Series A, no. 8, the Court decided that the principle did not apply to the examination of the applicant’s request for provisional release despite the prosecutor having been heard ex parte. In Bendoun v. France, Eur. Court H. R., judgement of 24 February 1994, Series A, no. 284, the Court ruled that an applicant who did not receive a complete file from the tax authorities was not entitled thereto under the principle of equality of arms because he was aware of its contents and gave no reason for the request. In Domb Beheer B.V. v. The Netherlands, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274, the Court held that there was a breach of equality of arms where the single first hand witness for the applicant company was barred from testifying whereas the defendant bank’s witness was heard.
88 Ibid., para. 34.
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. 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. 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. 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.”

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
would amount to exceptional circumstances under this rule. The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial de novo, as the Defence seeks to do in this case.

C. Conclusion

56. The Appeals Chamber finds that the Appellant has failed to show that the protection offered by the principle of equality of arms was not extended to him by the Trial Chamber. This ground of Appeal, accordingly, fails.

III. THIRD GROUND OF APPEAL BY THE DEFENCE: ERROR OF FACT LEADING TO A MISCARRIAGE OF JUSTICE

A. Submissions of the Parties

1. The Defence

57. The Trial Chamber made the factual finding that the Appellant was guilty of the murder of two Muslim policemen, Edin Besi} and a man identified at trial by the name of Osman, based on the testimony of only one witness, Nihad Seferovi}. The Defence contends that the Trial Chamber erred in deciding that it was satisfied beyond reasonable doubt that he was guilty of the two murders because the Chamber relied on the uncorroborated evidence of Mr. Seferovi}. The Defence maintains that Mr. Seferovi} is an unreliable witness because he was introduced to the Prosecution by the government of Bosnia and Herzegovina, a source which the Defence alleges the Trial Chamber found to be tainted for having planted another Prosecution witness, Dragan Opaci}. The latter was found to be untruthful at trial and, consequently, withdrawn by the Prosecution.

58. The Defence argues that the Trial Chamber erred in relying on the evidence of Mr. Seferovi} because it is implausible. Mr. Seferovi}, a Muslim who lived in an area under bombardment by Serbian paramilitary forces, fled to the mountains for safety. He testified at trial that he was so concerned about the welfare of his pet pigeons that he returned to town to feed them while the Serbian paramilitaries were still there. On his return to town, he saw Mr. Tadi} kill two policemen. Defence counsel contended at trial that the witness was never in town at the time of the killings.

59. The Defence maintains that the Appeals Chamber, in reviewing the factual finding of the Trial Chamber, is entitled to consider all relevant evidence and can reverse the Chamber’s finding if it is satisfied that no reasonable person could conclude that the evidence of Mr. Seferovi} proved that the Appellant was responsible for the killings.
60. The Defence asks the Appeals Chamber to reverse the Trial Chamber’s finding that the Appellant is guilty of the murders of Edic Besi} and the man identified by the name of Osman.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 he, like Mr. Opaci}, was also a tainted witness. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in relying on the uncorroborated testimony of Mr. Seferovi}.

66. The Defence alleges that the Trial Chamber erred in relying on the evidence of Mr. Seferovi} because it was implausible. Here, it is claimed that the Trial Chamber did not

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

1. The Prosecution Case

68. In the first ground of the Cross-Appeal, the Prosecution challenges the Appellant’s acquittal on Counts 8, 9, 12, 15, 21 and 32 of the Indictment which charged the Appellant with grave breaches under Article 2 of the Statute. The Appellant was acquitted on these counts on the ground that the victims referred to in those counts had not been proved to be “protected persons” under the applicable provisions of the Fourth Geneva Convention.  

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) 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 or entity over which the State did not have any effective control. Further, the Defence submits that the test at issue introduces uncertainty into international law as it is unclear what degree of link is necessary in order to satisfy the test.

99 See Defence's Substituted Response to Cross-Appellant's Brief, para. 2.6.
The Defence concedes that if the correct test were the "demonstrable link" test, on the facts of this case the test would be satisfied.\(^{100}\)

### 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,\(^{101}\) 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".

---

\(^{100}\) See Defence's Substituted Response to Cross-Appellant's Brief, paras. 2.1 – 2.18; T. 219-220 (21 April 1999).


---

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 FR Yugoslavia ("FRY") on the other.\(^{102}\) Judge McDonald, in her dissent, also found the conflict to be international at all relevant times.\(^{103}\)

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.\(^{104}\) 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

---

\(^{102}\) See para. 2.25 of the Cross-Appellant's Brief: "...The SFRY/FRY is a Party to an international armed conflict with [...] BH on the basis that the Trial Chamber found that until 19 May 1992 the JNA was involved in an international armed conflict with the BH, and that thereafter the VJ was directly involved in an armed conflict against the BH. Consequently, it is submitted that the only conclusion that can be drawn is that an international armed conflict existed between the BH and the FRY during 1992."

\(^{103}\) See para. 1 of Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, The Prosecutor v. Duško Tadić, Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997 ("Separate and Dissenting Opinion of Judge McDonald") where she held: "I find that at all times relevant to the indictment, the armed conflict in opština Prijedor was international in character [...]".

\(^{104}\) 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 Bosnian 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 Srebrenica, the seat of government of the Republic of Bosnia and Herzegovina, in April 1992 by Serb forces, their attack on towns along Bosnia and Herzegovina's border with Serbia on the
Army (VRS) and the BH after the VRS was established in May 1992. 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 jure or de facto organs of a foreign Power, namely the FRY.

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

Drina River and their invasion of south-eastern Herzegovina from Serbia and Montenegro [...].”

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 on whose territory they live and operate.
92. 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 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 1969 in Kassem et al.:

“In view, however, of the experience of two World Wars, the nations of the world found it necessary to add the fundamental requirement of the total responsibility of Governments for the operations of irregular corps and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war.”

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 those 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.

114 In view, however, of the experience of two World Wars, the nations of the world found it necessary to add the fundamental requirement of the total responsibility of Governments for the operations of irregular corps and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war.

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 [...] no Government with which we are in a state of war accepts responsibility for the acts of the Popular Front for the Liberation of Palestine. The Organisation itself, so far as we know, is not prepared to take orders from the Jordanian Government, witness[ed] by the fact that [the] Organisation 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. 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 of a State, that is, as acting as de facto State officials. 117 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. This opinion was authoritatively set forth by some members of the International Law Commission ("ILC") (Professor Reuter who observed that "[i]t was now a principle of codified international law that States were responsible for all acts of their "armed forces" regardless of whether such forces acted as State officials or private persons. In other words, whether or not in an armed conflict individuals act in a private capacity, their acts are attributed to a State if such individuals are part of the "armed forces" of that State. This opinion was authoritatively set forth by some members of the International Law Commission ("ILC") (Professor Reuter observed that ")[i]t was now a principle of codified international law that States were responsible for all acts of their "armed forces" (yearbook of the International Law Commission, 1975, vol. 1, p. 7, para. 5). Professor A. C. A. Ago stated that the IV Hague Convention of 1907 "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" (ibid., p. 36, 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. 118

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. 118 The Court went so far as to state that in order to establish that the United States was responsible for "acts contrary to human rights and humanitarian law" allegedly perpetrated by the Nicaraguan contras, it was necessary to prove that the United States had specifically "directed or enforced" the perpetration of those acts. 119

---

"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."

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 IV Hague Convention of 1907 and Article 91 of Additional Protocol I, international humanitarian law establishes a special regime of State responsibility; under this lex specialis States are responsible for all acts committed by their "armed forces" regardless of whether such forces acted as State officials or private persons. In other words, whether or not in an armed conflict individuals act in a private capacity, their acts are attributed to a State if such individuals are part of the "armed forces" of that State. This opinion was authoritatively set forth by some members of the International Law Commission ("ILC") (Professor Reuter who observed that "[i]t was now a principle of codified international law that States were responsible for all acts of their "armed forces" (yearbook of the International Law Commission, 1975, vol. 1, p. 7, para. 5). Professor A. C. A. Ago stated that the IV Hague Convention of 1907 "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" (ibid., p. 36, 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. 118 Nicaragua, para. 115. As the Court put it, there must be "effective control of the military or paramilitary operations in the course of which the alleged violations of international human rights and humanitarian law were committed". 119 ibid., para. 115: "All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State."

Case No.: -94-1-A 15 July 1999

Case No.: -94-1-A 15 July 1999
101. As is apparent, and as was rightly stressed by Trial Chamber II in Rajic\textsuperscript{120} and restated by the Prosecution in the instant case,\textsuperscript{121} the issue brought before the International Court of Justice revolved around State responsibility; what was at stake was not the criminal culpability of the contras for serious violations of international humanitarian law, but rather the question of whether or not the contras had acted as de facto organs of the United States on its request, thus generating the international responsibility of that State.

(i) Two Preliminary Issues

102. Before examining whether the Nicaragua test is persuasive, the Appeals Chamber must deal with two preliminary matters which are material to our discussion in the instant case.

103. First, with a view to limiting the scope of the test at issue, the Prosecution has contended that the criterion for ascertaining State responsibility is different from that necessary for establishing individual criminal responsibility. In the former case one would have to decide whether serious violations of international humanitarian law by private individuals may be attributed to a State because those individuals acted as de facto State officials. In the latter case, one would have instead to establish whether a private individual may be held criminally responsible for serious violations of international humanitarian law amounting to “grave breaches”.\textsuperscript{122} 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”.\textsuperscript{123} In the opinion of the Prosecution, the Court then 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.\textsuperscript{124} 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.\textsuperscript{125}

\textsuperscript{121} Cross-Appellant’s Brief, paras. 2.14-2.17.
\textsuperscript{122} Cross-Appellant’s Brief, paras. 2.16-2.17; Cross-Appellant’s Brief in Reply, para. 2.19.
\textsuperscript{123} Cross-Appellant’s Brief, para. 2.56.
\textsuperscript{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 between the United States and the contras was such as to permit the United States to be held responsible for particular acts committed by the contras in violation of international humanitarian law.” As noted above, the Court did not rely upon the Nicaragua test.
\textsuperscript{125} Cross-Appellant’s Brief, paras. 2.57-2.58.
107. The Appeals Chamber considers that the Prosecution's submissions are based on a misreading of the judgement of the International Court of Justice and a misapprehension of the doctrine of State responsibility on which that judgement is grounded.

108. Clearly, the Court did use two tests, but in any case its tests were conceived in a manner different from what is contended by the Prosecution, and in addition they were to a large extent set out along the lines dictated by customary international law. Admittedly, in its judgement, the Court did not always follow a straight line of reasoning (whereas it would seem that a jurisprudential approach more consonant with customary international law was taken by Judge Ago in his Separate Opinion). 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.

109. It would therefore seem that in Nicaragua the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: the members of the Government administration or armed forces of the United States. With regard to these individuals, the Court clearly started from a basic assumption, which the same Court recently defined as "a well-established rule of international law", 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

126 See Nicaragua, pp. 187-190.
127 See Nicaragua, para. 75.
128 See the Advisory Opinion delivered by the ILC 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.
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.

132 Ibid., para 86.
133 Ibid., para 109 (emphasis added).
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. 15).
(ii) The Grounds On Which the Nicaragua Test Does Not Seem To Be Persuasive

115. The "effective control" test enunciated by the International Court of Justice was regarded as correct and upheld by Trial Chamber II in the Judgement. 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. Under this Article, if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act de facto through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.

118. One situation is the case of a private individual who is engaged by a State to perform some specific illegal acts in the territory of another State (for instance, kidnapping a State official, murdering a dignitary or a high-ranking State official, blowing up a power station or, especially in times of war, carrying out acts of sabotage). In such a case, it would be necessary to show that the State issued specific instructions concerning the commission of the breach in order to prove — if only by necessary implication — that the individual acted as a de facto State agent. Alternatively it would be necessary to show that the State has publicly given retroactive approval to the action of that individual. A generic authority over the individual would not be sufficient to engage the international responsibility of the State. A similar situation may come about when an unorganised group of individuals commits acts contrary to international law. For these acts to be attributed to the State it would seem necessary to prove not only that the State exercised some measure of authority over those individuals but also that it issued specific instructions to them concerning the performance of the acts at issue, or that it ex post facto publicly endorsed those acts.

119. To these situations another one may be added, which arises when a State entrusts a private individual (or group of individuals) with the specific task of performing unlawful 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.

137 Judgement, paras. 584-588.
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:
a) it is established that such person or group of persons was in fact acting on behalf of that State; or
b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority" (U.N. Doc. A/35/10, para. 34, in Yearbook of the International Law Commission, 1980, vol. II (2)).
See also the First Report on State Responsibility by the Special Rapporteur J. Crawford (U.N. Doc. A/CN. 4/490/Add.5, pp. 16-24). The text of Article 8 as provisionally adopted by the ILC Drafting Committee in 1998 provides:
"The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct" (A/CN.4/L.569, p. 3).
120. One should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.

121. This kind of State control over a military group and the fact that the State is held responsible for acts performed by a group independently of any State instructions, or even contrary to instructions, to some extent equates the group with State organs proper. Under the rules of State responsibility, as restated in Article 10 of the Draft on State Responsibility as provisionally adopted by the International Law Commission, 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 those 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.140

122. The same logic should apply to the situation under discussion. As noted above, the situation of an organised group is different from that of a single private individual performing a specific act on behalf of a State. In the case of an organised group, the group normally engages in a series of activities. If it is under the overall control of a State, it must perform the responsibility of that State for its activities, whether or not each of them was specifically imposed, requested or directed by the State. To a large extent the wise words used by the United States-Mexico General Claims Commission in the Youmans case with regard to State responsibility for acts of State military officials should hold true for acts of organised groups over which a State exercises overall control.141

123. What has just been said should not, of course, blur the necessary distinction between the various legal situations described. In the case envisaged by Article 10 of the Draft on State Responsibility (as well as in the situation envisaged in Article 7 of the same Draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State's public entity. In the case under discussion here, that of organised groups, State responsibility is instead the objective corollary of the overall control exercised by the State over the group. Despite these legal differences, the fact

---

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 or entity having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity". (Report of the International Law Commission on the work of its thirty-second session (5 May–25 July 1980), U.N. Doc. A/35/10, p.31).

See also the First Report on State Responsibility by the Special Rapporteur J. Crawford, U.N. Doc. A/CN.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 as 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" (UN Doc. A/CN.4/L.569, p. 3).

140 This sort of "objective" State responsibility also arises in another 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).

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, or that the soldiers 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 its 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 Komiteh personnel were engaged in the maintenance of law and order from January 1979 to months after February 1979 as government police forces rapidly lost control over the situation." It had asserted, however, that "these revolutionaries did not operate under the name 'Revolutionary Komitehs' or 'Revolutionary Guards', and that they were not affiliated with the Provisional Government." 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

---

142 See United States v. Mexico (Stephens Case), Reports of International Arbitral Awards, vol. IV, pp. 266-267.


144 Ibid., para 37.

145 Ibid., para 23.

146 Ibid., paras 39, 45. The Claims Tribunal went on to note that: 

"[w]hile there were complaints about a lack of discipline among the numerous Komitehs, Ayatollah Khomeini stood behind them and the Komitehs, in general, were loyal to him and the clergy. Soon after the victory of the Revolution, the Komitehs, contrary to other groups, obtained a firm position within the State structure and were eventually conferred a permanent place in the State budget" (ibid., para 39; emphasis added).
were “dressed in everyday clothes, but wore distinctive arm bands indicating association with the new Government, and wore 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”.148 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”.149 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.150 The Claims Tribunal took the same stance in other cases.151

128. A similar approach was adopted by the European Court of Human Rights in Loizidou v. Turkey152 (although in this case the question revolved around the possible control of a sovereign State over a State entity, rather than control by a State over armed forces operating in the territory of another State). The Court had to determine whether Turkey was responsible for the continuous denial to the applicant of access to her property in northern Cyprus and the ensuing loss of control over the property. The respondent State, Turkey, denied that the Court had jurisdiction, on the grounds that the act complained of was not committed by one of its authorities but, rather, was attributable to the authorities of the Turkish Republic of Northern Cyprus (“TRNC”). The Court dismissed these arguments and found that Turkey was responsible. In reaching the conclusion that the restrictions on the right to property complained of by the applicant were attributable to Turkey, the Court did not find it necessary to ascertain whether the Turkish authorities had exercised “detailed” control over the specific “policies and actions” of the authorities of the “TRNC”. The Court was satisfied by the showing that the local authorities were under the “effective overall control” of Turkey.153

129. A substantially similar stand was recently taken in the Jorgic case by the Oberlandesgericht of Düsseldorf in a decision of 26 September 1997.154 With regard to crimes committed in Bosnia and Herzegovina by Bosnian Serbs, the Court held that the Bosnian Serbs fighting against the central authorities of Sarajevo had acted on behalf of the FRY. To support this finding, the court emphasised that Belgrade financed, organised and equipped the Bosnian Serb army and paramilitary units and that there existed between the JNA and the Bosnian Serbs “a close personal, organisational and logistical interconnection” which was considered to be a sufficient basis for regarding the conflict as

---

147 Ibid., paras. 12, 41.
148 Ibid., para. 61.
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 exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object. Under those circumstances, and for the kind of means involved here, the Respondent has the burden of coming forward with evidence showing that members of ‘Komitehs’ or ‘Guards’ were in fact not acting on its behalf, or were not exercising elements of government authority, or that it could not control them”, (Kenneth P. Yeager v. Islamic Republic of Iran, 17 Iran-U.S. Claims Tribunal Reports, 1987, vol. IV, p. 92, at para. 43).
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 1984, p. 198 at p. 226. See also Arthur Young and Company v. Islamic Republic of Iran, Telecommunications Company of Iran, Social Security Organization of Iran, Award No. 338-484-1, 17 Iran-U.S. Claims Tribunal Reports, 1987, p. 245. Here the Claims Tribunal found that in the circumstances of the case Iran was not responsible because there was no causal link between the action of the revolutionary guards and the alleged breach of international law. However, the Claims Tribunal held that otherwise Iran might have incurred international responsibility for acts of “armed men wearing patches on their pockets identifying them as members of the revolutionary guards” (para. 53). A similar stand was taken in Schott v. Islamic Republic of Iran, Award No. 474-268-1, 24 Iran-U.S. Claims Tribunal Reports, 1990, p. 203 at para 59.

---

In Dalay, on the other hand, the Claims Tribunal held Iran responsible for the expropriation of a car, for the five Iranian “Revolutionary Guards” who had taken the car were “in army-type uniforms” at the entrance of a hotel which had come “under the control of Revolutionary Guards” a few days before. (Dalay v. Islamic Republic of Iran, Award No. 360-514-1, 18 Iran-U.S. Claims Tribunal Reports, 1988, 232 at paras. 19-20).

154 In his 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 exercised 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).

155 2 StE 8/96 (unpublished typescript; kindly provided by the German Embassy to the Netherlands and on file with the International Tribunal’s Library).
international.\footnote{The Court stated the following: \textquotedblleft The conflict in Bosnia-Herzegovina was an international conflict for the purposes of Article 2 of the Fourth Geneva Convention. Owing to the declaration of independence and the referendum of 29 February and 1 March 1992 and to international recognition on 6 April 1992, Bosnia-Herzegovina had become an autonomous State, independent from Yugoslavia. The armed conflict that took place on its territory in the following period was not an internal clash (conflict), in which an ethnic group was trying to break with the existing State of Bosnia-Herzegovina and which as a consequence had no international character. The expert witness Fischer pointed out that, by using the term international humanitarian law applicable to this conflict, the United Nations Security Council has used the term usual in international terminology to refer to the law applicable to international armed conflicts. This [according to the expert witness] showed that the Security-Council considered the conflict to be international. The expert witness Fischer cited the following circumstances as indicia of an international conflict according to the prevailing view in international law: the participation of organs of a State in a conflict on the territory of another State, e.g. the participation of officers in the clashes, or the financing of and provision of technical equipment to one party to the conflict by another State; the latter at least when it is combined with the aforementioned interconnection (Verflechtung) between personnel. According to this Chamber’s findings, these criteria are met in the case at hand. The Chamber has found that at the beginning of May officers of the JNA, which at that time was purely Serb, began taking Doboj and the surrounding villages. There can, therefore, be no doubt regarding the existence of an international armed conflict at that point in time. However, this Chamber has further found that after 19 May 1992, when the JNA officially withdrew from Bosnia-Herzegovina, officers of the JNA continued to be employed in Bosnia-Herzegovina and paid by Belgrade, and that at the end of May 1992, weapons and vehicles were still being brought from Belgrade to Bosnia-Herzegovina. As a consequence, a close personal, organisational and logistical interconnection (Verflechtung) of the Bosnian-Serb army, paramilitary groups and the JNA persisted. The headquarters of the Bosnian-Serb army maintained a liaison office in Belgrade.\textquotedblright} (ibid., pp. 158-160 of the unpublished typescript; unofficial translation).

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.\footnote{The judgement of the Düsseldorf Court of Appeal was upheld on appeal by the Federal Court of Justice (Bundesgerichtshof) by a judgement of 30 April 1999 (unpublished). The appeal was based, inter alia, on a misapplication of substantive law. This ground also included the question of whether the conflict was international in character. The Bundesgerichtshof did not address the matter specifically, thus implicitly upholding the judgement of the Düsseldorf Court. See, in particular, pp. 19-20 and 23 of the German typescript (3 StR 215/98), on file with the International Tribunal library.} 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 . . . g not to use force against another State.”\footnote{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 as a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.} This was clearly a case of responsibility for the acts of its own organs.

131. In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.

132. It should be added that courts have taken a different approach with regard to individuals or groups not organised into military structures. With regard to such individuals or groups, courts have not considered an overall or general level of control to be sufficient, but have instead insisted upon specific instructions or directives aimed at the commission of specific acts, or have required public approval of those acts following their commission.

133. The Appeals Chamber will mention, first of all, the United States Diplomatic and Consular Staff in Tehran case.\footnote{Although there does not seem to exist any international practice in this area, it may happen that a State simply providing economic and military assistance to a military group (hence not necessarily exercising effective control over the group) directs a member of the group or the whole group to perform a specific internationally wrongful act, e.g., an international crime such as genocide. In this case one would face a situation similar to that described above, in the text, of a State issuing specific instructions to an individual.} 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.\textsuperscript{160} 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.\textsuperscript{161} 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.\textsuperscript{162}

134. The same approach was adopted in 1986 by the International Court itself in Nicaragua with regard to the UCLAs (which the Court defined as “persons of the nationality of unidentified Latin American countries”).\textsuperscript{163} 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).\textsuperscript{164}

135. Similar views were propounded in 1987 by the Iran-United States Claims Tribunal in Short.\textsuperscript{165} 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.\textsuperscript{166}

136. It should be added that State practice also seems to clearly support the approach under discussion.\textsuperscript{167}

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

\textsuperscript{160} Alfred W. Short v. Islamic Republic of Iran, Award No. 312-11135-3, 16 Iran-U.S. Claims Tribunal Reports 1987, p. 76.

\textsuperscript{161} After finding that the acts of the revolutionaries could not be attributed to Iran, the Claims Tribunal noted the following: "The Claimant’s reliance on the declarations made by the leader of the Revolution, Ayatollah Khomeini, and other spokesmen of the revolutionary movement, also lack the essential ingredient as being the cause for the Claimant’s departure in circumstances amounting to an expulsion. While these pronouncements were of a general nature and did not specify that Americans should be expelled, 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. 50; emphasis added).

\textsuperscript{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 complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible [...]” (ibid., p. 35, para. 74; emphasis added).

\textsuperscript{163} See Nicaragua, para. 75.

\textsuperscript{164} Ibid., para. 80.
specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved ex post facto by the State at issue. By contrast, control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.

138. Of course, if, as in Nicaragua, the controlling State is not the territorial State where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions.

139. The same substantial evidence is required when, although the State in question is the territorial State where armed clashes occur, the general situation is one of turmoil, civil strife and weakened State authority.

140. Where the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to 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 that of 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 inter alia accused of murder and other offences against the camp inmates. According to the official report on this case:

In rebutting 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

In many of 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. 172

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.
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{171} Public Prosecutor v. Menten, 75 International Law Reports 1987, pp. 331ff.

\textsuperscript{172} The court stated the following:

"Since Menten, on the orders of the Befehlshaber of the Sicherheitspolizei in Poland, was dressed in the uniform of an under-officer of this branch of the [German] police when he was dem Einsatzkommando als Dolmetscher zugewiesen [assigned to the Special forces as interpreter], the [District] Court of Amsterdam in its judgement of 14 December 1977 was justified in assuming that his position in the Einsatzkommando and his performance in within it of a more or less official character. Thus the relationship to the enemy in which Menten rendered incidental services was of such a nature that he could be regarded as a functionary of the enemy." (ibid., p. 347. The English translation has been slightly corrected by the Appeals Chamber to bring it into line with the Dutch original, which can be found in Nederlandse Jurisprudentie 1978, no. 358, p. 1236).

The court concluded that:

"From the above-mentioned evidence, taken together with the other evidence that in July 1941 Menten, dressed in a German uniform and in company with a number of other persons also so dressed, came to Podgorica [...] and was present at the killings, [it can be inferred] that he was there with members of the German Staff and that he rendered services to this Staff at the time of and in connection with these killings." (ibid., p. 348).

\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 Daly 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 Stocké case brought before the European Commission of Human Rights. A German national fled from Germany to Switzerland and then to France to avoid arrest in Germany for alleged tax offences. He was then tricked into re-entering Germany by a police informant and was arrested. He then claimed before the European Commission of Human Rights that he had been arrested in violation of Article 5(1) of the ECHR. The Commission held that:

"[I]n the case of collusion between State authorities, i.e. any State official irrespective of his hierarchical position, and a private individual for the purpose of returning against his will a person living abroad, without consent of his State of residence, to the territory where he is prosecuted, the High Contracting Party concerned incurs responsibility for the acts of the private individual who de facto acts on its behalf. The Commission considers that such circumstances may render this person's arrest and detention unlawful within the meaning of article 5(1) of the Convention" (Stocké v. Federal Republic of Germany, Eur. Court H. R., judgement of 19 March 1991, Series A, no 199, para. 168 (Opinion of the Commission).

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,\textsuperscript{176} but only on the legal interpretation to be given to those facts.

149. Since, however, the Appeals Chamber considers that the Trial Chamber applied an incorrect standard in evaluating the legal consequences of the relationship between the FRY

Although these cases concerned State responsibility, they may be relevant to the question of the criminal responsibility of individuals perpetrating grave breaches of the Geneva Conventions, inasmuch as they set out the conditions necessary for individuals to be considered as de facto State organs.

\textsuperscript{176} See Separate and Dissenting Opinion of Judge McDonald, para. 1: "I completely agree with and share in the Opinion and Judgment with the exception of the determination that Article 2 of the Statute is inapplicable to the charges against the accused."
and Bosnian Serb forces, the Appeals Chamber must now apply its foregoing analysis to the facts and draw the necessary legal conclusions therefrom.

150. The Trial Chamber clearly found that even after 19 May 1992, the command structure of the JNA did not change after it was renamed and redesignated as the VJ. Furthermore, and more importantly, it is apparent from the decision of the Trial Chamber and more particularly from the evidence as evaluated by Judge McDonald in her Separate and Dissenting Opinion, that even after that date the VJ continued to control the Bosnian Serb Army in Bosnia and Herzegovina, that is the VRS. The VJ controlled the political and military objectives, as well as the military operations, of the VRS. Two "factors" emphasised in the judgement need to be recalled: first, "the transfer to the 1st Krajina Corps, as with other units of the VRS, of former JNA Officers who were not of Bosnian Serb extraction from their equivalent postings in the relevant VRS unit's JNA predecessor" 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] was a legal fiction. The only changes made after the 15 May 1992 Security Council resolution were the transfer of troops, the establishment of a Main Staff of the VRS, a change in the name of the military organisation and individual units, and a change in the insignia. There remained the same weapons, the same equipment, the same officers, the same commanders, largely the same troops, the same logistics centres, the same suppliers, the same infrastructure, the same source of payments, the same goals and mission, the same tactics, and the same operations. Importantly, the objective remained the same [...]. The VRS clearly continued to operate as an integrated and instrumental part of the Serbian war effort. [...] The VRS Main Staff, the members of which had all been generals in the JNA and many of whom were appointed to their positions by the JNA General Staff, maintained direct communications with the VJ General Staff via a communications link from Belgrade. [...] Moreover, the VRS continued to receive supplies from the same suppliers in the Federal Republic of Yugoslavia (Serbia and Montenegro) who had contracted with the JNA, although the requests after 19 May 1992 went through the Chief of Staff of the VRS who then sent them onto Belgrade." (Separate and Dissenting Opinion of Judge McDonald, paras. 7-8).

180 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).

181 Judgement, para. 115:

"The VRS was in effect a product of the dissolution of the old JNA and the withdrawal of its non-Bosnian Serb 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 these 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.183 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.185

(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.186

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 1992.187

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.188 It was apparent that even after 19 May 1992 the Bosnian Serb army continued to act in pursuit 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.189 In spite of this, and although the Trial Chamber acknowledged the possibility that certain members of the VRS may have been specifically

183 Ibid., para. 118 ("Despite the announced JNA withdrawal from Bosnia and Herzegovina in May 1992, active elements of what had been the JNA, now rechristened as the VJ […] remained in Bosnia and Herzegovina after the May withdrawal and worked with the VRS throughout 1992 and 1993") and para. 569 ("[…] the forces of the VJ continued to be involved in the armed conflict after that date").

184 See in particular ibid., para. 566: “The ongoing conflicts before, during and after the time of the attack on Kozarac on 24 May 1992 were taking place and continued to take place throughout the territory of Bosnia and Herzegovina between the government of the Republic of Bosnia and Herzegovina, on the one hand, and, on the other hand, the Bosnian Serb forces, elements of the VJ operating from time to time in the territory of Bosnia and Herzegovina, in various paramilitary groups, all of which occupied or were proceeding to occupy a significant portion of the territory of that State.

See also para. 579: “The take over of Opšina Prijedor began before the JNA withdrawal on 19 May 1992 and was not completed until after that date”. See also the Dissenting Opinion of Judge McDonald who noted “Take continuity between the JNA and the VRS particularly as it relates to the military operations in the Opšina Prijedor area […]” (Separate and Dissenting Opinion of Judge McDonald, para. 15).

185 Moreover, it is interesting to observe that while concluding that by 19 May 1992 effective control over the VRS had been lost by the JNA/VJ, the Trial Chamber simultaneously observed that such control nevertheless did not appear to have been regained by the Bosnian authorities. In particular, the Trial Chamber found that the “Government of the Republic of Bosnia and Herzegovina […] faced […] major problems […] of defence, involving control over the mobilization and operations of the armed forces” (Judgement, para. 124, emphasis added).

186 In and of itself, the logistical difficulties of disengaging from the conflict and withdrawing such a large force would have been considerable. With regard to the extent and depth of the involvement of the large number of JNA forces engaged in Bosnia and Herzegovina and the ongoing nature of their activities beyond 19 May 1992, see ibid., paras. 124-125: “By early 1992 there were some 100,000 JNA troops in Bosnia and Herzegovina with over 700 tanks, 1,000 armoured personnel carriers, much heavy weaponry, 100 planes and 500 helicopters, all under the command of the General Staff of the JNA in Belgrade. […] On 19 May 1992 the withdrawal of JNA forces from Bosnia and Herzegovina was announced but the attacks were continued by the VRS.”

187 See in particular ibid., para. 116 (citing the 1993 publication of the former Yugoslav Federal Secretary for Defence, General Veljko Kadijević, entitled My view of the Break-up: an Army without a State (Prosecution Exhibit 30)):

“[t]he units and headquarters of the JNA formed the backbone of the army of the Serb Republic (Republic of Srpska) complete with weaponry and equipment […] First the JNA and later the army of the Republic of Srpska, which the JNA put on its feet, helped to liberate Serb territory, protect the Serb nation and create the favourable military preconditions for achieving the interests and rights of the Serbian nation in Bosnia and Herzegovina…”.

See also para. 590:

“The operation of Kozarac and of the surrounding villages was part of a military and political operation, begun before 19 May 1992 with the take-over of the town of Prijedor of 29 April 1992, aimed at establishing control over the Opština which formed part of the land corridor of Bosnian territory linking the Federal Republic of Yugoslavia (Serbia and Montenegro) with the so-called Republic of Serbian Krajina in Croatia.”

While the relationship between the JNA and VRS may have included coordination and cooperation, it cannot be seen as limited to this. As the Trial Chamber itself noted: “In 1991 and on into 1992 the Bosnian Serb and Croatian Serb paramilitary forces cooperated with and acted under the command and within the framework of the JNA” (ibid., para 593; emphasis added).

189 Ibid., para 598: “The Trial Chamber has already considered the overwhelming importance of the logistical support provided by the Federal Republic of Yugoslavia (Serbia and Montenegro) to the VRS. […] In addition to routing all high-level VRS communications through secure links in Belgrade, a
charged by the FRY authorities to commit particular acts or to carry out particular tasks of some kind, it concluded that “without evidence of orders having been received from Belgrade which circumvented or overrode the authority of the Corps Commander, those acts cannot be said to have been carried out ‘on behalf of’ the Federal Republic of Yugoslavia (Serbia and Montenegro).”

193. 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.

194. 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”. 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.”

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. 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.

195. 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.”

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, on the grounds, once again, that the Trial Chamber lacked explicit evidence of direct instructions having been issued from

existing administrative mechanisms for financing those soldiers and their operations would be relied on after 19 May 1992” (ibid).

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. It was deemed insufficient by the Trial Chamber that the VJ “made use of the potential for control inherent in that dependence”, or was otherwise given effective control over those forces [...]." (ibid; emphasis added)
Belgrade.\textsuperscript{197} However, this finding was based upon the Trial Chamber having applied the wrong test.

156. As the Appeals Chamber has already pointed out, international law does not require that the particular acts in question should be the subject of specific instructions or directives by a foreign State to certain armed forces in order for these armed forces to be held to be acting as de facto organs of that State. It follows that in the circumstances of the case it was not necessary to show that those specific operations carried out by the Bosnian Serb forces which were the object of the trial (the attacks on Kozarac and more generally within opština Prijedor) had been specifically ordered or planned by the Yugoslav Army. It is sufficient to show that this Army exercised overall control over the Bosnian Serb Forces. This showing has been made by the Prosecution before the Trial Chamber. Such control manifested itself not only in financial, logistical and other assistance and support, but also, and more importantly, in terms of participation in the general direction, coordination and supervision of the activities and operations of the VRS. This sort of control is sufficient for the purposes of the legal criteria required by international law.

157. An ex post facto confirmation of the fact that over the years (and in any event between 1992 and 1995) the FRY wielded general control over the Republika Srpska in the political and military spheres can be found in the process of negotiation and conclusion of the Dayton-Paris Accord of 1995. Of course, the conclusion of the Dayton-Paris Accord in 1995 cannot constitute direct proof of the nature of the link that existed between the Bosnian Serb and FRY armies after May 1992 and hence it is by no means decisive as to the issue of control in this period. Nevertheless, the Dayton-Paris Accord may be seen as the culmination of a long process. This process necessitated a dialogue with all political and military forces wielding actual power on the ground (whether de facto or de iure) and a continuous response to the shifting military and political fortunes of these forces. The political process leading up to Dayton commenced soon after the outbreak of hostilities and was ongoing during the key period under examination. To the extent that its contours were shaped by, and thus reflect, the actual power structures which persisted in Bosnia and Herzegovina over the course of the conflict, the Dayton-Paris Accord provides a particular insight into the political, strategic and military realities which prevailed in Bosnia and Herzegovina up to 1995, and including May 1992. The fact that from 4 August 1994 the FRY appeared to cut off its support to the Republika Srpska because the leadership of the former had misgivings about the authorities in the latter is not insignificant.\textsuperscript{198} Indeed, this “delinking” served to emphasise the high degree of overall control exercised over the Republika Srpska by the FRY. For, soon after this cessation of support from the FRY, the Republika Srpska realised that it had little choice but to succumb to the authority of the FRY.\textsuperscript{199} Thus, the Dayton-Paris Accord may indirectly shed light upon the realities of the command and control structure that existed over the Bosnian Serb army at the time the VRS and the VJ were ostensibly delinked, and may also assist the evaluation of whether or not control continued to be exercised over the Bosnian Serb army by the FRY army thereafter.

158. The Appeals Chamber will now turn to examine the specific features of the Dayton Accord that are of relevance to this inquiry.

159. By an agreement concluded on 29 August 1995 between the FRY and the Republika Srpska and referred to in the preamble of the Dayton-Paris Accord, it was provided that a unified delegation would negotiate at Dayton. This delegation would consist of six persons, three from the FRY and three from the Republika Srpska. The Delegation was to be chaired by the FRY, for, soon after this cessation of support from the FRY, the Republika Srpska realised that it had little choice but to succumb to the authority of the FRY.\textsuperscript{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, UNGA OR, 49\textsuperscript{th} sess., supp. no. 1 (A/49/1), 2 September 1994, p. 95).

\textsuperscript{197} The Trial Chamber noted that: “the Federal Republic of Yugoslavia (Serbia and Montenegro), through the dependence of the VRS on the supply of materiel by the VJ, had the capability to exercise great influence and perhaps even control over the VRS […] However, 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.).

\textsuperscript{198} 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 1994, p. 3, where it is noted that as of 4 August 1994, the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) ordered, inter alia, the breaking off of political and economic relations with the Republika Srpska and the closure of the border between the Republika Srpska and the FRY to all transport towards the Republika Srpska, except food, clothing and medicine. International observers were deployed to monitor compliance with these measures, and it was reported by the Co-Chairmen that the Government of the FRY appeared to be “meeting its commitment to close the border between the Federal Republic of Yugoslavia (Serbia and Montenegro) and the areas of the Republic of Bosnia and Herzegovina under the control of the Bosnian Serb forces.” (Report of the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia on the state of implementation of the border closure measures taken by the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro), S/1994/1124, 3 October 1994, pp. 2-3).

\textsuperscript{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).
by President Milošević, 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 fulfillment of their provisions, was signed by President Milošević. This signature had the effect of guaranteeing respect for these commitments by the Republika Srpska. Furthermore, by a letter of 21 November 1995 addressed to various States (the United States, Russia, Germany, France and the United Kingdom), the FRY pledged to take “all necessary steps, consistent with the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, to ensure that the Republika Srpska fully respects and complies with the provisions” of the Agreement on Military Aspects of the Peace Settlement (Annex 1A to the Dayton-Paris Accord). In addition, the letter by which the Republika Srpska undertook to comply with the aforementioned Agreement was signed on 21 November 1995 by the Foreign Minister of the FRY, Mr. Milutinović, for the Republika Srpska.

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.

160. This agreement stipulated that the delegation of the Republika Srpska was to be “headed by the President of the Republic of Serbia Mr. Slobodan Milošević” (Article 2). Pursuant to this agreement, the leadership of the Republika Srpska agreed “to adopt the binding decisions of the delegation, regarding the Peace Plan, in plenary sessions, by simple majority. In the case of divided votes, the vote of the President, Mr. Slobodan Milošević, shall be decisive” (Article 3). That Mr. Milošević was head of the joint delegation was confirmed by Mr. Milošević himself in his letter of 21 November 1995 to President Izetbegović concerning Annex 9 to the Dayton-Paris Accord. (A agreement on file with the International Tribunal’s Library).

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 offenses 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

200 This agreement stipulated that the delegation of the Republika Srpska was to be “headed by the President of the Republic of Serbia Mr. Slobodan Milošević” (Article 2). Pursuant to this agreement, the leadership of the Republika Srpska agreed “to adopt the binding decisions of the delegation, regarding the Peace Plan, in plenary sessions, by simple majority. In the case of divided votes, the vote of the President, Mr. Slobodan Milošević, shall be decisive” (Article 3). That Mr. Milošević was head of the joint delegation was confirmed by Mr. Milošević himself in his letter of 21 November 1995 to President Izetbegović concerning Annex 9 to the Dayton-Paris Accord. (A agreement on file with the International Tribunal’s Library).

201 This letter had been signed by Mr. Milutinović, Foreign Minister of the FRY, following a request of 20 November 1995 of the three members of the “Delegation of Republika Srpska” to Mr. Milošević.


203 Article 4(2) of Geneva Convention IV provides as follows: “Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are”.

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 comparatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.

169. Hence, even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable. Indeed, the victims did not owe allegiance to (and did not receive the diplomatic protection of) the State (the FRY) on whose behalf the Bosnian Serb armed forces had been fighting.
C. Conclusion

170. It follows from the above that the Trial Chamber erred in so far as it acquitted the Appellant on the sole ground that the grave breaches regime of the Geneva Conventions of 1949 did not apply.

171. The Appeals Chamber accordingly finds that the Appellant was guilty of grave breaches of the Geneva Conventions on Counts 8, 9, 12, 15, 21 and 32.

V. THE SECOND GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE FINDING OF INSUFFICIENT EVIDENCE OF PARTICIPATION IN THE KILLINGS IN JASKI

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.\(^\text{206}\)

173. The Prosecution fully accepts the findings of fact of the Trial Chamber,\(^\text{207}\) 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.\(^\text{208}\)

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.\(^\text{209}\) 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.”\(^\text{210}\) 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”\(^\text{211}\) is not fair or

\(^{206}\) 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. The use of such terms as “bare possibility” and “could suggest” indicates the misapplication of the test of proof beyond reasonable doubt.

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. The Trial Chamber found that the Appellant’s participation in the attack on Sivci and Jaski 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 on 14 June 1992. 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. 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.

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

B. Discussion

1. The Armed Group to Which the Appellant Belonged Committed the Killings

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. It also found that five men were killed in the latter village.

2. The Defence Case

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 were killed by another, distinct group of armed men, especially as nothing is known as to who shot the victims or in what circumstances. Accordingly, the standard of proof beyond reasonable doubt was correctly applied.

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. On the basis of the distinction between the operation in Jaski 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.
which the accused took part; it is accordingly a distinct possibility that it may have been the act of a quite distinct group of armed men, or the unauthorized and unforeseen act of one of the force that entered Sivci, for which the accused cannot be held responsible, that caused their death. 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\textdagger. 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\textdagger 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\textdagger villagers were the result of encountering a part of that large force of Serb soldiers that invaded Sivci would be enough, in the state of the evidence, or rather, the lack of it, relating to their deaths, to prevent satisfaction beyond reasonable doubt that the accused was involved in those deaths. 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\textdagger.

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\textdagger 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\textdagger even though there is no evidence that he personally killed any of them. The two central issues are:

(i) whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan; and

(ii) what degree of mens rea is required in such a case.

186. The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (nula poena sine culpa). In national legal systems this principle is laid down in Constitutions, 228 in laws, 229 or in judicial decisions. 230 In international criminal law the principle is laid down, inter alia, in Article 7(1) of the Statute of the International Tribunal which states that:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute shall be individually responsible for the crime. (emphasis added)

This provision is aptly explained by the Report of the Secretary-General on the establishment of the International Tribunal, which states the following:

228 An example is provided by Article 27 para. 1 of the Italian Constitution ("La responsabilità penale è personale." ("Criminal responsibility is personal.") (unofficial translation)).
229 See for instance Article 121-1 of the French Code pénal ("Nul n’est responsable pénalemment que de son propre fait."), para. 4 of the Austrian Strafgesetzbuch ("Straftat ist nur, wer schuldhaft handelt." ("Only he who is culpable may be punished") (unofficial translation)).
230 This rather basic proposition is usually tacitly assumed rather than explicitly acknowledged. For an example of where it was expressly stated, however, see, for Great Britain, R. v. Dalloway (1847) 3 Cox CC 273. See also the various decisions of the German Constitutional Court, e.g., BverfGE 6, 389 (439) and 50, 125 (133), as well as decisions of the German Federal Court of Justice (e.g., BGHSt 2, 194 (200)).
An important element in relation to the competence ratione personae (personal jurisdiction) of the International Tribunal is the principle of individual criminal responsibility. As noted above, the Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.\footnote{Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993 (“Report of the Secretary-General”), para. 53 (emphasis added).}

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.

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.

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.

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 \textit{actus reus} of the enumerated crimes but appears to extend also to other offenders (see in particular Article 2, which refers to committing or \textit{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 \textit{conspiracy}, \textit{incitement}, \textit{attempt} and \textit{complicity}).

It should be noted that this notion is spelled out in the Secretary General’s Report, according to which:

\begin{quote}
The Secretary-General believes that \textit{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.\footnote{Ibid., para 54 (emphasis added).}
\end{quote}

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.

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.

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
those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.

193. This interpretation, based on the Statute and the inherent characteristics of many crimes perpetrated in wartime, warrants the conclusion that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design. It may also be noted that – as will be mentioned below – international criminal rules on common purpose are substantially rooted in, and to a large extent reflect, the position taken by many States of the world in their national legal systems.

194. However, the Tribunal’s Statute does not specify (either expressly or by implication) the objective and subjective elements (actus reus and mens rea) of this category of collective criminality. To identify these elements one must turn to customary international law. Customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation.

195. Many post-World War II cases concerning war crimes proceed upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group. Close scrutiny of the relevant case law shows that broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality.

196. The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.

197. With regard to this category, reference can be made to the Georg Otto Sandrock et al. case (also known as the Almelo Trial).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

---

233 Trial of Otto Sandrock and three others, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, on 24th-26th November, 1945, UNWCC, vol. I, p. 35.
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 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. 41).
235 Hoelzer et al., Canadian Military Court, Aurich, Germany, Record of Proceedings 25 March 6 April 1946, vol. I, pp. 341, 347, 349 (RCAC 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. 41.
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.

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, 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, and stressed:

> [...] the requirement that an accused, before he can be found guilty, must have been concerned in the offence. [T]o 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 [...]. [I]n 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. 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.

---

238 Trial of Franz *Schonfeld* and others, British Military Court, Essen, June 11th-26th, 1946, UNWCC, vol. XI, p. 68 (summing up of the judge Advocate).
239 Trial of Feustein and others, Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), judgement of 24 August 1948 (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal’s Library).
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 intended to take 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 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 Ibid., summing up of the judge Advocate, p. 7.
242 In this regard, the Judge Advocate noted that: “Of 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 that

---

244 A final case worthy of mention with regard to this first category is the *Einsatzgruppen* case. With regard to common design, a United States Tribunal sitting at Nuremberg noted that:

> “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 Weiden and Others, Proceedings of the Military Court at Hamburg, (1-3 July 1947) (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal’s Library), which concerned the killing of fifty officers of the allied air force who had escaped from the Stalag Luft III camp in Silesia. The Prosecutor in his opening remarks stressed that:

> “everybody, particularly every policeman of whatever sort it may be, knew quite well that there had been a mass escape of prisoners of war on the 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, Strafenset., Urteil vom 8. Februar 1949 gegen 5, S. 512-518, p. 286-290, 286, vol. II). See also Case no. 17, vol. I, 94-96, 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 was sufficient that he observed the local action, that he approved it, and that he wanted it "as his own" (unofficial translation). The United States District Court, District of Columbia, United States v. Otto Ohlenforf et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, United States Government Printing Office, Washington, 1951, vol. IV, p. 3.

245 The tribunal went on to say: "Even though these men [Redetsky, Ruhl, 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 about, is guilty of the crimes committed by the unit. The cook in the galley of a pirate ship does not escape the yachtman 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 Italian246 and German247 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,248 decided by a United States court sitting in Germany and Belsen,249 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.250 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.251 The convictions of several of the accused appear to have been explicitly based upon these criteria.252

203. This category of cases (which obviously is not applicable to the facts of the present case) is really a variant of the first category, considered above. The accused, when they were found guilty, were regarded as co-perpetrators of the crimes of ill-treatment, because of their objective “position of authority” within the concentration camp system and because they had “the power to look after the inmates and make their life satisfactory”253 but failed to do so.254 It would seem that in these cases the required 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 design, 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”.

---

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 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:

> [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 police officer 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.256]

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 Tayler, the Prosecutor, stated the following:

My friend [the Defence Counsel] has spoken to you about the intent which is necessary and he says that there is 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 slip 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.257

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.258

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,

256 Ibid., p. 89.
258 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. 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 ones who dealt the fatal blows. This rule of law and common sense must, of necessity, be so. Otherwise, many of the true instigators of crime would never be punished.

Who can tell which particular act was the most responsible for the final shooting of these flyers? Can it not be true that any one of the acts or 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, 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.]

In short, 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”. 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.”

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.

Other defence counsel claimed that there was no evidence that there was a conspiracy among the German officers, or they argued that, if there had been such a plot, it did not involve the killing of the airmen.

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 while others were only found guilty of assault.

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.
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 “illegal restraint” (sequestro di persona) but also for manslaughter (omicidio preterintenzionale). The Court of Cassation upheld this finding. It held that for this type of criminal liability to arise, it was necessary that there exist not only a material but also a psychological “causal nexus” between the result all the members of the group intended to bring about and the different actions carried out by an individual member of that group. The court went on to point out that:

...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 causatii.^[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 (stata preveduta) 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) (judgement 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. 6-7 (unofficial translation; emphasis added).

The intended offence, but a new fact, having its own causal autonomy, and linked to the conduct willed by the instigator (mandante) by a merely incidental relationship (emphasis added).

219. The same notion was enunciated by the same Court of Cassation in many other cases. That this was the basic notion upheld by the court seems to be borne out by the fact that the one instance where the same court adopted a different approach is somewhat conspicuous. Accordingly, it would seem that, with regard to the mens rea element required for the criminal responsibility of a person for acts committed within a common purpose but not envisaged in the criminal design, that court either applied the notion of an attenuated form of intent (dolus eventualis) or required a high degree of carelessness (culpa).

220. In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal. As for the objective and subjective elements of the crime, the case law shows that the notion has been applied to three distinct categories of cases. First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called “concentration camp” cases, where the requisite mens rea comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused’s authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of “common purpose” only where the following requirements concerning mens rea are fulfilled: (i) the intention to

unforeseen (imprevisto) event”, for during a search a civilian had escaped to avoid being detained and had been shot at by the German soldier. A similar position was taken by the same court in Ferrida. The appellant had participated, “only in his capacity as a nurse,” in a mopping-up operation in the course of which some partisans had been killed. The court found that he was not guilty of murder; the law on amnesty was therefore applicable to him. In Bonati et al. the appellant argued that the crime of murder, not envisaged by the group of persons concerned, had been perpetrated by another member of that group. The Court of Cassation rejected the appeal, holding that the appellant was also guilty of murder. Although this crime was more grave than that intended by some of the participants (concorrenti), it “was in any case a consequence, albeit indirect, of his participation”. 

218. In these cases courts indisputably applied the notion that a person may be held criminally responsible for a crime committed by another member of a group and not envisaged in the criminal plan. Admittedly, in some of the cases the mens rea required for a member of the group to be held responsible for such an action was not clearly spelled out. However, in light of other judgements handed down in the same period on the same matter, although not relating to war crimes, it may nevertheless be assumed that courts required that the event must have been predictable. In this connection it suffices to mention the judgement of the Court of Cassation of 20 July 1949 in Mannelli, where the court explained the required causal nexus as follows:

The relationship of material causality by virtue of which the law makes some of the participants liable for the crime other than that envisaged, must be correctly understood from the viewpoint of logic and law and be strictly differentiated from an incidental relationship (rapporto di occasionalitá). 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 occasionalitá), 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

277 See e.g. Court of Cassation, 15 March 1948, Peveri case, in Archivio penale, 1948, pp. 431-432; Court of Cassation, 20 July 1949, Mannelli case, in Giustizia penale, 1949, Part II, col. 906, no. 599; Court of Cassation, 27 October 1949, P. M. v. Minapò, in Giustizia penale, 1950, Part II, col. 252, no. 202; 24 February 1950, Montagnino, ibid., col. 821; 19 April 1950, Solestio 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).
278 In the Antonini case (judgement of the Court of Cassation of 29 March 1949), the trial court had found the accused guilty not only of illegally arresting some civilians but also of their subsequent shooting by the Germans, as a "reprisal" for an attack on German troops in Via Rasella, in Rome. According to the trial court the accused, in arresting the civilians, had not intended to bring about their killing, but knew that he thus brought into being a situation likely to lead to their killing. The Court of Cassation reversed this finding,
take part in a joint criminal enterprise and to further—individually and jointly—the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to predict this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called dolus eventualis is required (also called “ advertent recklessness” in some national legal systems).

221. In addition to the aforementioned case law, the notion of common plan has been upheld in at least two international treaties. The first of these is the International Convention for the Suppression of Terrorist Bombing, adopted by consensus by the United Nations General Assembly through resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998. Pursuant to Article 2(3)(c) of the Convention, offences envisaged in the Convention may be committed by any person who:

[i]n any other way [other than participating as an accomplice, or organising or directing others to commit an offence] contributes to the commission of one or more offences as set forth in paragraphs 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

The negotiating process does not shed any light on the reasons behind the adoption of this text. 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:

[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 Furundžija. 281 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 this 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, 72 nd plenary meeting, 52 nd sess., Mon. 15 December 1997, U.N. Doc. A/52/IV.72). The Japanese delegate during the 33 rd meeting of the Sixth Committee nevertheless noted that “some terms used in the Convention such as [ ] ‘such contribution’ (Article 2, para. 3(c)) were ambiguous” (33 rd 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.

224. As pointed out above, the doctrine of acting in pursuance of a common purpose is rooted in the national law of many States. Some countries act upon the principle that where multiple persons participate in a common purpose or common design, all are responsible for the ensuing criminal conduct, whatever their degree or form of participation, provided all had the intent to perpetrate the crime envisaged in the common purpose. If one of the participants commits a crime not envisaged in the common purpose or common design, he alone will incur criminal responsibility for such a crime. These countries include Germany and the Netherlands. Other countries also uphold the principle whereby if persons take part in a common plan or common design to commit a crime, all of them are criminally responsible for the crime, whatever the role played by each of them. However, in these countries, if one of the persons taking part in a common criminal plan or enterprise perpetrates another offence that was outside the common plan but nevertheless foreseeable, those persons are all fully liable for that offence. These countries include civil law systems, such as that of France and Italy.

282 Even should it be argued that the objective and subjective elements of the crime, laid down in Article 25 (3) of the Rome Statute differ to some extent from those required by the case law cited above, the consequences of this departure may only be appreciable in the long run, once the Court is established. This is due to the inapplicability to Article 25(3) of Article 10 of the Statute, which provides that “nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”. This provision does not embrace Article 25, as this Article appears in Part 2 of the Statute, whereas Article 25 is included in Part 3.

283 See Para. 25(2) of the Gesetzesbuche: “Begehren mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraf (Mittäter).” “If several persons commit a crime as co-perpetrators, each is liable to punishment as a principal perpetrator.” (unofficial translation). The German case law has clearly established the principle whereby if an offence is perpetrated that had not been envisaged in the common criminal plan, only the author of this offence is criminally responsible for it. See BGH GA 85, 270. A according to the German Federal Court (in BGH GA 85, 270):

“Mittäterschaft ist anzunehmen, wenn und soweit das Zusammenwirken der mehreren Beteiligten auf gegenseitigem Einverständnis beruht, während jede rechtsverletzende Handlung eines Mittäters, die über dieses Einverständnis hinausgeht, nur demselben 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 (Einverständnissen), whereas any criminal action of a participant (Mittäter) going beyond this agreement can only be attributed to that participant.” (unofficial translation)).

284 In the Netherlands, the term designated for this form of criminal liability is “medeplegen”. (See HR 6 December 1943, NJ 1944, 245; HR 17 May 1943, NJ 1943, 576; and HR 6 April 1925, NJ 1925, 723, W 11393).

285 See Article 121-7 of the Code pénal, which reads: “L’auteur d’un délit qui, avec l’aide ou en facilitant sa préparation ou sa consommation, a contribué à la réalisation d’un délit commission.” (Any person who knowingly has assisted in planning or committing a crime or offences, 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)).

286 They also embrace common law jurisdictions such as England and Wales, Canada, Australian and Zambia. 

In addition to responsibility for crimes committed by more persons, the Court of Cassation has envisaged criminal responsibility for acts committed by an accomplice going beyond the criminal plan. In this connection the Court has distinguished between crimes bearing no relationship to the crime envisaged (e.g. a person hands a gun to an accomplice in the context of a hold-up, but the accomplice uses the gun to kill one of his relatives), and crimes where the conduct bears some relationship to the planned crime (e.g. theft is carried out in the course of a robbery). In the former category of cases French case law does not hold the person concerned responsible, while in the latter it does, under certain conditions (as held in a judgement of 31 December 1947, Bulletin des arrêts criminels de la Cour de Cassation 1947, no. 270, the accomplice "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.

287 The principles of common purpose are delineated, in substance, in the following provisions of the Codice penale:

“Art 110. Punta per colui che concorrono nel reato. - Quando più persone concorrono nel medesimo reato, ciascuno di esse soggiace alla pena per questo stabilita, salve le disposizioni degli articoli seguenti.” (“Penalties for those who take part in a crime. - Where multiple persons participate in the same crime, each of them is liable to the penalty established for that crime, subject to the provisions of the following Articles.” (unofficial translation)); and

“Art 116. Reato diverso da quello voluto da taluno dei concorrenti, anche questi ne risponde, se l’evento e conseguenza della sua azione od omissione.” (“Crimes other than that intended by some of the participants. - Where the crime committed is different from that intended by one of the participants, he too shall answer for that crime if the event is a consequence of his act or omission.” (unofficial translation)).

It should be noted that Italian courts have increasingly interpreted Article 116 as providing for criminal responsibility in cases of foreseeability. See R. v. Hyde [1966] 1 QB 134, R. v. Anderson; R. v. Morris [1966] 2 QB 110, in which Lord Parker CJ held that “where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise. However, liability for such unusual consequences is limited to those offenders who the accused foresaw that the principal might commit as a possible incident of the common unlawful enterprise and further, the accused, with such foresight, must have continued to participate in the enterprise.” (Case No.: -94-1-A 15 July 1999).
225. It should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case. Nor can reference to national law have, in this case, the scope and purport adumbrated in general terms by the United Nations Secretary-General in his Report, where it is pointed out that “suggestions have been made that the international tribunal should apply domestic law in so far as it incorporates customary international humanitarian law”.292 In the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation.

226. The Appeals Chamber considers that the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down in both the Statute and general international criminal law and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law.

227. In sum, the objective elements (actus reus) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows:

i. **A plurality of persons.** They need not be organised in a military, political or administrative structure, as is clearly shown by the Essen Lynching and the Kurt Goebell cases.

ii. **The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.** There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

iii. **Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.** This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.

228. By contrast, the mens rea element differs according to the category of common design under consideration. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the

---

289 E.g., in Maine (17 Maine Criminal Code § 57 (1997)), Minnesota (Minnesota Statutes § 609.05 (1998)), Iowa (Iowa Code § 7032 (1997)), Kansas (Kansas Statutes § 21-3205 (1999)), Wisconsin (Wisconsin Statutes § 939.05 (West 1995)). Although there is no clearly defined doctrine of common purpose under the United States' Federal common law, similar principles are promulgated by the Pinkerton doctrine. This doctrine imposes criminal liability for acts committed in furtherance of a common criminal purpose, whether the acts are explicitly planned or not, provided that such acts might have been reasonably contemplated as a probable consequence or likely result of the common criminal purpose (see Pinkerton v. United States, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946); State v. Walton, 227 Conn. 32; 630 A.2d 990 (1993); State of Connecticut v. Dixo, 237 Conn. 518; 679 A.2d 902 (1996)).

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. It was also found that, in furtherance of this policy, inhumane acts were committed against numerous victims and "pursuant to a recognisable plan". The attacks on Sivci and Jaski 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 Jaski 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 Jaski on 14 June 1992. The Trial Chamber found the following:

Of the killing of the five men in Jaski, the witnesses Draguna Jaski, Zemka Ahbaz and Senija Elkasovi saw their five dead bodies lying in the village when the women were able to leave their houses after the armed men had gone. Senija Elkasovi saw that four of them had been shot in the head. She had heard shooting after the men from her house were taken away.293

The Appellant actively took part in this attack, rounding up and severely beating some of the men from Jaski. As the Trial Chamber further noted:

293 See Judgement, paras. 127-179, which outlines the background to the conflict in the op{tina 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.

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 COMMENDED 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". The first caveat was "that the act be linked geographically as well as temporally with the armed conflict". 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". 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. Secondly, the act must not have been carried out for the purely personal motives of the perpetrator.

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".

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.

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. 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.

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.

297 Judgement, para. 633.
298 Ibid.
299 Ibid., para. 634.
300 Ibid., para. 656-657.
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.  

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. 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.

B. Discussion

247. Neither Party asserts that the Trial Chamber’s finding that crimes against humanity cannot be committed for purely personal motives had a bearing on the verdict in terms of Article 25(1) of the Tribunal Statute. 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.

1. Article 5 of the Statute

248. The Appeals Chamber agrees with the Prosecution that there is nothing in Article 5 to suggest that it contains a requirement that crimes against humanity cannot be committed for purely personal motives. The Appeals Chamber agrees that it may be inferred from the words “directed against any civilian population” in Article 5 of the Statute that the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population 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” (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...
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 Tadić Decision on Jurisdiction, to the effect that "the 'primary purpose' of the establishment of the International Tribunal 'is not to leave unpunished any person guilty of [a] serious violation [of international humanitarian law], whatever the context within which it may have been committed'". 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 such 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 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...
The International Military Tribunal and the Supreme Court considered that a crime against humanity as defined in CCL 10 Article II 1 (c) is committed whenever the victim suffers prejudice as a result of the National Socialist rule of violence and tyranny ("Gewalt- oder Willkürherrschaft") to such an extent that mankind itself was affected thereby. Such prejudice can also arise from an attack committed against an individual victim for personal reasons. However, this is only the case if the victim was not only harmed by the perpetrator – this would not be a matter which concerned mankind as such – but if the character, duration or extent of the prejudice were determined by the National Socialist rule of violence and tyranny or if a link between them existed. If the victim was harmed in his or her human dignity, the incident was no longer an event that did not concern mankind as such. If an individual's attack against an individual victim for personal reasons is connected to the National Socialist rule of violence and tyranny and if the attack harms the victim in the aforementioned way, it, too, becomes one link in the chain of the measures which under the National Socialist rule were intended to persecute large groups among the population. There is no apparent reason to exonerate the accused only because he acted against an individual victim for personal reasons.

This view was upheld in a later decision of the Supreme Court in the case of H. H. denounced his father-in-law, V.F., for listening to a foreign broadcasting station, allegedly because V.F., who was of aristocratic origin, incessantly mocked H. for his low birth and tyrannised the family with his relentlessly scornful behaviour. The family members supposedly considered a denunciation to be the only solution to their family problems. Upon the denunciation, V.F. was sentenced by the Nazi authorities to three years in prison. V.F., who suffered from an intestinal illness, died in prison. Despite the fact that H.’s denunciation was motivated by personal reasons, the Court of First Instance sentenced H. for a crime against humanity, stating that “it can be left open as to whether [...] H. was motivated by political, personal or other reasons”. Referring to the established jurisprudence of the Supreme Court for the British Zone, the Court of First Instance held that “the motives ("Beweggründe") prompting a denunciation are not decisive (nicht entscheidend)”.

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.

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”...
defence which has as its premise “non-official acts”. The question whether an accused acted for purely personal reasons can only arise where the accused can claim to have acted as a private individual in a private or non-official capacity. This is why the issue arises mainly in denunciation cases, where one neighbour or relative denounces another. This paradigm is, however, inapplicable to trials of Nazi ministers, judges or other officials of the State, particularly where they have not raised such a defence by admitting the acts in question whilst claiming that they acted for personal reasons. Any plea that an act was done for “purely personal” motives and that it therefore cannot constitute a crime against humanity is pre-eminently for the defence to raise and one would not expect the court to rule on the issue proprio motu and as obiter dictum.

264. The two sections of the Ministries case, referred to by the Prosecution,327 are also not strictly relevant, as those sections re-state the law of complicity – “[…] he who participates or plays a consenting part therein is guilty of a crime against humanity” – rather than dealing with the importance or otherwise of whether the accused acted from personal motives. Equally, in the Justice case,328 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”.329 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”.330 Such a senior official would not be one to whom the “purely personal reasons” consideration could conceivably apply.

266. The Finta case331 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.332]

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,333 that “the issue in these cases was not whether the Defendants committed the acts for purely personal motives”. The Appeals Chamber believes, however, that a further reason why this was not in issue is precisely because motive is generally irrelevant in criminal law, as the Prosecution pointed out in the hearing of 20 April 1999:

For example, it doesn’t matter whether or not an accused steals money in order to buy Christmas presents for his poor children or to support a heroin habit. All we’re concerned with is that he stole and he intended to steal, and what we’re concerned with is the same sort of thing. There’s no requirement for non-personal motive beyond knowledge of the context of a widespread or systematic act into which an accused’s act fits. The Prosecutor is submitting that, as a general proposition and one which is applicable here, motives are simply irrelevant in criminal law.334

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

330 Ibid., p. 331.
331 R. v. Finta, 71994g 1 SCR 701.
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. 5.3; T. 165 (20 April 1999).
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 discriminatory intent.

343 T. 236 – 239 (21 April 1999).
344 See Cross-Appellant's Brief, para. 32.
345 See Cross-Appellant’s Brief, para. 7.14, where the Prosecution requests the Appeals Chamber to “reverse the decision of the Trial Chamber, at page 250 paragraph 652, that discriminatory intent is an ingredient of all crimes against humanity under Article 5 of the Statute.”
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.\textsuperscript{347} Such an interpretation of Article 5 would create significant lacunae by failing to protect victim groups not covered by the listed discriminatory grounds. The experience of Nazi Germany demonstrated that crimes against humanity may be committed on discriminatory grounds other than those enumerated in Article 5 (h), such as physical or mental disability, age or infirmity, or sexual preference. Similarly, the extermination of "class enemies" in the Soviet Union during the 1930s (admittedly, as in the case of Nazi conduct before the Second World War, an occurrence that took place in times of peace, not in times of armed conflict) and the deportation of the urban educated of Cambodia under the Khmer Rouge between 1975-1979, provide other instances which would not fall under the ambit of crimes against humanity based on the strict enumeration of discriminatory grounds suggested by the Secretary-General in his Report.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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)).\textsuperscript{348} Similar language can also be found in Control Council Law No. 10 (Article II (1) (c)).\textsuperscript{349}

\textsuperscript{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, uncontroversial 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.

\textsuperscript{346} ICJ Reports (1950), p. 8.
\textsuperscript{347} See paragraphs 294-300 below.
\textsuperscript{348} Article 5 (c) of the Statute of the International Military Tribunal for the Far East provides: "Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."
\textsuperscript{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 laid down in the London Agreement. With specific reference to the question at issue, it should be noted that, except for a very few isolated cases such as Finta, national jurisprudence includes many cases where courts found that in the circumstances of the case crimes against humanity did not necessarily consist of persecutory or discriminatory actions.

291. It is interesting to note that the necessity for discriminatory intent was considered but eventually rejected by the International Law Commission in its Draft Code of Offences Against the Peace and Security of Mankind. 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. SIS 309/49) in the H. case (Entscheidungen des Obersten Gerichtshofes für die Britische Zone, vol. II, pp. 233-246). There, the court dealt with a case where a German judge had presided over two trials by a naval court-martial (Bordkriegsgerichte) against two officers of the German Navy, a submarine commander, charged in 1944 with criticising Hitler, and the other a lieutenant-commander of the German naval forces, charged in 1944 with procuring two foreign identity cards for himself and his wife. The judge had voted for sentencing both officers to death (the first had been executed, while the sentence against the second had been commuted by Hitler to 10 years’ imprisonment). The Supreme Court held that the judge could be found guilty of crimes against humanity even if he had not acted for political reasons, in the extent that his action was deliberately taken in connection with the Nazi system of violence and terror (Entscheidungen des Obersten Gerichtshofes für die Britische Zone, ibid., vol. II, pp. 233, 238). See for instance ILC 1996 Draft Code of Offences Against the Peace and Security of Mankind, Report of the International Law Commission on the work of its 48th session May 6-July 26, 1996, UNGAOR 51st sess., supp. no. 10 (A/51/10), pp. 93-94.

While some delegates argued that a conviction for crimes against humanity required proof that the defendant was motivated by a discriminatory animus, others argued that “the inclusion of such a criterion would complicate the task of the Prosecution by significantly increasing its burden of proof in requiring evidence of this subjective element.” These delegates further argued that crimes against humanity could be committed against other groups, including intellectuals, social, cultural or political groups, and that such an element was not required under customary international law as evidenced by the Yugoslav Tribunal’s Statute. (See Summary of the Preparatory Committee During the Period March 25-April 12, 1996, U.N. Doc. A/AC.249/1 (May 7, 1996), pp. 16-17).

Article 7(1) of the Rome Statute provides: “For the purposes of this Statute, ‘crime against humanity’ means any of the following acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder […],” Article 7(1) of the Statute of the International Criminal Court thus articulates a definition of crimes against humanity based solely upon the interplay between the mens rea of the defendant and the existence of a widespread or systematic attack directed against a civilian population.
3. The Report of the Secretary-General

293. The interpretation suggested so far is not in keeping with the Report of the Secretary-General and the statements made by three members of the Security Council before the Tribunal’s Statute was adopted by the Council. The Appeals Chamber is nevertheless of the view that these two interpretative sources do not suffice to establish that all crimes against humanity need be committed with a discriminatory intent.

294. We shall consider first the Report of the Secretary-General, which stated that the crimes under discussion are those “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”.

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." With regard to the representative of the Russian Federation, his statement concerning Article 5 was expressly conceived of as an interpretative declaration. 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 Treaties. 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. In spelling out that this ingredient was indispensable, the States in question took up the relevant passage of the Secretary-General's Report and in the same breath also mentioned the discriminatory intent which may, in practice, frequently accompany such crimes.

302. The contention may also be warranted that the intent of the three States which made these declarations was to stress that in the former Yugoslavia most atrocities had been motivated by ethnic, racial, political or religious hatred. Those States therefore intended to draw the attention of the future Tribunal to the need to take this significant factor into account. One should not, however, confuse what happens most of the time (quod plurumque accidit) with the strict requirements of law.

303. Be that as it may, since at least with regard to the issue of discriminatory intent those statements may not be taken to be part of the "context" of the Statute, it may be argued that they comprise a part of the travaux préparatoires. Even if this were so, these statements would not be indispensable aids to interpretation, at least insofar as they relate to the particular issue of discriminatory intent under Article 5. Under customary international law, as codified in Article 32 of the Vienna Convention referred to above, the travaux constitue

---

359 On Article 5 the United States representative said that: "It is understood that Article 5 applies to all acts listed in that Article, when committed contrary to law during a period of armed conflict in the territory of the former Yugoslavia, as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, gender, or religious grounds" (U.N. Doc. S/PV. 3217, p. 16).
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 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 and when pronouncing on the question whether the International Tribunal could apply international agreements binding upon the parties to the conflict.

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.

306. Ground five of the Cross-Appeal by the Prosecution is as follows:

The majority of the Trial Chamber, composed of Judge Ninian Stephen and Judge Lal Chand Vohrah, erred when it denied the Prosecution motion for production of witness statements. 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.

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. 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. 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.

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
witness statements from disclosure.\textsuperscript{370} 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.\textsuperscript{371} Once the Defence calls a witness, that evidence should be subjected to the same scrutiny as that of the Prosecution.\textsuperscript{372}

309. The Prosecution also submits that no implied privilege exempting Defence witness statements from disclosure can be inferred from the Rules (as Judge Stephen found, with Judge Vohrah concurring). In its view, there is no ambiguity in the Rules in this regard, and Judge Stephen’s reference to the legal professional privilege found in national jurisdictions is incorrect.\textsuperscript{373} 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.\textsuperscript{374} 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”.\textsuperscript{375} The Prosecution relies in particular upon the restrictions set out by the U.S. Supreme Court in \textit{United States v. Nobles}.\textsuperscript{376}

310. The Prosecution also submits that the disclosure of prior statements of Defence witnesses is not otherwise inconsistent with the principles of a fair trial.\textsuperscript{377} 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.\textsuperscript{378} If the Defence decides to call a witness at trial, that witness should in principle be subject to the same scrutiny as Prosecution witnesses.\textsuperscript{379}

2. The Defence Case

311. The Defence submits that the Trial Chamber’s Witness Statements Decision was correctly decided.

312. The Trial Chamber was correct in holding that the Statute and Rules do not specifically deal with the problem at issue.\textsuperscript{380} 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”.\textsuperscript{381}

313. The Defence submits that the general principles referred to may be summarised as follows. To begin with, the burden of proving the allegation is on the Prosecution. The Prosecution must inform the accused of the charges and the evidence against him. The accused has the right to remain silent and to require the Prosecution to prove its case. There is no duty similar to that imposed on the Prosecution for the Defence to disclose its evidence, and the privilege attaching to Defence witness statements is not waived when the witness in question gives evidence.\textsuperscript{382}

314. It is also submitted that to allow such disclosure would increase the inequality of arms between the parties.\textsuperscript{383} 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.\textsuperscript{384} The Defence also submits that such a disclosure requirement might deter witnesses from

\textsuperscript{369} T. 191 (20 April 1999).
\textsuperscript{370} Cross-Appellant’s Brief, paras. 6.7-6.14.
\textsuperscript{371} T. 187 (20 April 1999).
\textsuperscript{372} Cross-Appellant’s Brief, paras. 6.15-6.18.
\textsuperscript{373} Ibid, para. 6.20.
\textsuperscript{374} Ibid, para. 6.21.
\textsuperscript{375} 422 U.S. 225 (1975).
\textsuperscript{376} Cross-Appellant’s Brief, paras. 6.25-6.31.
\textsuperscript{377} Ibid, para. 6.31.
\textsuperscript{378} Ibid.
\textsuperscript{379} Defence’s Substituted Response to Cross-Appellant’s Brief, para 6.3; Skeleton Argument of the Prosecution, para 5(b).
\textsuperscript{380} Defence’s Substituted Response to Cross-Appellant’s Brief, para 6.13; Skeleton Argument of the Prosecution, para 5(d).
\textsuperscript{381} Skeleton Argument of the Prosecution, paras. 5(f)-(g).
\textsuperscript{382} T. 265 (21 April 1999).
\textsuperscript{383} T. 275 (21 April 1999).
\textsuperscript{384} T. 275, 278 (21 April 1999).
testifying because of a loss of confidentiality, which in turn would impact on the right of a defendant to call witnesses.\footnote{\footnotetext{Skeleton Argument of the Prosecution, para. 5(h).}}

B. Discussion

1. The Reason for Dealing with this Ground of the Cross-Appeal

315. While neither party asserts that the Witness Statements Decision had a bearing on the verdicts on any of the counts or that an appeal lies under Article 25(1),\footnote{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."} 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.\footnote{T. 387 (20 April 1999).}

316. The Appeals Chamber has no power under Article 25 of the Statute to pass, one way or another, on the decision of the Trial Chamber as if the decision was itself under appeal. But the point of law which is involved is one of importance and worthy of an expression of opinion by the Appeals Chamber. The question posed as to whether or not a Trial Chamber has the power to order the disclosure of prior Defence witness statements after the witness has testified, must be placed in its proper context. Further, it is the view of the Appeals Chamber that this question impinges upon the ability of a Trial Chamber to meet its obligations in searching for the truth in all proceedings under the jurisdiction of the International Tribunal, with due regard to fairness. The judicial mandate of the International Tribunal is carried out by the Chambers, in this case a Trial Chamber, as this is a matter that arose during the trial process.

317. It is therefore necessary that the Appeals Chamber clarify the context in which the question posed is discussed. This is a matter that touches upon the duty of a Trial Chamber to ascertain facts, deal with credibility of witnesses and determine the innocence or guilt of the accused person. However, before answering the question posed, it is desirable to examine the implications of disclosure.

2. The Power to Order the Disclosure of Prior Defence Witness Statements

318. The Appeals Chamber is of the view that the Defence witness statement referred to would be a recorded description of events touching upon the indictment, made and, normally, signed by a person with a view to the preparation of the Defence case.\footnote{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."}

319. There is no blanket right for the Prosecution to see the witness statement of a Defence witness. The Prosecution has the power only to apply for disclosure of a statement after the witness has testified, with the Chamber retaining the discretion to make a decision based on the particular circumstances in the case at hand.

320. The power of a Trial Chamber to order the disclosure of a prior Defence witness statement relates to an evidentiary question. Strictly speaking, the principle of equality of arms is not relevant to the problem. Also, since the Statute and the Rules do not expressly cover the problem at hand, the broad powers conferred by Sub-rule 89(B) may come into play.\footnote{Article 14 provides in part:} The question to be addressed is whether those powers include the power of a Trial Chamber to order the disclosure of a prior Defence witness statement.

321. The mandate of the International Tribunal, as set out in Article 1 of the Statute, is to prosecute persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia. To fulfil its mandate, a Trial Chamber has to ascertain the credibility of all the evidence brought before it. A Trial Chamber must also take account of the following provisions of the Statute: Article 20(1), concerning the need to ensure a fair and expeditious trial, Article 21 dealing with the rights of the accused, and Article 22, dealing with the protection of victims and witnesses. Further guidance may be taken from Article 14 of the International Covenant on Civil and Political Rights.\footnote{Article 14 provides in part:} and
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 Blažić (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, 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:

\[
\begin{align*}
(\ldots) & \quad \text{the Trial Chamber may order that the defence, before the commencement of its case but after the close of the case for the prosecution, file the following:} \\
(\ldots) & \quad \text{a list of witnesses the defence intends to call with:} \\
(\ldots) & \quad (a) \quad \text{the name or pseudonym of each witness;} \\
(\ldots) & \quad (b) \quad \text{a summary of the facts on which each witness will testify;} \\
(\ldots)
\end{align*}
\]

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), 391  (D)392  and (E)393  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 97394  relates to lawyer-client privilege; it does not cover prior Defence witness statements.

---

390 Article 6 provides in part:

“(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]”


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

326. For the reasons set out above, it is the opinion of the Appeals Chamber that a Trial Chamber may order, depending on the circumstances of the case at hand, the disclosure of Defence witness statements after examination-in-chief of the witness.

IX. DISPOSITION

327. For the foregoing reasons, THE APPEALS CHAMBER, UNANIMOUSLY

(1) DENIES the first ground of the Appellant’s Appeal against Judgement;

(2) DENIES the third ground of the Appellant’s Appeal against Judgement;

(3) RESERVES JUDGEMENT on the Appellant’s Appeal against Sentence until such time as the further sentencing proceedings referred to in sub-paragraph (6) below have been completed;

(4) ALLOWS the first ground of the Prosecution’s Cross-Appeal, REVERSES the Trial Chamber’s verdict in this part, AND FINDS the Appellant guilty on Counts 8, 9, 12, 15, 21 and 32 of the Indictment;

(5) ALLOWS the second ground of the Prosecution’s Cross-Appeal, REVERSES the Trial Chamber’s verdict in this part, AND FINDS the Appellant guilty on Counts 29, 30 and 31 of the Indictment;

(6) DEFERS sentencing on the Counts mentioned in sub-paragraphs (4) and (5) above to a further stage of sentencing proceedings;

(7) HOLDS that an act carried out for the purely personal motives of the perpetrator can constitute a crime against humanity within the meaning of Article 5 of the Tribunal’s Statute relating to such crimes;

(8) FINDS that the Trial Chamber erred in finding that all crimes against humanity require discriminatory intent and HOLDS that such intent is an indispensable legal ingredient of the offence only with regard to those crimes for which it is expressly required, that is, for the types of persecution crimes mentioned in Article 5(h) of the Tribunal’s Statute;
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 on oppression". Double jeopardy does not bar the convicted person from appealing because he/she chooses to put himself/herself at risk once more.

---

1 The Fifth Amendment of the U.S. Constitution reads: "nor shall any person be subject for the same
4. Similarly, in the United Kingdom, the application of the double jeopardy principle precludes the Prosecution from appealing against acquittals, except where the appeal challenges an acquittal tainted by bribery, threats or other interference with a witness or juror, 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. 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.

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 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 civilised life thrown into confusion". Sadly, it seems, people took "it upon themselves to begin the process of repealing those general laws of humanity which are there to give a hope of salvation to all who are in distress, instead of leaving those laws in existence, remembering that there may come a time when they, too, will be in danger and will need their protection".  

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 Herzegovina (“BH”) within the meaning of Article 2, first paragraph, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (“Fourth Geneva Convention”). The provision states that “... the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties ...”. There was no state of declared war. If also there was no “armed conflict” as between the FRY and BH (as the majority of the Trial Chamber seemingly thought), the Fourth Geneva Convention did not apply, and the question whether victims were protected persons within the meaning of Article 4, first paragraph, of the Convention did not arise, a question which the majority nevertheless answered. Persons could only be protected by the Convention if the Convention in the first instance applied to the armed conflict by which they were affected.

2. Nicaragua Shows That There Was an Armed Conflict Between the FRY, Acting Through the VRS, and BH

7. Ex hypothesi, an armed conflict involves a use of force. Thus, the question whether there was an armed conflict between the FRY and BH depended on whether the FRY was using force against BH through the Bosnian Serbian Army of the Republic.

8. Nicaragua is not easy reading. Many issues were involved, and interpretations differ. A general understanding is that the Court said that the United States had no responsibility for delictual acts committed by the contras because, in its view, the former lacked the requisite degree of control over the latter. However, the Court was careful to say that this “conclusion ... does not of course suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the contras”. (I.C.J. Reports 1986, p. 63, para. 110). One part of this unresolved question of responsibility was whether, as claimed by Nicaragua, “the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua”. (Ibid., p. 19, para. 15(c)). In so far as it was sought to support this part of the claim by reference to funds being supplied by the United States to the contras, the Court held that “the mere supply of funds to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua, ... does not in itself amount to a use of force”. (Ibid., p. 119, para. 228).

9. By contrast, the Court considered that, as distinguished from the mere supplying of funds, the United States had committed other acts in relation to the contras which amounted to a threat or use of force against Nicaragua. In paragraph 228 of its judgement, the Court put it this way:

As to the claim that United States activities in relation to the contras constitute a breach of the customary international law principle of the non-use of force, the Court finds that, subject to the question whether the action of the United States might be justified as an exercise of the right of self-defence, the United States has committed a prima facie violation of that principle by its assistance to the contras in Nicaragua by organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another State, and participating in acts of civil strife ... in another State, in terms of General Assembly resolution 2625(XXV). According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to ‘involve a threat or use of force’. In the view of the Court, while the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government.

The Court then mentioned “the mere supply of funds to the contras” as a form of assistance which did not amount to a use of force, although it amounted to intervention. Subject to that kind of exception, the Court considered that the arming and training of the contras in the circumstances of the case amounted to a use of force.

10. The Court adhered to this view in its formal disposition of the case. In paragraph 292(3) of its holding, it decided that the United States, by “training, arming, equipping,
affairs of Nicaragua. Then, in paragraph 292(4), it held that the United States, "by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State". The acts of intervention which involved a use of force included the arming and training of the contras, the Court having explicitly held that "the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua".

11. This is consistent with the Court's statement, in paragraph 238 of its judgement, that the United States, having no legal right to use force in the circumstances of the case, "has violated the principle prohibiting recourse to the threat or use of force ... by its assistance to the contras to the extent that this assistance 'involve[s] a threat or use of force' (paragraph 228 above)". Paragraph 228, to which the Court referred, is set out in relevant part above.

12. The contras were not using force exclusively on behalf of the United States; the case makes it clear that they were also using force on their own behalf against the Government of Nicaragua. This must be borne in mind in considering the following statement of the Court:

"The conflict between the contras' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts." (ibid., p.334, para.219).

I do not think anything in this passage is opposed to the conclusion that the United States was using force through the contras against the Government of Nicaragua, a finding which the Court in fact made as, I think, the Appeals Chamber in this case recognises (see para. 130 of the judgement). To judge whether that finding is applicable here, it is necessary to consider the facts of this case.

13. The Trial Chamber accepted that, having been itself in direct armed conflict with BH through the Yugoslav People's Army ("JNA"), the FRY established the VRS, trained it, equipped it, supplied it and maintained it. The establishment was done by the FRY, on 19 May 1992, by leaving in BH part of the JNA to function as the VRS, and doing that just days after the Security Council had called on the FRY to withdraw from BH. Senior military officers from the FRY were members of the staff of the VRS. The FRY Yugoslav Army, or VJ, as the Yugoslav portion of the old JNA was now known. The VRS was engaged in carrying out the FRY's plan of ethnic cleansing and of carving out territory of BH to be ultimately added to that of the FRY so as to realise the FRY's ambition to create a "Greater Serbia".

14. Thus, the FRY did more than provide general funds to the VRS. On the basis of Nicaragua, I have no difficulty in concluding that the findings of the Trial Chamber suffice to show that the FRY was using force through the VRS against BH, even if it is supposed that the facts were not sufficient to fix the FRY with responsibility for any delictual acts committed by the VRS. The FRY and BH were therefore in armed conflict within the meaning of Article 2, first paragraph, of the Fourth Geneva Convention, with the consequence that the Convention applied to that armed conflict.

3. The Position Taken by the Majority of the Trial Chamber

15. Citing Nicaragua, the majority of the Trial Chamber (Judge Stephen and Judge Vohrah) held that the test as to whether there was an international armed conflict was whether the FRY had effective control over the VRS, which it considered meant command and control. (Judgement of the Trial Chamber, paras. 598 and 600). It found that the FRY did not have command and control over the VRS and so did not have effective control over the VRS; in its opinion, the relationship between them was one of coordination and cooperation as between allies (as to the legal implications of which I reserve my opinion). Consequently, in the view of the majority, the FRY was not a party to the armed conflict in BH after 19 May 1992. In effect, after that date, that conflict was not international.

16. With respect, it is too high a threshold to insist on proof of command and control for the purpose of determining whether a state was using force through a foreign military entity, as distinguished from whether the state was committing breaches of international humanitarian law through that entity. In Nicaragua, the Court held that the United States was using force through the contras by reason of the fact that, in the circumstances of that case, it was arming and training the contras. The Court did not say that these facts amounted to command and control; if they did, they should have given rise to state responsibility for breaches by the contras of international humanitarian law, which the Court did not do.

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 caused the Court not to 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 caused force through 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.

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 judgment 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

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 or is it to be determined by reference to criteria of unmanageable plasticity. The question is a precise one as to whether there is an "armed conflict... between two or more of the High Contracting Parties..." to the Fourth Geneva Convention. Barring a "declared war" between them, it is only if there is such a conflict that the Convention applies. But whether or not there is such a conflict turns on whether one state is using force against the other. A demonstrable link test has to result in showing whether or not force was being used by a state. If the test premises that it is not necessary to prove that a state was using force, it is not persuasive.

27. More pertinently, if the proposed test is meant to show whether or not force was being used by a state through a foreign army, it has to have the effect of connecting the state with the use of force by the foreign army; and I do not see how it can do this unless it has a degree of specificity commensurate with the gravity of a finding that one state was using force against another and with the serious implications of such a finding for individual criminal responsibility for, if the Convention applies, the individual becomes liable to conviction for certain serious crimes to which he would not otherwise be exposed. If the test has the requisite degree of specificity, it does 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.
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.

Therefore, if the Trial Chamber meant that the existence of personal motives excluded the possibility of a crime against humanity being committed if the elements of the crime were proven, I should have difficulty in supporting that. But I respectfully agree with the Appeals Chamber that the Trial Chamber did not mean to say so. What the Trial Chamber said, in paragraph 659 of its judgement, was this:

Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict.

34. There are difficulties in the passages, 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 these 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 if 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

---

4 Sir Henschel Lautenpacht and C.H.M. Waldock (eds.), The Basis of Obligation in International Law and
the prosecution, whereas the killing of the wife who was a member of the aggressor group, would always be simple murder that of the wife, who was a member of the attacked civilian population, would always be a crime against humanity.

36. The hypothesis of the murder of the wife who was a member of the attacked civilian population, is accommodated by the necessity for the prosecution to prove, as an element of a crime against humanity, that the murder was "directed against any civilian population" as is required by the chapeau of Article 5 of the Statute. Such a murder would not have been directed against the civilian population. Where the evidence is of that kind, the prosecution has failed to prove that element of a crime against humanity.

37. The Trial Chamber seems to have regarded the non-existence of personal reasons as being itself an element of the crime to be proved by the prosecution. With respect, that was a mistake. The prosecution does not have to prove negatively that there were no personal reasons; it has to prove affirmatively that the crime was directed against the civilian population. However, the evidence may show that the act was not directed against the civilian population for any of several reasons, and one of these may be that it was done for purely personal reasons completely unrelated to the attack on the civilian population, as discussed above. That possibility may be disclosed either by the evidence for the prosecution or by that for the defence. If that is the evidence, failure by the prosecution to overcome it means that the prosecution has failed to prove a required element of a crime against humanity, namely, that the act was directed against the civilian population.

38. That is a far cry from suggesting, as the Trial Chamber seems to have done, that it is an element of the crime, having to be proved by the prosecution, that the act of the accused was not dictated by purely personal motives. But I do not think that the Trial Chamber was wrong in taking the position that, where the act was dictated by purely personal motives which were completely unrelated to the attack on the civilian population, no crime against humanity was committed, even if the accused was aware of that attack.

C. Whether the Prosecution has a Right to Disclosure of Defence Witness Statements

39. I respectfully agree with the decision of the Appeals Chamber on this point but would add something on the reasoning out of the matter and the scope of the result.

40. The provisions of the Statute of the Tribunal relating to evidence are sparse. That suggests that there is room for fashioning the rest of the needed system under Article 15 of the Statute and Rules 54 and 89(B) of the Rules of Procedure and Evidence. Barring amendment of the Rules, how far can the Chambers now go?

41. Rule 90(E) provides for a privilege against self-incrimination, and Rule 97 provides for a lawyer-client privilege. It may be argued that, by implication, these express provisions exclude what is called a litigation privilege, which would have the effect of denying to the prosecution a right of access to defence witness statements. The exclusion of that privilege would leave a Chamber free to order disclosure of such statements in pursuit of its search for truth. But the sparsity of the provisions relating to evidence counsels caution in adopting that approach.

42. I do not think that protection from disclosure is provided by Rule 70(A), which states:

Notwithstanding the provisions of Rules 66 and 67, reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.

It could be argued that the last phrase contemplated the pre-trial stage only; but I think that a better view is that the provision (as set out in the scheme of the Tribunal’s Rules) was seeking, in part, to cancel out the effect of previous provisions which themselves assumed that, to the extent that such previous provisions did not control, “reports, memoranda or other internal documents” would not be subject to disclosure at any stage of the case. It would be odd if the protection afforded by Rule 70(A) was confined to the pre-trial stage, with the material being open to disclosure at any stage thereafter. No doubt, a similar provision is differently understood elsewhere. But it is good to recall that the transposition of a municipal text to the international plane does not necessarily take with it the technical environment in which the original text had its life. Otherwise,
one runs into those difficulties which are created "when a rule is removed from the framework in which it was formed, to another of different dimensions, to which it cannot adapt itself as easily as it did to its proper setting." 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.

---

9 See the reference by Lord Parker CJ to the impermissibility of "an accusation of crime without cause" in
The right to protection is not spent at the point at which the witness has testified in chief. 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. The defence had not referred to these statements in its evidence-in-chief, nor had anything been brought to the attention of the trial judge regarding the report. 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 witnesses. 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. The trial judge had power, in those circumstances, to order the defence to make the statement 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.

Clearly, the defence had not sought in any way to place reliance on the particular defence witness statements. Thus, the conclusion reached by the majority that defence witness statements were not accessible to the prosecution in the circumstances with which the majority was dealing was one which was being asserted by the prosecution in 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.

51. 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 with which the majority was dealing there was a factor which would obviously enter into the assessment of the truth. The majority was dealing with a situation 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.

52. There is one other matter. The parties were agreed that nothing in the relief is not clear that this limited and conditional right of access to a defence witness statement is being asserted by the prosecution in an unqualified right to see a defence witness statement provided only that the witness has testified in chief.

53. However it is not clear that this limited and conditional right of access to a defence witness statement is being asserted by the prosecution in an unqualified right to see a defence witness statement provided only that the witness has testified in chief.

54. There is one other matter. The parties were agreed that nothing in the relief is being asserted by the prosecution in an unqualified right to see a defence witness statement provided only that the witness has testified in chief.

55. The right to protection is not spent at the point at which the witness has testified in chief. 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. The defence had not referred to these statements in its evidence-in-chief, nor had anything been brought to the attention of the trial judge regarding the report. 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 witnesses. 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. The trial judge had power, in those circumstances, to order the defence to make the statement 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.

Clearly, the defence had not sought in any way to place reliance on the particular defence witness statements. Thus, the conclusion reached by the majority that defence witness statements were not accessible to the prosecution in the circumstances with which the majority was dealing was one which was being asserted by the prosecution in 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.

However it is not clear that this limited and conditional right of access to a defence witness statement is being asserted by the prosecution in an unqualified right to see a defence witness statement provided only that the witness has testified in chief.

53. However it is not clear that this limited and conditional right of access to a defence witness statement is being asserted by the prosecution in an unqualified right to see a defence witness statement provided only that the witness has testified in chief.

54. There is one other matter. The parties were agreed that nothing in the relief is being asserted by the prosecution in an unqualified right to see a defence witness statement provided only that the witness has testified in chief.

55. The right to protection is not spent at the point at which the witness has testified in chief. 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. The defence had not referred to these statements in its evidence-in-chief, nor had anything been brought to the attention of the trial judge regarding the report. 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 witnesses. 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. The trial judge had power, in those circumstances, to order the defence to make the statement 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.

Clearly, the defence had not sought in any way to place reliance on the particular defence witness statements. Thus, the conclusion reached by the majority that defence witness statements were not accessible to the prosecution in the circumstances with which the majority was dealing was one which was being asserted by the prosecution in 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.

However it is not clear that this limited and conditional right of access to a defence witness statement is being asserted by the prosecution in an unqualified right to see a defence witness statement provided only that the witness has testified in chief.

53. However it is not clear that this limited and conditional right of access to a defence witness statement is being asserted by the prosecution in an unqualified right to see a defence witness statement provided only that the witness has testified in chief.

54. There is one other matter. The parties were agreed that nothing in the relief is being asserted by the prosecution in an unqualified right to see a defence witness statement provided only that the witness has testified in chief.

55. The right to protection is not spent at the point at which the witness has testified in chief. 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. The defence had not referred to these statements in its evidence-in-chief, nor had anything been brought to the attention of the trial judge regarding the report. 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 witnesses. 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. The trial judge had power, in those circumstances, to order the defence to make the statement 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.

Clearly, the defence had not sought in any way to place reliance on the particular defence witness statements. Thus, the conclusion reached by the majority that defence witness statements were not accessible to the prosecution in the circumstances with which the majority was dealing was one which was being asserted by the prosecution in 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.

However it is not clear that this limited and conditional right of access to a defence witness statement is being asserted by the prosecution in an unqualified right to see a defence witness statement provided only that the witness has testified in chief.
or are of moment to the profession, or unless some useful result will follow decision.11

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 case as 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

Additional Protocol I
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977.

Amended Notice of Appeal against Judgement
Amended Notice of Appeal, Case No.: IT-94-1-A, 8 January 1999.

Appellant
Duško Tadić.

Appellant's Amended Brief on Judgement
Amended Brief of Argument on behalf of the Appellant, Case No.: IT-94-1-A, 8 January 1999.

Appellant's Brief on Judgement

Appellant's Brief on Sentencing Judgement

BH
Bosnia and Herzegovina.

Claims Tribunal
Iran-United States Claims Tribunal.

Cross-Appellant
Office of the Prosecutor.

Cross-Appellant's Brief
Brief of Argument of the Prosecution (Cross-Appellant), Case No.: IT-94-1-A, 12 January 1998.

Cross-Appellant's Brief in Reply
Prosecution (Cross-Appellant) Brief in Reply, Case No.: IT-94-1-A, 1 December 1998.

Dayton-Paris Accord

Decision on Admissibility of Additional Evidence

Defence's Skeleton Argument on the Cross-Appeal
Skeleton Argument – Prosecutor's Cross-Appeal, Case No.: IT-94-1-A, 20 April 1999.

Defence's Substituted Response to Cross-Appellant's Brief

DR
European Commission of Human Rights, Decisions and Reports.

ECHR

Eur. Commission H.R.
European Commission of Human Rights.

Eur. Court H.R.
European Court of Human Rights.

FRY
Federal Republic of Yugoslavia (Serbia and Montenegro).

Geneva Convention III (Third Geneva Convention)

Geneva Convention IV (Fourth Geneva Convention)

HRC
Human Rights Committee.

ICCPR
International Covenant on Civil and Political Rights.

ICRC
International Committee of the Red Cross.

ICRC Commentary on Additional Protocols

ICRC Commentary on Geneva Convention III
<table>
<thead>
<tr>
<th>Citations</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<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>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission.</td>
</tr>
<tr>
<td>JNA</td>
<td>Yugoslav People’s Army.</td>
</tr>
<tr>
<td>Appellant’s Brief on Judgement</td>
<td></td>
</tr>
<tr>
<td>Prosecution Response to</td>
<td>Response to Appellant’s Brief on Appeal Against</td>
</tr>
<tr>
<td>Appellant’s Brief on Sentencing Judgement</td>
<td></td>
</tr>
<tr>
<td>Skeleton Argument – Appellant’s Appeal Against Conviction</td>
<td>Skeleton Argument – Appellant’s Appeal against Conviction, Case No.: IT-94-1-A, 19 March 1999.</td>
</tr>
<tr>
<td>Skeleton Argument of the Prosecution</td>
<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>
</tr>
<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>
</tbody>
</table>
Tribunal

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

TRNC

Turkish Republic of Northern Cyprus.

UNWCC


VJ

Army of the Federal Republic of Yugoslavia.

VRS

Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska.

Witness Statements Decision