Addis Ababa, Ethiopia
2–27 February 2015

PROFESSOR SEAN D. MURPHY

Codification Division of the United Nations Office of Legal Affairs

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INTRODUCTION TO INTERNATIONAL LAW
PROFESSOR SEAN D. MURPHY

Outline

Legal Instruments and Documents

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2. Charter of the United Nations, 1945
   For text, see Charter of the United Nations and Statute of the International Court of Justice
3. Statute of the International Court of Justice, 1945
   For text, see Charter of the United Nations and Statute of the International Court of Justice
   For text, see The Work of the International Law Commission, Eighth edition, Volume II
6. WHO International Health Regulations (2005), Preamble and Articles 1-66 20
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Case Law

Suggested Reading (*not reproduced here*)

Monday, 2 February 2015

Hour

# 1  Foundations of International Law

Readings:  Murphy, Principles of International Law, Chapter 1, pp. 3-26

Skim WHO International Health Regulations (2005), Preamble and Arts. 1-66

# 2  Actors of International Law: Part I (States: Recognition of States and Governments)

Readings:  Murphy, Principles of International Law, Chapter 2, pp. 33-46

Montevideo Convention on the Rights and Duties of States, (1933) 165 L.N.T.S. 19

European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 31 I.L.M. 1486 (December 16, 1991)


United Nations General Assembly resolution 65/308 (July 14, 2011)

# 3  Actors of International Law: Part II (States: Delimitation of Boundaries)

Readings:  Murphy, Principles of International Law, Chapter 2, pp. 46-47

Frontier Dispute (Benin/Niger), I.C.J. Reports 2005, pp. 90-151

# 4  Actors of International Law: Part II (non-State actors, including int’l organizations)

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Skim Charter of the United Nations (1945)

# 5/6  International Law Creation: Part I (treaties, custom, general principles)

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# 7  International Law Creation: Part II (jus cogens; law-making of int’l organizations)

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United Nations Security Council resolution 1373 (September 28, 2001)

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# 8  International Law Interpretation and Dispute Resolution

Readings: Murphy, Principles of International Law, Chapter 4, pp. 125-51

Skim Statute of the International Court of Justice


# 9  International Law Compliance and Enforcement

Readings: Murphy, Principles of International Law, Chapter 5, pp. 173-99

United Nations Security Council resolution 1816 (June 2, 2008)

United Nations Security Council resolution 1851 (December 16, 2008)

# 10 Relationship of International and National Law: Part I (rules on national jurisdiction)

Readings: Murphy, Principles of International Law, Chapter 3, pp. 271-92


# 11 Relationship of International and National Law: Part II (rules on immunity in national courts)

Readings: Murphy, Principles of International Law, Chapter 3, pp. 295-323


# 12 Review Session
Montevideo Convention on the Rights and Duties of States,
26 December 1933
SOCIÉTÉ DES NATIONS

Recueil des Traités

Traités et Engagements internationaux enregistrés par le Secrétariat de la Société des Nations

LEAGUE OF NATIONS

Treaty Series

Treaties and International Engagements registered with the Secretariat of the League of Nations

No. 3802. — CONVENTION ON RIGHTS AND DUTIES OF STATES ADOPTED BY THE SEVENTH INTERNATIONAL CONFERENCE OF AMERICAN STATES. SIGNED AT MONTEVIDEO, DECEMBER 26TH, 1933.

Spanish, English, French and Portuguese official texts communicated by the Envoy Extraordinary and Plenipotentiary of the United States of America at Berne and by the Permanent Delegate of the Republic of Cuba to the League of Nations. The registration of this Convention took place January 8th, 1936.

The Governments represented in the Seventh International Conference of American States: Wishing to conclude a Convention on Rights and Duties of States, have appointed the following Plenipotentiaries:

HONDURAS:
Miguel Paz Baraona.
Augusto C. Corillo.
Luis Bográn.

UNITED STATES OF AMERICA:
Cordell Hull.
Alexander W. Weddell.
J. Reuben Clark.
J. Butler Wright.
Spruille Braden.
Miss Sophonisba P. Breckinridge.

DOMINICAN REPUBLIC:
Tuño M. Cestero.

UNITED STATES OF AMERICA:
Miguel Paz Baraona.
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Miss Sophonisba P. Breckinridge.

DOMINICAN REPUBLIC:
Tuño M. Cestero.

1 Ratifications deposited in the archives of the Pan-American Union at Washington:

United States of America: July 13th, 1934.
Dominican Republic: December 26th, 1934.
Chile: March 28th, 1935.
Guatemala: June 12th, 1935.
Cuba: April 28th, 1936.
Who, after having exhibited their full powers, which were found to be in good and due order, have agreed upon the following:

Article 1.

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.

Article 2.

The Federal State shall constitute a sole person in the eyes of international law.

Article 3.

The political existence of the State is independent of recognition by the other States. Even before recognition the State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organise itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.

The exercise of these rights has no other limitation than the exercise of the rights of other States according to international law.

Article 4.

States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.

Article 5.

The fundamental rights of States are not susceptible of being affected in any manner whatsoever.

Article 6.

The recognition of a State merely signifies that the State which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.

Article 7.

The recognition of a State may be express or tacit. The latter results from any act which implies the intention of recognizing the new State.

Article 8.

No State has the right to intervene in the internal or external affairs of another.
In witness whereof, the following Plenipotentiaries have signed this Convention in Spanish, English, Portuguese and French and hereunto affix their respective seals in the city of Montevideo, Republic of Uruguay, this 20th day of December, 1933.

RESERVATIONS.

The Delegation of the United States of America, in signing the Convention on the Rights and Duties of States, does so with the express reservation presented to the Plenary Session of the Conference on December 22nd, 1933, which reservation reads as follows:

The Delegation of the United States, in voting "yes" on the final vote on this committee recommendation and proposal, makes the same reservation to the eleven Articles of the project or proposal that the United States Delegation made to the first ten Articles during the final vote in the full Commission, which reservation is in words as follows:

"The policy and attitude of the United States Government toward every important phase of international relationships in this hemisphere could scarcely be made more clear and definite than they have been made by both word and action especially since March 4th. I have no disposition therefore to indulge in any repetition or rehearsal of these acts and utterances and shall not do so. Every observing person must by this thoroughly understand that under the Roosevelt Administration the United States Government is as much opposed as any other Government to interference with the freedom, the sovereignty, or other internal affairs or processes of the Governments of other nations.

"In addition to numerous acts and utterances in connection with the carrying out of these doctrines and policies, President Roosevelt, during recent weeks, gave out a public statement expressing his disposition to open negotiations with the Cuban Government for the purpose of dealing with the treaty which has existed since 1903. I feel safe in undertaking to say that under our support of the general principle of non-intervention as has been suggested, no Government need fear any intervention on the part of the United States under the Roosevelt Administration. I think it unfortunate that during the brief period of this Conference there is apparently not time within which to prepare interpretations and definitions of these fundamental terms that are embraced in the report. Such definitions and interpretations would enable every Government to proceed in a uniform way without any difference of opinion or of interpretations. I hope that at the earliest possible date such very important work will be done. In the meantime in case of differences of interpretations and also until they (the proposed doctrines and principles) can be worked out and codified for the common use of every Government, I desire to say that the United States Government in all of its international associations and relationships and conduct will follow scrupulously the doctrines and policies which it has pursued since March 4th which are embodied in the different addresses of President Roosevelt since that time and in the recent peace address of myself on the 15th day of December before this Conference and in the law of nations as generally recognized and accepted."

The delegates of Brazil and Peru recorded the following private vote with regard to Article XI: "That they accept the doctrine in principle but that they do not consider it codifable because there are some countries which have not yet signed the Anti-War Pact of Rio de Janeiro of which this doctrine is a part and therefore it does not yet constitute positive international law suitable for codification."

28 September 2001
Resolution 1373 (2001)

Adopted by the Security Council at its 4385th meeting, on 28 September 2001

The Security Council,


Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368(2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

Acting under Chapter VII of the Charter of the United Nations,

1. Decides that all States shall:
   (a) Prevent and suppress the financing of terrorist acts;
   (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
   (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;
   (d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. Decides also that all States shall:
   (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
   (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
   (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
   (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
   (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
   (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;
   (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;
3. **Calls** upon all States to:

   (a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;

   (b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;

   (c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

   (d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

   (e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

   (f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

   (g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

4. **Notes** with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard **emphasizes** the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

5. **Declares** that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

6. **Decides** to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and **calls upon** all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

7. **Directs** the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;

8. **Expresses** its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;

9. **Decides** to remain seized of this matter.
WHO International Health Regulations (2005)

Preamble and Articles 1-66
# International Health Regulations (2005) — 2nd ed.


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FOREWORD

A central and historic responsibility for the World Health Organization (WHO) has been the management of the global regime for the control of the international spread of disease. Under Articles 21(a) and 22, the Constitution of WHO confers upon the World Health Assembly the authority to adopt regulations “designed to prevent the international spread of disease” which, after adoption by the Health Assembly, enter into force for all WHO Member States that do not affirmatively opt out of them within a specified time period.

The International Health Regulations (“the IHR” or “Regulations”) were adopted by the Health Assembly in 1969, having been preceded by the International Sanitary Regulations adopted by the Fourth World Health Assembly in 1951. The 1969 Regulations, which initially covered six “quarantinable diseases” were amended in 1973 and 1981, primarily to reduce the number of covered diseases from six to three (yellow fever, plague and cholera) and to mark the global eradication of smallpox.

In consideration of the growth in international travel and trade, and the emergence or re-emergence of international disease threats and other public health risks, the Forty-eighth World Health Assembly in 1995 called for a substantial revision of the Regulations adopted in 1969. In resolution WHA48.7, the Health Assembly requested the Director-General to take steps to prepare their revision, urging broad participation and cooperation in the process.

After extensive preliminary work on the revision by WHO’s Secretariat in close consultation with WHO Member States, international organizations and other relevant partners, and the momentum created by the emergence of severe acute respiratory syndrome (the first global public health emergency of the 21st century), the Health Assembly established an Intergovernmental Working Group in 2003 open to all Member States to review and recommend a draft revision of the Regulations to the Health Assembly. The IHR (2005) were adopted by the Fifty-eighth World Health Assembly on 23 May 2005. They entered into force on 15 June 2007.

The purpose and scope of the IHR (2005) are “to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.” The IHR (2005) contain a range of innovations, including: (a) a scope not limited to any specific disease or manner of transmission, but covering “illness or medical condition, irrespective of origin or source, that presents or could present significant harm to humans”; (b) State Party obligations to develop certain minimum core public health capacities; (c) obligations on States Parties to notify WHO of events that may constitute a public health emergency of international concern according to defined criteria; (d) provisions authorizing WHO to take into consideration unofficial reports of public health events and to obtain verification from States Parties concerning such events; (e) procedures for the determination by the Director-General of a “public health emergency of international concern” and issuance of corresponding temporary recommendations, after taking into account the views of an Emergency Committee; (f) protection of the human rights of persons and travellers; and (g) the
establishment of National IHR Focal Points and WHO IHR Contact Points for urgent communications between States Parties and WHO.

By not limiting the application of the IHR (2005) to specific diseases, it is intended that the Regulations will maintain their relevance and applicability for many years to come even in the face of the continued evolution of diseases and of the factors determining their emergence and transmission. The provisions in the IHR (2005) also update and revise many of the technical and other regulatory functions, including certificates applicable to international travel and transport, and requirements for international ports, airports and ground crossings.

This second edition contains the text of the IHR (2005), the text of World Health Assembly resolution WHA58.3, the version of the Health Part of the Aircraft General Declaration that entered into force on 15 July 2007, appendices containing a list of States Parties and State Party reservations and other communications in connection with the IHR (2005).

**REVISION OF THE INTERNATIONAL HEALTH REGULATIONS**

The Fifty-eighth World Health Assembly,

Having considered the draft revised International Health Regulations 1;

Having regard to articles 2(k), 21(a) and 22 of the Constitution of WHO;

Recalling references to the need for revising and updating the International Health Regulations in resolutions WHA48.7 on revision and updating of the International Health Regulations, WHA54.14 on global health security: epidemic alert and response, WHA55.16 on global public health response to natural occurrence, accidental release or deliberate use of biological and chemical agents or radionuclear material that affect health, WHA56.28 on revision of the International Health Regulations, and WHA56.29 on severe acute respiratory syndrome (SARS), with a view to responding to the need to ensure global public health;

Welcoming resolution 58/3 of the United Nations General Assembly on enhancing capacity building in global public health, which underscores the importance of the International Health Regulations and urges that high priority should be given to their revision;

Affirming the continuing importance of WHO's role in global outbreak alert and response to public health events, in accordance with its mandate;

Underscoring the continued importance of the International Health Regulations as the key global instrument for protection against the international spread of disease;

Commending the successful conclusion of the work of the Intergovernmental Working Group on Revision of the International Health Regulations,

1. **ADOPTS** the revised International Health Regulations attached to this resolution, to be referred to as the “International Health Regulations (2005)”;

2. **CALLS UPON** Member States and the Director-General to implement fully the International Health Regulations (2005), in accordance with the purpose and scope set out in Article 2 and the principles embodied in Article 3;

3. **DECIDES**, for the purposes of paragraph 1 of Article 54 of the International Health Regulations (2005), that States Parties and the Director-General shall submit their first report to the Sixty-first World Health Assembly, and that the Health Assembly shall on that occasion consider the schedule for the submission of further such reports and the first review on the functioning of the Regulations pursuant to paragraph 2 of Article 54;


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1 See document A58/4.
3. URGES Member States:
   (1) to build, strengthen and maintain the capacities required under the International Health Regulations (2005), and to mobilize the resources necessary for that purpose;
   (2) to collaborate actively with each other and WHO in accordance with the relevant provisions of the International Health Regulations (2005), so as to ensure their effective implementation;
   (3) to provide support to developing countries and countries with economies in transition if they so request in the building, strengthening and maintenance of the public health capacities required under the International Health Regulations (2005);
   (4) to take all appropriate measures for furthering the purpose and eventual implementation of the International Health Regulations (2005) pending their entry into force, including development of the necessary public health capacities and legal and administrative provisions, in particular to ensure that the measures that they so request are taken;

4. REQUESTS the Secretary-General:
   (1) to provide prompt notification of adoption of the International Health Regulations (2005) in accordance with paragraph 1 of Article 65 thereof;
   (2) to inform all competent international organizations and intergovernmental bodies of adoption of the International Health Regulations (2005) and, upon request, to cooperate with them in the updating of their norms and standards and in coordination with them in ensuring application of the Regulations and in monitoring implementation of the decision instrument contained in Annex 2 thereof;
   (3) to take steps immediately to prepare guidelines for implementation of the decision instrument contained in the International Health Regulations (2005), including elaboration of a procedure for review of its functioning, which shall be submitted to the Health Assembly for its consideration pursuant to paragraph 3 of Article 54 of the Regulations;

5. URGES Member States:
   (1) to take steps to build, strengthen and maintain the capacities required under the International Health Regulations (2005), and to mobilize the resources necessary for that purpose;
   (2) to collaborate actively with each other and WHO in accordance with the relevant provisions of the International Health Regulations (2005), so as to ensure their effective implementation;
   (3) to provide support to developing countries and countries with economies in transition if they so request in the building, strengthening and maintenance of the public health capacities required under the International Health Regulations (2005);
   (4) to take all appropriate measures for furthering the purpose and eventual implementation of the International Health Regulations (2005) pending their entry into force, including development of the necessary public health capacities and legal and administrative provisions, in particular to ensure that the measures that they so request are taken;

6. REQUESTS the Director-General:
   (1) to give prompt notification of adoption of the International Health Regulations (2005) in accordance with paragraph 1 of Article 65 thereof;
   (2) to inform other competent international organizations and intergovernmental bodies of adoption of the International Health Regulations (2005) and, upon request, to cooperate with them in the updating of their norms and standards and to coordinate with them in ensuring application of the Regulations and in monitoring implementation of the decision instrument contained in Annex 2 thereof;
   (3) to take steps to prepare guidelines for implementation of the decision instrument contained in the International Health Regulations (2005), including elaboration of a procedure for review of its functioning, which shall be submitted to the Health Assembly for its consideration pursuant to paragraph 3 of Article 54 of the Regulations;

7. REQUESTS the Secretary-General:
   (1) to provide prompt notification of adoption of the International Health Regulations (2005) in accordance with paragraph 1 of Article 65 thereof;
   (2) to inform all competent international organizations and intergovernmental bodies of adoption of the International Health Regulations (2005) and, upon request, to cooperate with them in the updating of their norms and standards and in coordination with them in ensuring application of the Regulations and in monitoring implementation of the decision instrument contained in Annex 2 thereof;
   (3) to take steps immediately to prepare guidelines for implementation of the decision instrument contained in the International Health Regulations (2005), including elaboration of a procedure for review of its functioning, which shall be submitted to the Health Assembly for its consideration pursuant to paragraph 3 of Article 54 of the Regulations;
Article 1 Definitions

1. For the purposes of the International Health Regulations (hereinafter “the IHR” or “Regulations”):

“affected” means persons, baggage, cargo, containers, conveyances, goods, postal parcels or human remains that are infected or contaminated, or carry sources of infection or contamination, so as to constitute a public health risk;

“affected area” means a geographical location specifically for which health measures have been recommended by WHO under these Regulations;

“aircraft” means an aircraft making an international voyage;

“airport” means any airport where international flights arrive or depart;

“arrival” of a conveyance means:
(a) in the case of a seagoing vessel, arrival or anchoring in the defined area of a port;
(b) in the case of an aircraft, arrival at an airport;
(c) in the case of an inland navigation vessel on an international voyage, arrival at a point of entry;
(d) in the case of a train or road vehicle, arrival at a point of entry;

“baggage” means the personal effects of a traveller;

“cargo” means goods carried on a conveyance or in a container;

“competent authority” means an authority responsible for the implementation and application of health measures under these Regulations;

“container” means an article of transport equipment:
(a) of a permanent character and accordingly strong enough to be suitable for repeated use;
(b) specially designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading;
(c) fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another; and
(d) specially designed as to be easy to fill and empty;

“container loading area” means a place or facility set aside for containers used in international traffic;

“contamination” means the presence of an infectious or toxic agent or matter on a human or animal body surface, in or on a product prepared for consumption or on other inanimate objects, including conveyances, that may constitute a public health risk;

“conveyance” means an aircraft, ship, train, road vehicle or other means of transport on an international voyage;

“conveyance operator” means a natural or legal person in charge of a conveyance or their agent;

“crew” means persons on board a conveyance who are not passengers;

“decontamination” means a procedure whereby health measures are taken to eliminate an infectious or toxic agent or matter on a human or animal body surface, in or on a product prepared for consumption or on other inanimate objects, including conveyances, that may constitute a public health risk;

“departure” means, for persons, baggage, cargo, conveyances or goods, the act of leaving a territory;

“deratting” means the procedure whereby health measures are taken to control or kill rodent vectors of human disease present in baggage, cargo, containers, conveyances, facilities, goods and postal parcels at the point of entry;

“Director-General” means the Director-General of the World Health Organization;

“disease” means an illness or medical condition, irrespective of origin or source, that presents or could present significant harm to humans;

“disinfection” means the procedure whereby health measures are taken to control or kill infectious agents on a human or animal body surface or in or on baggage, cargo, containers, conveyances, goods and postal parcels by direct exposure to chemical or physical agents;

“disinsection” means the procedure whereby health measures are taken to control or kill the insect vectors of human diseases present in baggage, cargo, containers, conveyances, goods and postal parcels;

“event” means a manifestation of disease or an occurrence that creates a potential for disease;

“free pratique” means permission for a ship to enter a port, embark or disembark, discharge or load cargo or stores; permission for an aircraft, after landing, to embark or disembark, discharge or load cargo or stores; and permission for a ground transport vehicle, upon arrival, to embark or disembark, discharge or load cargo or stores;

“goods” mean tangible products, including animals and plants, transported on an international voyage, including for utilization on board a conveyance;

“ground crossing” means a point of land entry in a State Party, including one utilized by road vehicles and trains;

“ground transport vehicle” means a motorized conveyance for overland transport on an international voyage, including trains, coaches, lorries and automobiles;
“health measure” means procedures applied to prevent the spread of disease or contamination; a health measure does not include law enforcement or security measures;

“ill person” means an individual suffering from or affected with a physical ailment that may pose a public health risk;

“infection” means the entry and development or multiplication of an infectious agent in the body of humans and animals that may constitute a public health risk;

“inspection” means the examination, by the competent authority or under its supervision, of areas, baggage, containers, conveyances, facilities, goods or postal parcels, including relevant data and documentation, to determine if a public health risk exists;

“international traffic” means the movement of persons, baggage, cargo, containers, conveyances, goods or postal parcels across an international border, including international trade;

“international voyage” means:

(a) in the case of a conveyance, a voyage between points of entry in the territories of more than one State, or a voyage between points of entry in the territory or territories of the same State if the conveyance has contacts with the territory of any other State on its voyage but only as regards those contacts;

(b) in the case of a traveller, a voyage involving entry into the territory of a State other than the territory of the State in which that traveller commences the voyage;

“intrusive” means possibly provoking discomfort through close or intimate contact or questioning;

“invasive” means the puncture or incision of the skin or insertion of an instrument or foreign material into the body or the examination of a body cavity. For the purposes of these Regulations, medical examination of the ear, nose and mouth, temperature assessment using an ear, oral or cutaneous thermometer, or thermal imaging; medical inspection; auscultation; external palpation; retinoscopy; external measurement of blood pressure; and electrocardiography shall be considered to be non-invasive;

“isolation” means separation of ill or contaminated persons or affected baggage, containers, conveyances, goods or postal parcels from others in such a manner as to prevent the spread of infection or contamination;

“medical examination” means the preliminary assessment of a person by an authorized health worker or by a person under the direct supervision of the competent authority, to determine the person’s health status and potential public health risk to others, and may include the scrutiny of health documents, and a physical examination when justified by the circumstances of the individual case;

“National IHR Focal Point” means the national centre, designated by each State Party, which shall be accessible at all times for communications with WHO IHR Contact Points under these Regulations;

“Organization” or “WHO” means the World Health Organization;

“permanent residence” has the meaning as determined in the national law of the State Party concerned;

“personal data” means any information relating to an identified or identifiable natural person;

“point of entry” means a passage for international entry or exit of travellers, baggage, cargo, containers, conveyances, goods and postal parcels as well as agencies and areas providing services to them on entry or exit;

“port” means a seaport or a port on an inland body of water where ships on an international voyage arrive or depart;

“postal parcel” means an addressed article or package carried internationally by postal or courier services;

“public health emergency of international concern” means an extraordinary event which is determined, as provided in these Regulations:

(i) to constitute a public health risk to other States through the international spread of disease and

(ii) to potentially require a coordinated international response;

“public health observation” means the monitoring of the health status of a traveller over time for the purpose of determining the risk of disease transmission;

“public health risk” means a likelihood of an event that may affect adversely the health of human populations, with an emphasis on one which may spread internationally or may present a serious and direct danger;

“quarantine” means the restriction of activities and/or separation from others of suspect persons who are not ill or of suspect baggage, containers, conveyances or goods in such a manner as to prevent the possible spread of infection or contamination;

“recommendation” and “recommended” refer to temporary or standing recommendations issued under these Regulations;

“reservoir” means an animal, plant or substance in which an infectious agent normally lives and whose presence may constitute a public health risk;

“road vehicle” means a ground transport vehicle other than a train;

“scientific evidence” means information furnishing a level of proof based on the established and accepted methods of science;

“scientific principles” means the accepted fundamental laws and facts of nature known through the methods of science;

“ship” means a seagoing or inland navigation vessel on an international voyage;

“standing recommendation” means non-binding advice issued by WHO for specific ongoing public health risks pursuant to Article 16 regarding appropriate health measures for routine or periodic application needed to prevent or reduce the international spread of disease and minimize interference with international traffic;
"surveillance" means the systematic ongoing collection, collation and analysis of data for public health purposes and the timely dissemination of public health information for assessment and public health response as necessary;

"suspect" means those persons, baggage, cargo, containers, conveyances, goods or postal parcels considered by a State Party as having been exposed, or possibly exposed, to a public health risk and that could be a possible source of spread of disease;

"temporary recommendation" means non-binding advice issued by WHO pursuant to Article 15 for application on a time-limited, risk-specific basis, in response to a public health emergency of international concern, so as to prevent or reduce the international spread of disease and minimize interference with international traffic;

"temporary residence" has the meaning as determined in the national law of the State Party concerned;

"traveller" means a natural person undertaking an international voyage;

"vector" means an insect or other animal which normally transports an infectious agent that constitutes a public health risk;

"verification" means the provision of information by a State Party to WHO confirming the status of an event within the territory or territories of that State Party;

"WHO IHR Contact Point" means the unit within WHO which shall be accessible at all times for communications with the National IHR Focal Point.

2. Unless otherwise specified or determined by the context, reference to these Regulations includes the annexes thereto.

Article 2 Purpose and scope

The purpose and scope of these Regulations are to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.

Article 3 Principles

1. The implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.

2. The implementation of these Regulations shall be guided by the Charter of the United Nations and the Constitution of the World Health Organization.

3. The implementation of these Regulations shall be guided by the goal of their universal application for the protection of all people of the world from the international spread of disease.

4. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to legislate and to implement legislation in pursuance of their health policies. In doing so they should uphold the purpose of these Regulations.

Article 4 Responsible authorities

1. Each State Party shall designate or establish a National IHR Focal Point and the authorities responsible within its respective jurisdiction for the implementation of health measures under these Regulations.

2. National IHR Focal Points shall be accessible at all times for communications with the WHO IHR Contact Points provided for in paragraph 3 of this Article. The functions of National IHR Focal Points shall include:

(a) sending to WHO IHR Contact Points, on behalf of the State Party concerned, urgent communications concerning the implementation of these Regulations, in particular under Articles 6 to 12; and

(b) disseminating information to, and consolidating input from, relevant sectors of the administration of the State Party concerned, including those responsible for surveillance and reporting, points of entry, public health services, clinics and hospitals and other government departments.

3. WHO shall designate IHR Contact Points, which shall be accessible at all times for communications with National IHR Focal Points. WHO IHR Contact Points shall send urgent communications concerning the implementation of these Regulations, in particular under Articles 6 to 12, to the National IHR Focal Point of the States Parties concerned. WHO IHR Contact Points may be designated by WHO at the headquarters or at the regional level of the Organization.

4. States Parties shall provide WHO with contact details of their National IHR Focal Point and WHO shall provide States Parties with contact details of WHO IHR Contact Points. These contact details shall be continuously updated and annually confirmed. WHO shall make available to all States Parties the contact details of National IHR Focal Points it receives pursuant to this Article.

PART II – INFORMATION AND PUBLIC HEALTH RESPONSE

Article 5 Surveillance

1. Each State Party shall develop, strengthen and maintain, as soon as possible but no later than five years from the entry into force of these Regulations for that State Party, the capacity to detect, assess, notify and report events in accordance with these Regulations, as specified in Annex 1.

2. Following the assessment referred to in paragraph 2, Part A of Annex 1, a State Party may report to WHO on the basis of a justified need and an implementation plan and, in so doing, obtain an extension of two years in which to fulfill the obligation in paragraph 1 of this Article. In exceptional circumstances, and supported by a new implementation plan, the State Party may request a further extension not exceeding two years from the Director-General, who shall make the decision, taking into account the technical advice of the Committee established under Article 50 (hereinafter the "Review Committee"). After the period mentioned in paragraph 1 of this Article, the State Party that has obtained an extension shall report annually to WHO on progress made towards the full implementation.

3. WHO shall assist States Parties, upon request, to develop, strengthen and maintain the capacities referred to in paragraph 1 of this Article.

4. WHO shall collect information regarding events through its surveillance activities and assess their potential to cause international disease spread and possible interference with international traffic. Information received by WHO under this paragraph shall be handled in accordance with Articles 11 and 45 where appropriate.
Article 10 Verification

1. WHO shall request, in accordance with Article 9, verification from a State Party of reports from sources other than notifications or consultations of events which may constitute a public health emergency of international concern allegedly occurring in the State’s territory. In such cases, WHO shall inform the State Party concerned regarding the reports it is seeking to verify.

2. Pursuant to the foregoing paragraph and to Article 9, each State Party, when requested by WHO, shall verify and provide:
   (a) within 24 hours, an initial reply to, or acknowledgement of, the request from WHO;
   (b) within 24 hours, available public health information on the status of events referred to in WHO’s request; and
   (c) information to WHO in the context of an assessment under Article 6, including relevant information as described in that Article.

3. When WHO receives information of an event that may constitute a public health emergency of international concern, it shall offer to collaborate with the State Party concerned in assessing the potential for international disease spread, possible interference with international traffic and the adequacy of control measures. Such activities may include collaboration with other standard-setting organizations and the offer to mobilize international assistance in order to support the national authorities in conducting and coordinating on-site assessments. When requested by the State Party, WHO shall provide information supporting such an offer.

4. If the State Party does not accept the offer of collaboration, WHO may, when justified by the magnitude of the public health risk, share with other States Parties the information available to it, whilst encouraging the State Party to accept the offer of collaboration by WHO, taking into account the views of the State Party concerned.

Article 11 Provision of information by WHO

1. Subject to paragraph 2 of this Article, WHO shall send to all States Parties and, as appropriate, to relevant intergovernmental organizations, as soon as possible and by the most efficient means available, in confidence, such public health information which it has received under Articles 5 to 10 inclusive and which is necessary to enable States Parties to respond to a public health risk. WHO should communicate information to other States Parties that might help them in preventing the occurrence of similar incidents.

2. WHO shall use information received under Articles 6 and 8 and paragraph 2 of Article 9 for verification, assessment and assistance purposes under these Regulations and, unless otherwise agreed with the States Parties referred to in those provisions, shall not make this information generally available to other States Parties, until such time as:
   (a) the event is determined to constitute a public health emergency of international concern in accordance with Article 12; or
   (b) information evidencing the international spread of the infection or contamination has been confirmed by WHO in accordance with established epidemiological principles; or

3. When WHO receives information of an event that may constitute a public health emergency of international concern, it shall offer to collaborate with the State Party concerned in assessing the potential for international disease spread, possible interference with international traffic and the adequacy of control measures. Such activities may include collaboration with other standard-setting organizations and the offer to mobilize international assistance in order to support the national authorities in conducting and coordinating on-site assessments. When requested by the State Party, WHO shall provide information supporting such an offer.

4. If the State Party does not accept the offer of collaboration, WHO may, when justified by the magnitude of the public health risk, share with other States Parties the information available to it, whilst encouraging the State Party to accept the offer of collaboration by WHO, taking into account the views of the State Party concerned.

Article 12 Notification

1. Each State Party shall assess events occurring within its territory by using the decision instrument in Annex 2. Each State Party shall notify WHO, by the most efficient means of communication available, by way of the National IHR Focal Point, and within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory in accordance with the decision instrument, as well as any health measure implemented in response to those events. If the notification received by WHO involves the competency of the International Atomic Energy Agency (IAEA), WHO shall immediately notify the IAEA.

2. Following a notification, a State Party shall continue to communicate to WHO timely, accurate and sufficiently detailed public health information available to it on the notified event, where possible including case definitions, laboratory results, source and type of the risk, number of cases and deaths, conditions affecting the spread of the disease and the health measures employed; and report, when necessary, the difficulties faced and support needed in responding to the potential public health emergency of international concern.

Article 7 Information-sharing during unexpected or unusual public health events

If a State Party has evidence of an unexpected or unusual public health event within its territory, irrespective of origin or source, which may constitute a public health emergency of international concern, it shall provide to WHO all relevant public health information. In such a case, the provisions of Article 6 shall apply in full.

Article 8 Consultation

In the case of events occurring within its territory not requiring notification as provided in Article 6 in particular those events for which there is insufficient information available to complete the decision instrument, a State Party may nevertheless keep WHO advised thereof through the National IHR Focal Point and consult with WHO on appropriate health measures. Such communications shall be treated in accordance with paragraphs 2 to 4 of Article 11. The State Party in whose territory the event has occurred may request WHO assistance to assess any epidemiological evidence obtained by that State Party.

Article 9 Other reports

1. WHO may take into account reports from sources other than notifications or consultations and shall assess these reports according to established epidemiological principles and then communicate information on the event to the State Party in whose territory the event is allegedly occurring. Before taking any action based on such reports, WHO shall consult with and attempt to obtain verification from the State Party in whose territory the event is allegedly occurring in accordance with the procedure set forth in Article 10. To this end, WHO shall make the information received available to the States Parties and only where it is duly justified may WHO maintain the confidentiality of the source. This information will be used in accordance with the procedure set forth in Article 11.

2. States Parties shall, as far as practicable, inform WHO within 24 hours of receipt of evidence of a public health risk identified outside their territory that may cause international disease spread, as manifested by exported or imported:
   (a) human cases;
   (b) vectors which carry infection or contamination; or
   (c) goods that are contaminated.
5. If the Director-General, following consultations with the State Party within whose territory the public health emergency of international concern has occurred, considers that a public health emergency of international concern has ended, the Director-General shall take a decision in accordance with the procedure set out in Article 49.

Article 13 Public health response

1. Each State Party shall develop, strengthen and maintain, as soon as possible but no later than five years from the entry into force of these Regulations for that State Party, the capacity to respond promptly and effectively to public health risks and public health emergencies of international concern as set out in Annex 1. WHO shall publish, in consultation with Member States, guidelines to support States Parties in the development of public health response capacities.

2. Following the assessment referred to in paragraph 2, Part A of Annex 1, a State Party may report to WHO on the basis of a justified need and an implementation plan and, in so doing, obtain an extension of two years in which to fulfill the obligation in paragraph 1 of this Article. In exceptional circumstances and supported by a new implementation plan, the State Party may request a further extension not exceeding two years from the Director-General, who shall make the decision, taking into account the technical advice of the Review Committee. After the period mentioned in paragraph 1 of this Article, the State Party that has obtained an extension shall report annually to WHO on progress made towards the full implementation.

3. At the request of a State Party, WHO shall collaborate in the response to public health risks and other events by providing technical guidance and assistance and by assessing the effectiveness of the control measures in place, including the mobilization of international teams of experts for on-site assistance, when necessary.

4. If WHO, in consultation with the States Parties concerned as provided in Article 12, determines that a public health emergency of international concern is occurring, it may offer, in addition to the support indicated in paragraph 3 of this Article, further assistance to the State Party, including an assessment of the severity of the international risk and the adequacy of control measures. Such collaboration may include the offer to mobilize international assistance in order to support the national authorities in conducting and coordinating on-site assessments. When requested by the State Party, WHO shall provide information supporting such an offer.

5. When requested by WHO, States Parties should provide, to the extent possible, support to WHO-coordinated response activities.

6. When requested, WHO shall provide appropriate guidance and assistance to other States Parties affected or threatened by the public health emergency of international concern.

Article 14 Cooperation of WHO with intergovernmental organizations and international bodies

1. WHO shall cooperate and coordinate its activities, as appropriate, with other competent intergovernmental organizations or international bodies in the implementation of these Regulations, including through the conclusion of agreements and other similar arrangements.

2. In cases in which notification or verification of, or response to, an event is primarily within the competence of other intergovernmental organizations or international bodies, WHO shall coordinate its activities with such organizations or bodies in order to ensure the application of adequate measures for the protection of public health.

3. Notwithstanding the foregoing, nothing in these Regulations shall preclude or limit the provision by WHO of advice, support, or technical or other assistance for public health purposes.
PART III – RECOMMENDATIONS

Article 15 Temporary recommendations

1. If it has been determined in accordance with Article 12 that a public health emergency of international concern is occurring, the Director-General shall issue temporary recommendations in accordance with the procedure set out in Article 49. Such temporary recommendations may be modified or extended as appropriate, including after it has been determined that a public health emergency of international concern has ended, at which time other temporary recommendations may be issued as necessary for the purpose of preventing or promptly detecting its recurrence.

2. Temporary recommendations may include health measures to be implemented by the State Party experiencing the public health emergency of international concern, or by other States Parties, regarding persons, baggage, cargo, containers, conveyances, goods and/or postal parcels to prevent or reduce the international spread of disease and avoid unnecessary interference with international traffic.

3. Temporary recommendations may be terminated in accordance with the procedure set out in Article 49 at any time and shall automatically expire three months after their issuance. They may be modified or extended for additional periods of up to three months. Temporary recommendations may not continue beyond the second World Health Assembly after the determination of the public health emergency of international concern to which they relate.

Article 16 Standing recommendations

WHO may make standing recommendations of appropriate health measures in accordance with Article 53 for routine or periodic application. Such measures may be applied by States Parties regarding persons, baggage, cargo, containers, conveyances, goods and/or postal parcels for specific, ongoing public health risks in order to prevent or reduce the international spread of disease and avoid unnecessary interference with international traffic. WHO may, in accordance with Article 53, modify or terminate such recommendations, as appropriate.

Article 17 Criteria for recommendations

When issuing, modifying or terminating temporary or standing recommendations, the Director-General shall consider:

(a) the views of the States Parties directly concerned;
(b) the advice of the Emergency Committee or the Review Committee, as the case may be;
(c) scientific principles as well as available scientific evidence and information;
(d) health measures that, on the basis of a risk assessment appropriate to the circumstances, are not more restrictive of international traffic and trade and are not more intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection;
(e) relevant international standards and instruments;
(f) activities undertaken by other relevant intergovernmental organizations and international bodies; and
(g) other appropriate and specific information relevant to the event.

With respect to temporary recommendations, the consideration by the Director-General of subparagraphs (e) and (f) of this Article may be subject to limitations imposed by urgent circumstances.

Article 18 Recommendations with respect to persons, baggage, cargo, containers, conveyances, goods and postal parcels

1. Recommendations issued by WHO to States Parties with respect to persons may include the following advice:

- no specific health measures are advised;
- review travel history in affected areas;
- review proof of medical examination and any laboratory analysis;
- require medical examinations;
- review proof of vaccination or other prophylaxis;
- require vaccination or other prophylaxis;
- place suspect persons under public health observation;
- implement quarantine or other health measures for suspect persons;
- implement isolation and treatment where necessary of affected persons;
- implement tracing of contacts of suspect or affected persons;
- refuse entry of suspect and affected persons;
- refuse entry of unaffected persons to affected areas; and
- implement exit screening and/or restrictions on persons from affected areas.

2. Recommendations issued by WHO to States Parties with respect to baggage, cargo, containers, conveyances, goods and postal parcels may include the following advice:

- no specific health measures are advised;
- review manifest and routing;
- implement inspections;
- review proof of measures taken on departure or in transit to eliminate infection or contamination;
- implement treatment of the baggage, cargo, containers, conveyances, goods, postal parcels or human remains to remove infection or contamination, including vectors and reservoirs;
- the use of specific health measures to ensure the safe handling and transport of human remains;
- implement isolation or quarantine;
– seizure and destruction of infected or contaminated or suspect baggage, cargo, containers, conveyances, goods or postal parcels under controlled conditions if no available treatment or process will otherwise be successful; and
– refuse departure or entry.

PART IV – POINTS OF ENTRY

Article 19  General obligations

Each State Party shall, in addition to the other obligations provided for under these Regulations:

(a) ensure that the capacities set forth in Annex 1 for designated points of entry are developed within the timeframe provided in paragraph 1 of Article 5 and paragraph 1 of Article 13;

(b) identify the competent authorities at each designated point of entry in its territory; and

(c) furnish to WHO, as far as practicable, when requested in response to a specific potential public health risk, relevant data concerning sources of infection or contamination, including vectors and reservoirs, at its points of entry, which could result in international disease spread.

Article 20  Airports and ports

1. States Parties shall designate the airports and ports that shall develop the capacities provided in Annex 1.

2. States Parties shall ensure that Ship Sanitation Control Exemption Certificates and Ship Sanitation Control Certificates are issued in accordance with the requirements in Article 39 and the model provided in Annex 3.

3. Each State Party shall send to WHO a list of ports authorized to offer:

(a) the issuance of Ship Sanitation Control Certificates and the provision of the services referred to in Annexes 1 and 3; or

(b) the issuance of Ship Sanitation Control Exemption Certificates only; and

(c) extension of the Ship Sanitation Control Exemption Certificate for a period of one month until the arrival of the ship in the port at which the Certificate may be received.

Each State Party shall inform WHO of any changes which may occur to the status of the listed ports. WHO shall publish the information received under this paragraph.

4. WHO may, at the request of the State Party concerned, arrange to certify, after an appropriate investigation, that an airport or port in its territory meets the requirements referred to in paragraphs 1 and 3 of this Article. These certifications may be subject to periodic review by WHO, in consultation with the State Party.

5. WHO, in collaboration with competent intergovernmental organizations and international bodies, shall develop and publish the certification guidelines for airports and ports under this Article. WHO shall also publish a list of certified airports and ports.

Article 21  Ground crossings

1. Where justified for public health reasons, a State Party may designate ground crossings that shall develop the capacities provided in Annex 1, taking into consideration:

(a) the volume and frequency of the various types of international traffic, as compared to other points of entry, at a State Party’s ground crossings which might be designated; and

(b) the public health risks existing in areas in which the international traffic originates, or through which it passes, prior to arrival at a particular ground crossing.

2. States Parties sharing common borders should consider:

(a) entering into bilateral or multilateral agreements or arrangements concerning prevention or control of international transmission of disease at ground crossings in accordance with Article 57; and

(b) joint designation of adjacent ground crossings for the capacities in Annex 1 in accordance with paragraph 1 of this Article.

Article 22  Role of competent authorities

1. The competent authorities shall:

(a) be responsible for monitoring baggage, cargo, containers, conveyances, goods, postal parcels and human remains departing and arriving from affected areas, so that they are maintained in such a condition that they are free of sources of infection or contamination, including vectors and reservoirs;

(b) ensure, as far as practicable, that facilities used by travellers at points of entry are maintained in a sanitary condition and are kept free of sources of infection or contamination, including vectors and reservoirs;

(c) be responsible for the supervision of any deratting, disinfection, dissection or decontamination of baggage, cargo, containers, conveyances, goods, postal parcels and human remains or sanitary measures for persons, as appropriate under these Regulations;

(d) advise conveyance operators, as far in advance as possible, of their intent to apply control measures to a conveyance, and shall provide, where available, written information concerning the methods to be employed;

(e) be responsible for the supervision of the removal and safe disposal of any contaminated water or food, human or animal dejecta, wastewater and any other contaminated matter from a conveyance;

(f) take all practicable measures consistent with these Regulations to monitor and control the discharge by ships of sewage, refuse, ballast water and other potentially disease-causing matter which might contaminate the waters of a port, river, canal, strait, lake or other international waterway;

(g) be responsible for supervision of service providers for services concerning travellers, baggage, cargo, containers, conveyances, goods, postal parcels and human remains at points of entry, including the conduct of inspections and medical examinations as necessary.
(h) have effective contingency arrangements to deal with an unexpected public health event;

and

(i) communicate with the National IHR Focal Point on the relevant public health measures taken pursuant to these Regulations.

2. Health measures recommended by WHO for travellers, baggage, cargo, containers, conveyances, goods, postal parcels and human remains arriving from an affected area may be reapplied on arrival, if there are verifiable indications and/or evidence that the measures applied on departure from the affected area were unsuccessful.

3. Disinsection, deratting, disinfection, decontamination and other sanitary procedures shall be carried out so as to avoid injury and as far as possible discomfort to persons, or damage to the environment in a way which impacts on public health, or damage to baggage, cargo, containers, conveyances, goods and postal parcels.

PART V – PUBLIC HEALTH MEASURES

Chapter I – General provisions

Article 23 Health measures on arrival and departure

1. Subject to applicable international agreements and relevant articles of these Regulations, a State Party may require for public health purposes, on arrival or departure:

(a) with regard to travellers:

(i) information concerning the traveller’s destination so that the traveller may be contacted;

(ii) information concerning the traveller’s itinerary to ascertain if there was any travel in or near an affected area or other possible contacts with infection or contamination prior to arrival, as well as review of the traveller’s health documents if they are required under these Regulations; and/or

(iii) a non-invasive medical examination which is the least intrusive examination that would achieve the public health objective;

(b) inspection of baggage, cargo, containers, conveyances, goods, postal parcels and human remains.

2. On the basis of evidence of a public health risk obtained through the measures provided in paragraph 1 of this Article, or through other means, States Parties may apply additional health measures, in accordance with these Regulations, in particular, with regard to a suspect or affected traveller, on a case-by-case basis, the least intrusive and invasive medical examination that would achieve the public health objective of preventing the international spread of disease.

3. No medical examination, vaccination, prophylaxis or health measure under these Regulations shall be carried out on travellers without their prior express informed consent or that of their parents or guardians, except as provided in paragraph 2 of Article 31, and in accordance with the law and international obligations of the State Party. States Parties shall inform medical practitioners of these requirements in accordance with the law of the State Party.

5. Any medical examination, medical procedure, vaccination or other prophylaxis which involves a risk of disease transmission shall only be performed on, or administered to, a traveller in accordance with established national or international safety guidelines and standards so as to minimize such a risk.

Chapter II – Special provisions for conveyances and conveyance operators

Article 24 Conveyance operators

1. States Parties shall take all practicable measures consistent with these Regulations to ensure that conveyance operators:

(a) comply with the health measures recommended by WHO and adopted by the State Party;

(b) inform travellers of the health measures recommended by WHO and adopted by the State Party for application on board; and

(c) permanently keep conveyances for which they are responsible free of sources of infection or contamination, including vectors and reservoirs. The application of measures to control sources of infection or contamination may be required if evidence is found.

2. Specific provisions pertaining to conveyances and conveyance operators under this Article are provided in Annex 4. Specific measures applicable to conveyances and conveyance operators with regard to vector-borne diseases are provided in Annex 5.

Article 25 Ships and aircraft in transit

Subject to Articles 27 and 43 or unless authorized by applicable international agreements, no health measure shall be applied by a State Party to:

(a) a ship not coming from an affected area which passes through a maritime canal or waterway in the territory of that State Party on its way to a port in the territory of another State.

Any such ship shall be permitted to take on, under the supervision of the competent authority, fuel, water, food and supplies.

(b) a ship which passes through waters within its jurisdiction without calling at a port or on the coast; and

(c) an aircraft in transit at an airport within its jurisdiction, except that the aircraft may be restricted to a particular area of the airport with no embarking and disembarking or loading and discharging. However, any such aircraft shall be permitted to take on, under the supervision of the competent authority, fuel, water, food and supplies.

Article 26 Civilian lorries, trains and coaches in transit

Subject to Articles 27 and 43 or unless authorized by applicable international agreements, no health measure shall be applied to a civilian lorry, train or coach not coming from an affected area which passes through a territory without embarking, disembarking, loading or discharging.
Article 27 Affected conveyances

1. If clinical signs or symptoms and information based on fact or evidence of a public health risk, including sources of infection and contamination, are found on board a conveyance, the competent authority shall consider the conveyance as affected and may:

   (a) disinfect, decontaminate, disinsect or derat the conveyance, as appropriate, or cause these measures to be carried out under its supervision; and
   (b) decide in each case the technique employed to secure an adequate level of control of the public health risk as provided in these Regulations. Where there are methods or materials advised by WHO for these procedures, these should be employed, unless the competent authority determines that other methods are as safe and reliable.

The competent authority may implement additional health measures, including isolation of the conveyances, as necessary, to prevent the spread of disease. Such additional measures should be reported to the National IHR Focal Point.

2. If the competent authority for the point of entry is not able to carry out the control measures required under this Article, the affected conveyance may nevertheless be allowed to depart, subject to the following conditions:

   (a) the competent authority shall, at the time of departure, inform the competent authority for the next known point of entry of the type of information referred to under subparagraph (b); and
   (b) in the case of a ship, the evidence found and the control measures required shall be noted in the Ship Sanitation Control Certificate.

Any such conveyance shall be permitted to take on, under the supervision of the competent authority, fuel, water, food and supplies.

3. A conveyance that has been considered as affected shall cease to be regarded as such when the competent authority is satisfied that:

   (a) the measures provided in paragraph 1 of this Article have been effectively carried out; and
   (b) there are no conditions on board that could constitute a public health risk.

Article 28 Ships and aircraft at points of entry

1. Subject to Article 43 or as provided in applicable international agreements, a ship or an aircraft shall not be prevented for public health reasons from calling at any point of entry. However, if the point of entry is not equipped for applying health measures under these Regulations, the ship or aircraft may be ordered to proceed at its own risk to the nearest suitable point of entry available to it, unless the ship or aircraft has an operational problem which would make this diversion unsafe.

2. Subject to Article 43 or as provided in applicable international agreements, ships or aircraft shall not be refused free pratique by States Parties for public health reasons; in particular they shall not be prevented from embarking or disembarking, discharging or loading cargo or stores, or taking on fuel, water, food and supplies. States Parties may subject the granting of free pratique to inspection and, if a source of infection or contamination is found on board, the carrying out of necessary disinfection, decontamination, disinsection or deratting, or other measures necessary to prevent the spread of the infection or contamination.

3. Whenever practicable and subject to the previous paragraph, a State Party shall authorize the granting of free pratique by radio or other communication means to a ship or an aircraft when, on the basis of information received from it prior to its arrival, the State Party is of the opinion that the arrival of the ship or aircraft will not result in the introduction or spread of disease.

4. Officers in command of ships or pilots in command of aircraft, or their agents, shall make known to the port or airport control as early as possible before arrival at the port or airport of destination any cases of illness indicative of a disease of an infectious nature or evidence of a public health risk on board as soon as such illnesses or public health risks are made known to the officer or pilot. This information must be immediately relayed to the competent authority for the port or airport. In urgent circumstances, such information should be communicated directly by the officers or pilots to the relevant port or airport authority.

5. The following shall apply if a suspect or affected aircraft or ship, for reasons beyond the control of the pilot in command of the aircraft or the officer in command of the ship, lands elsewhere than at the airport at which the aircraft was due to land or berths elsewhere than at the port at which the ship was due to berth:

   (a) the pilot in command of the aircraft or the officer in command of the ship or other person in charge shall make every effort to communicate without delay with the nearest competent authority;
   (b) as soon as the competent authority has been informed of the landing it may apply health measures recommended by WHO or other health measures provided in these Regulations;
   (c) unless required for emergency purposes or for communication with the competent authority, no traveller on board the aircraft or ship shall leave its vicinity and no cargo shall be removed from that vicinity, unless authorized by the competent authority; and
   (d) when all health measures required by the competent authority have been completed, the aircraft or ship may, so far as such health measures are concerned, proceed either to the airport or port at which it was due to land or berth, or, if for technical reasons it cannot do so, to a conveniently situated airport or port.

6. Notwithstanding the provisions contained in this Article, the officer in command of a ship or pilot in command of an aircraft may take such emergency measures as may be necessary for the health and safety of travellers on board. He or she shall inform the competent authority as early as possible concerning any measures taken pursuant to this paragraph.

Article 29 Civilian lorries, trains and coaches at points of entry

WHO, in consultation with States Parties, shall develop guiding principles for applying health measures to civilian lorries, trains and coaches at points of entry and passing through ground crossings.

Chapter III – Special provisions for travellers

Article 30 Travellers under public health observation

Subject to Article 43 or as authorized in applicable international agreements, a suspect traveller who on arrival is placed under public health observation may continue an international voyage, if the traveller does not pose an imminent public health risk and the State Party informs the competent authority of the point of entry at destination, if known, of the traveller’s expected arrival. On arrival, the traveller shall report to that authority.
Article 31 Health measures relating to entry of travellers

1. Invasive medical examination, vaccination or other prophylaxis shall not be required as a condition of entry of any traveller to the territory of a State Party, except that, subject to Articles 32, 42 and 45, these Regulations do not preclude States Parties from requiring medical examination, vaccination or other prophylaxis or proof of vaccination or other prophylaxis:

(a) when necessary to determine whether a public health risk exists;
(b) as a condition of entry for any travellers seeking temporary or permanent residence;
(c) as a condition of entry for any travellers pursuant to Article 43 or Annexes 6 and 7; or
(d) which may be carried out pursuant to Article 23.

2. If a traveller for whom a State Party may require a medical examination, vaccination or other prophylaxis under paragraph 1 of this Article fails to consent to any such measure, or refuses to provide the information or the documents referred to in paragraph 1(a) of Article 23, the State Party concerned may, subject to Articles 32, 42 and 45, deny entry to that traveller. If there is evidence of an imminent public health risk, the State Party may, in accordance with its national law and to the extent necessary to control such a risk, compel the traveller to undergo or advise the traveller, pursuant to paragraph 3 of Article 23, to undergo:

(a) the least invasive and intrusive medical examination that would achieve the public health objective;
(b) vaccination or other prophylaxis; or
(c) additional established health measures that prevent or control the spread of disease, including isolation, quarantine or placing the traveller under public health observation.

Article 32 Treatment of travellers

In implementing health measures under these Regulations, States Parties shall treat travellers with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with such measures, including by:

(a) treating all travellers with courtesy and respect;
(b) taking into consideration the gender, sociocultural, ethnic or religious concerns of travellers; and
(c) providing or arranging for adequate food and water, appropriate accommodation and clothing, protection for baggage and other possessions, appropriate medical treatment, means of necessary communication if possible in a language that they can understand and other appropriate assistance for travellers who are quarantined, isolated or subject to medical examinations or other procedures for public health purposes.

Chapter IV – Special provisions for goods, containers and container loading areas

Article 33 Goods in transit

Subject to Article 43 or unless authorized by applicable international agreements, goods, other than live animals, in transit without transhipment shall not be subject to health measures under these Regulations or detained for public health purposes.

Article 34 Container and container loading areas

1. States Parties shall ensure, as far as practicable, that container shippers use international traffic containers that are kept free from sources of infection or contamination, including vectors and reservoirs, particularly during the course of packing.

2. States Parties shall ensure, as far as practicable, that container loading areas are kept free from sources of infection or contamination, including vectors and reservoirs.

3. Whenever, in the opinion of a State Party, the volume of international container traffic is sufficiently large, the competent authorities shall take all practicable measures consistent with these Regulations, including carrying out inspections, to assess the sanitary condition of container loading areas and containers in order to ensure that the obligations contained in these Regulations are implemented.

4. Facilities for the inspection and isolation of containers shall, as far as practicable, be available at container loading areas.

5. Container consignees and consignors shall make every effort to avoid cross-contamination when multiple-use loading of containers is employed.

PART VI – HEALTH DOCUMENTS

Article 35 General rule

No health documents, other than those provided for under these Regulations or in recommendations issued by WHO, shall be required in international traffic, provided however that this Article shall not apply to travellers seeking temporary or permanent residence, nor shall it apply to container loading areas.

Article 36 Certificates of vaccination or other prophylaxis

1. Vaccines and prophylaxis for travellers administered pursuant to these Regulations, or to recommendations and certificates relating thereto, shall conform to the provisions of Annex 6 and, when applicable, Annex 7 with regard to specific diseases.

2. A traveller in possession of a certificate of vaccination or other prophylaxis issued in conformity with Annex 6 and, when applicable, Annex 7, shall not be denied entry as a consequence of the disease to which the certificate refers, even if coming from an affected area, unless the competent authority has verifiable indications and/or evidence that the vaccination or other prophylaxis was not effective.
Article 37  Maritime Declaration of Health

1. The master of a ship, before arrival at its first port of call in the territory of a State Party, shall ascertain the state of health on board, and, except when that State Party does not require it, the master shall, on arrival, or in advance of the vessel’s arrival if the vessel is so equipped and the State Party requires such advance delivery, complete and deliver to the competent authority for that port a Maritime Declaration of Health which shall be countersigned by the ship’s surgeon, if one is carried.

2. The master of a ship, or the ship’s surgeon if one is carried, shall supply any information required by the competent authority as to health conditions on board during an international voyage.

3. A Maritime Declaration of Health shall conform to the model provided in Annex 8.

4. A State Party may decide:
   (a) to dispense with the submission of the Maritime Declaration of Health by all arriving ships; or
   (b) to require the submission of the Maritime Declaration of Health under a recommendation concerning ships arriving from affected areas or to require it from ships which might otherwise carry infection or contamination.

The State Party shall inform shipping operators or their agents of these requirements.

Article 38  Health Part of the Aircraft General Declaration

1. The pilot in command of an aircraft or the pilot’s agent, in flight or upon landing at the first airport in the territory of a State Party, shall, to the best of his or her ability, except when that State Party does not require it, complete and deliver to the competent authority for that airport the Health Part of the Aircraft General Declaration which shall conform to the model specified in Annex 9.

2. The pilot in command of an aircraft or the pilot’s agent shall supply any information required by the State Party as to health conditions on board during an international voyage and any health measure applied to the aircraft.

3. A State Party may decide:
   (a) to dispense with the submission of the Health Part of the Aircraft General Declaration by all arriving aircraft; or
   (b) to require the submission of the Health Part of the Aircraft General Declaration under a recommendation concerning aircraft arriving from affected areas or to require it from aircraft which might otherwise carry infection or contamination.

The State Party shall inform aircraft operators or their agents of these requirements.

Article 39  Ship sanitation certificates

1. Ship Sanitation Control Exemption Certificates and Ship Sanitation Control Certificates shall be valid for a maximum period of six months. This period may be extended by one month if the inspection or control measures required cannot be accomplished at the port.

2. If a valid Ship Sanitation Control Exemption Certificate or Ship Sanitation Control Certificate is not produced or evidence of a public health risk is found on board a ship, the State Party may proceed as provided in paragraph 1 of Article 27.

3. The certificates referred to in this Article shall conform to the model in Annex 3.

4. Whenever possible, control measures shall be carried out when the ship and holds are empty. In the case of a ship in ballast, they shall be carried out before loading.

5. When control measures are required and have been satisfactorily completed, the competent authority shall issue a Ship Sanitation Control Certificate, noting the evidence found and the control measures taken.

6. The competent authority may issue a Ship Sanitation Control Exemption Certificate at any port specified under Article 20 if it is satisfied that the ship is free of infection and contamination, including vectors and reservoirs. Such a certificate shall normally be issued only if the inspection of the ship has been carried out when the ship and holds are empty or when they contain only ballast or other material, of such a nature or so disposed as to make a thorough inspection of the holds possible.

7. If the conditions under which control measures are carried out are such that, in the opinion of the competent authority for the port where the operation was performed, a satisfactory result cannot be obtained, the competent authority shall make a note to that effect on the Ship Sanitation Control Certificate.

PART VII – CHARGES

Article 40  Charges for health measures regarding travellers

1. Except for travellers seeking temporary or permanent residence, and subject to paragraph 2 of this Article, no charge shall be made by a State Party pursuant to these Regulations for the following measures for the protection of public health:
   (a) any medical examination provided for in these Regulations, or any supplementary examination which may be required by that State Party to ascertain the health status of the traveller examined;
   (b) any vaccination or other prophylaxis provided to a traveller on arrival that is not a published requirement or is a requirement published less than 10 days prior to provision of the vaccination or other prophylaxis;
   (c) appropriate isolation or quarantine requirements of travellers;
   (d) any certificate issued to the traveller specifying the measures applied and the date of application; or
   (e) any health measures applied to baggage accompanying the traveller.

2. States Parties may charge for health measures other than those referred to in paragraph 1 of this Article, including those primarily for the benefit of the traveller.

3. Where charges are made for applying such health measures to travellers under these Regulations, there shall be in each State Party only one tariff for such charges and every charge shall:
   (a) conform to this tariff;
4. The tariff, and any amendment thereto, shall be published at least 10 days in advance of any levy thereunder.

5. Nothing in these Regulations shall preclude States Parties from seeking reimbursement for expenses incurred in providing the health measures in paragraph 1 of this Article:
   (a) from conveyance operators or owners with regard to their employees; or
   (b) from applicable insurance sources.

6. Under no circumstances shall travellers or conveyance operators be denied the ability to depart from the territory of a State Party pending payment of the charges referred to in paragraphs 1 or 2 of this Article.

Article 41 Charges for baggage, cargo, containers, conveyances, goods or postal parcels

1. Where charges are made for applying health measures to baggage, cargo, containers, conveyances, goods or postal parcels under these Regulations, there shall be in each State Party only one tariff for such charges and every charge shall:
   (a) conform to this tariff;
   (b) not exceed the actual cost of the service rendered; and
   (c) be levied without distinction as to the nationality, flag, registry or ownership of the baggage, cargo, containers, conveyances, goods or postal parcels concerned. In particular, there shall be no distinction made between national and foreign baggage, cargo, containers, conveyances, goods or postal parcels.

2. The tariff, and any amendment thereto, shall be published at least 10 days in advance of any levy thereunder.

PART VIII – GENERAL PROVISIONS

Article 42 Implementation of health measures

Health measures taken pursuant to these Regulations shall be initiated and completed without delay, and applied in a transparent and non-discriminatory manner.

Article 43 Additional health measures

1. These Regulations shall not preclude States Parties from implementing health measures, in accordance with their relevant national law and obligations under international law, in response to specific public health risks or public health emergencies of international concern, which:
   (a) achieve the same or greater level of health protection than WHO recommendations; or
   (b) are otherwise prohibited under Article 25, Article 26, paragraphs 1 and 2 of Article 28, Article 30, paragraph 1(c) of Article 31 and Article 33,

3. A State Party implementing additional health measures referred to in paragraph 1 of this Article shall inform WHO of such measures and their health rationale within 48 hours after implementing such measures.

5. A State Party implementing a health measure pursuant to paragraph 1 or 2 of this Article shall within three months review such a measure taking into account the advice of WHO and the criteria in paragraph 2 of this Article.

6. A State Party implementing a health measure pursuant to paragraph 1 or 2 of this Article may request the State Party implementing such a measure to consult with it. The purpose of such consultations is to clarify the scientific information and public health rationale underlying the measure and to find a mutually acceptable solution.

7. Without prejudice to its rights under Article 56, any State Party impacted by a measure taken pursuant to paragraph 1 or 2 of this Article may request the State Party implementing such a measure to consult with it. The purpose of such consultations is to clarify the scientific information and public health rationale underlying the measure and to find a mutually acceptable solution.

8. The provisions of this Article may apply to implementation of measures concerning travellers taking part in mass congregations.
Article 44  Collaboration and assistance

1. States Parties shall undertake to collaborate with each other, to the extent possible, in:
   (a) the detection and assessment of, and response to, events as provided under these
      Regulations;
   (b) the provision or facilitation of technical cooperation and logistical support, particularly in
      the development, strengthening and maintenance of the public health capacities required under
      these Regulations;
   (c) the mobilization of financial resources to facilitate implementation of their obligations
      under these Regulations; and
   (d) the formulation of proposed laws and other legal and administrative provisions for the
      implementation of these Regulations.

2. WHO shall collaborate with States Parties, upon request, to the extent possible, in:
   (a) the evaluation and assessment of their public health capacities in order to facilitate the effective
      implementation of these Regulations;
   (b) the provision or facilitation of technical cooperation and logistical support to States
      Parties; and
   (c) the mobilization of financial resources to support developing countries in building,
      strengthening and maintaining the capacities provided for in Annex 1.

3. Collaboration under this Article may be implemented through multiple channels, including bilaterally, through regional networks and the WHO regional offices, and through intergovernmental
   and regional economic integration organizations.

Article 45  Treatment of personal data

1. Health information collected or received by a State Party pursuant to these Regulations from
   another State Party or from WHO shall be kept confidential and processed in an anonymous form,
   unless otherwise provided for in these Regulations.

2. Data shall be processed fairly and lawfully, and not for any purpose incompatible with that
   purpose.

3. Upon request, WHO shall, as far as practicable, provide an individual with his or her personal
   data referred to in this Article in a readable form, without undue delay or expense and, when
   necessary, allow for correction.
Article 10 Procedure

1. The Director-General shall convene meetings of the Emergency Committee by selecting experts from among those referred to in paragraph 2 of Article 48, according to the fields of expertise and experience most relevant to the specific event that is occurring. For the purpose of this Article, "meetings" of the Emergency Committee may include teleconferences, videoconferences or electronic communications.

2. The Director-General shall provide the Emergency Committee with the agenda and any relevant information concerning the event, including information provided by the States Parties, as well as any temporary recommendation that the Director-General proposes for issuance.

3. The Emergency Committee shall elect its Chairperson and prepare following each meeting a brief summary report of its proceedings and deliberations, including any advice on recommendation.

4. The views of the Emergency Committee shall be forwarded to the Director-General for consideration. The Director-General shall make the final determination on these matters.

5. Decisions of the Emergency Committee shall be taken by a majority of the members present and voting.

6. The Director-General shall appoint members to the Review Committee for the duration of the work of a session only.

Article 51 Terms of reference and composition

Chapter III – The Review Committee

Article 50 Terms of reference and composition

1. The Director-General shall establish a Review Committee, which shall carry out the following functions:

(a) make technical recommendations to the Director-General regarding amendments to these Regulations;

(b) provide technical advice to the Director-General with respect to standing recommendations, including any modification or termination thereof;

(c) provide technical advice to the Director-General on the functioning of these Regulations.

2. The Review Committee shall be considered an expert committee and shall be subject to the WHO Advisory Panel Regulations, unless otherwise provided in this Article.
Article 57  Relationship with other international agreements

PART X – FINAL PROVISIONS

Article 58 Reporting and review

3. WHO shall periodically conduct studies to review and evaluate the functioning of Annex 2. The first such review shall commence no later than one year after the entry into force of these Regulations. The results of such reviews shall be submitted to the Health Assembly for its consideration, as appropriate.

Article 59 Amendments

1. Amendments to these Regulations may be proposed by any State Party or by the Director-General. Such proposals for amendments shall be submitted to the Health Assembly for its consideration.

2. The text of any proposed amendments adopted shall be communicated to all States Parties by the Director-General. The first time a Conference of the Regulations, the States Parties concerned shall seek in the first instance to seek application of these Regulations.
Article 58  International sanitary agreements and regulations

1. These Regulations, subject to the provisions of Article 62 and the exceptions hereinafter provided, shall replace as between the States bound by these Regulations and as between these States and WHO, the provisions of the following international sanitary agreements and regulations:

(a) International Sanitary Convention, signed in Paris, 21 June 1926;
(b) International Sanitary Convention for Aerial Navigation, signed at The Hague, 12 April 1933;
(c) International Agreement for dispensing with Bills of Health, signed in Paris, 22 December 1934;
(d) International Agreement for dispensing with Consular Visas on Bills of Health, signed in Paris, 22 December 1934;
(e) Convention modifying the International Sanitary Convention of 21 June 1926, signed in Paris, 31 October 1938;
(g) International Sanitary Convention for Aerial Navigation, 1944, modifying the International Sanitary Convention of 12 April 1933, opened for signature in Washington, 15 December 1944;
(h) Protocol of 23 April 1946 to prolong the International Sanitary Convention, 1944, signed in Washington;
(i) Protocol of 23 April 1946 to prolong the International Sanitary Convention for Aerial Navigation, 1944, signed in Washington;
(k) the International Health Regulations of 1969 and the amendments of 1973 and 1981.

2. The Pan American Sanitary Code, signed at Havana, 14 November 1924, shall remain in force with the exception of Articles 2, 9, 10, 11, 16 to 53 inclusive, 61 and 62, to which the relevant part of paragraph 1 of this Article shall apply.

Article 59  Entry into force; period for rejection or reservations

1. The period provided in execution of Article 22 of the Constitution of WHO for rejection of or reservation to, these Regulations or an amendment thereto, shall be 18 months from the date of the notification by the Director-General of the adoption of these Regulations or of an amendment to these Regulations by the Health Assembly. Any rejection or reservation received by the Director-General after the expiry of that period shall have no effect.

2. These Regulations shall enter into force 24 months after the date of notification referred to in paragraph 1 of this Article, except for:

(a) a State that has rejected these Regulations or an amendment thereto in accordance with Article 61;
(b) a State that has made a reservation, for which these Regulations shall enter into force as provided in Article 62;
(c) a State that becomes a Member of WHO after the date of the notification by the Director-General referred to in paragraph 1 of this Article, and which is not already a party to these Regulations, for which these Regulations shall enter into force as provided in Article 60; and
(d) a State that is not a Member of WHO that accepts these Regulations, for which they shall enter into force in accordance with paragraph 1 of Article 64.

3. If a State is not able to adjust its domestic legislative and administrative arrangements fully with these Regulations within the period set out in paragraph 2 of this Article, that State shall submit within the period specified in paragraph 1 of this Article a declaration to the Director-General regarding the outstanding adjustments and achieve them no later than 12 months after the entry into force of these Regulations for that State Party.

Article 60  New Member States of WHO

Any State which becomes a Member of WHO after the date of the notification by the Director-General referred to in paragraph 1 of Article 59, and which is not already a party to these Regulations, may communicate its rejection of, or any reservation to, these Regulations within a period of twelve months from the date of the notification to it by the Director-General after becoming a Member of WHO. Unless rejected, these Regulations shall enter into force with respect to that State, subject to the provisions of Articles 62 and 63, upon expiry of that period. In no case shall these Regulations enter into force in respect to that State earlier than 24 months after the date of notification referred to in paragraph 1 of Article 59.

Article 61  Rejection

If a State notifies the Director-General of its rejection of these Regulations or of an amendment thereto within the period provided in paragraph 1 of Article 59, these Regulations or the amendment concerned shall not enter into force with respect to that State. Any international sanitary agreement or regulations listed in Article 58 to which such State is already a party shall remain in force as far as such State is concerned.

Article 62  Reservations

1. States may make reservations to these Regulations in accordance with this Article. Such reservations shall not be incompatible with the object and purpose of these Regulations.

2. Reservations to these Regulations shall be notified to the Director-General in accordance with paragraph 1 of Article 59 and Article 60, paragraph 1 of Article 63 or paragraph 1 of Article 64, as the case may be. A State not a Member of WHO shall notify the Director-General of any reservation with its notification of acceptance of these Regulations. States formulating reservations should provide the Director-General with reasons for the reservations.

3. A rejection in part of these Regulations shall be considered as a reservation.

4. The Director-General shall, in accordance with paragraph 2 of Article 65, issue notification of each reservation received pursuant to paragraph 2 of this Article. The Director-General shall:
(a) if the reservation was made before the entry into force of these Regulations, request those Member States that have not rejected these Regulations to notify him or her within six months of any objection to the reservation, or
States objecting to a reservation should provide the Director-General with reasons for the objection.  

5. After this period, the Director-General shall notify all States Parties of the objections he or she has received with regard to reservations. Unless by the end of six months from the date of the notification referred to in paragraph 4 of this Article a reservation has been objected to by one-third of the States referred to in paragraph 4 of this Article, it shall be deemed to be accepted and these Regulations shall enter into force for the reserving State, subject to the reservation.  

6. If at least one-third of the States referred to in paragraph 4 of this Article object to the reservation by the end of six months from the date of the notification referred to in paragraph 4 of this Article, the Director-General shall notify the reserving State with a view to its considering withdrawing the reservation within three months from the date of the notification by the Director-General.  

7. The reserving State shall continue to fulfil any obligations corresponding to the subject matter of the reservation, which the State has accepted under any of the international sanitary agreements or regulations listed in Article 58.  

8. If the reserving State does not withdraw the reservation within three months from the date of the notification by the Director-General referred to in paragraph 6 of this Article, the Director-General shall seek the view of the Review Committee if the reserving State so requests. The Review Committee shall advise the Director-General as soon as possible and in accordance with Article 50 on the practical impact of the reservation on the operation of these Regulations.  

9. The Director-General shall submit the reservation, and the views of the Review Committee if applicable, to the Health Assembly for its consideration. If the Health Assembly, by a majority vote, objects to these Regulations, the reservation shall not be accepted and these Regulations shall enter into force for the reserving State only after it withdraws its reservation pursuant to Article 63. If the Health Assembly accepts the reservation, these Regulations shall enter into force for the reserving State, subject to its reservation.  

Article 65 Withdrawal of rejection and reservation  

1. A rejection made under Article 61 may at any time be withdrawn by a State by notifying the Director-General. In such cases, these Regulations shall enter into force with regard to that State upon receipt by the Director-General of the notification, except where the State makes a reservation when withdrawing its rejection, in which case these Regulations shall enter into force as provided in Article 62. In no case shall these Regulations enter into force in respect to that State earlier than 24 months after the date of notification referred to in paragraph 1 of Article 59.  

2. The whole or part of any reservation may at any time be withdrawn by the State Party concerned by notifying the Director-General. In such cases, the withdrawal will be effective from the date of receipt by the Director-General of the notification.  

Article 64 States not Members of WHO  

1. Any State not a Member of WHO, which is a party to any international sanitary agreement or regulations listed in Article 58 or to which the Director-General has notified the adoption of these Regulations by the World Health Assembly, may become a party hereto by notifying its acceptance to the Director-General and, subject to the provisions of Article 62, such acceptance shall become effective upon the date of entry into force of these Regulations, or, if such acceptance is notified after that date, three months after the date of receipt by the Director-General of the notification of acceptance.  

2. Any State not a Member of WHO which has become a party to these Regulations may at any time withdraw from participation in these Regulations, by means of a notification addressed to the Director-General which shall take effect six months after the Director-General has received it. The State which has withdrawn shall, as from that date, resume application of the provisions of any international sanitary agreement or regulations listed in Article 58 to which it was previously a party.  

Article 65 Notifications by the Director-General  

1. The Director-General shall notify all States Members and Associate Members of WHO, and also other parties to any international sanitary agreement or regulations listed in Article 58, of the adoption by the Health Assembly of these Regulations.  

2. The Director-General shall also notify these States, as well as any other State which has become a party to these Regulations or to any amendment to these Regulations, of any notification received by WHO under Articles 60 to 64 respectively, as well as of any decision taken by the Health Assembly under Article 62.  

Article 66 Authentic texts  

1. The Arabic, Chinese, English, French, Russian and Spanish texts of these Regulations shall be equally authentic. The original texts of these Regulations shall be deposited with WHO.  

2. The Director-General shall send, with the notification provided in paragraph 1 of Article 59, certified copies of these Regulations to all Members and Associate Members, and also to other parties to any of the international sanitary agreements or regulations listed in Article 58.  

3. Upon the entry into force of these Regulations, the Director-General shall deliver certified copies thereof to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations.
ANNEX 1

A. CORE CAPACITY REQUIREMENTS FOR SURVEILLANCE AND RESPONSE

1. States Parties shall utilize existing national structures and resources to meet their core capacity requirements under these Regulations, including with regard to:

(a) their surveillance, reporting, notification, verification, response and collaboration activities; and

(b) their activities concerning designated airports, ports and ground crossings.

2. Each State Party shall assess, within two years following the entry into force of these Regulations for that State Party, the ability of existing national structures and resources to meet the minimum requirements described in this Annex. As a result of such assessment, States Parties shall develop and implement plans of action to ensure that these core capacities are present and functioning throughout their territories as set out in paragraph 1 of Article 5 and paragraph 1 of Article 13.

3. States Parties and WHO shall support assessments, planning and implementation processes under this Annex.

4. At the local community level and/or primary public health response level

The capacities:

(a) to detect events involving disease or death above expected levels for the particular time and place in all areas within the territory of the State Party; and

(b) to report all available essential information immediately to the appropriate level of healthcare response. At the community level, reporting shall be to local community health-care institutions or the appropriate health personnel. At the primary public health response level, reporting shall be to the intermediate or national response level, depending on organizational structures. For the purposes of this Annex, essential information includes the following: clinical descriptions, laboratory results, sources and type of risk, numbers of human cases and deaths, conditions affecting the spread of the disease and the health measures employed; and

(c) to implement preliminary control measures immediately.

5. At the intermediate public health response levels

The capacities:

(a) to confirm the status of reported events and to support or implement additional control measures; and

(b) to assess reported events immediately and, if found urgent, to report all essential information to the national level. For the purposes of this Annex, the criteria for urgent events include serious public health impact and/or unusual or unexpected nature with high potential for spread.

6. At the national level

Assessment and notification. The capacities:

(a) to assess all reports of urgent events within 48 hours; and

(b) to notify WHO immediately through the National IHR Focal Point when the assessment indicates the event is notifiable pursuant to paragraph 1 of Article 6 and Annex 2 and to inform WHO as required pursuant to Article 7 and paragraph 2 of Article 9.

Public health response. The capacities:

(a) to determine rapidly the control measures required to prevent domestic and international spread;

(b) to provide support through specialized staff, laboratory analysis of samples (domestically or through collaborating centres) and logistical assistance (e.g. equipment, supplies and transport);

(c) to provide on-site assistance as required to supplement local investigations;

(d) to provide a direct operational link with senior health and other officials to approve rapidly and implement containment and control measures;

(e) to provide direct liaison with other relevant government ministries;

(f) to provide, by the most efficient means of communication available, links with hospitals, clinics, airports, ports, ground crossings, laboratories and other key operational areas for the dissemination of information and recommendations received from WHO regarding events in the State Party’s own territory and in the territories of other States Parties;

(g) to establish, operate and maintain a national public health emergency response plan, including the creation of multidisciplinary/multisectoral teams to respond to events that may constitute a public health emergency of international concern; and

(h) to provide the foregoing on a 24-hour basis.

B. CORE CAPACITY REQUIREMENTS FOR DESIGNATED AIRPORTS, PORTS AND GROUND CROSSINGS

1. At all times

The capacities:

(a) to provide access to (i) an appropriate medical service including diagnostic facilities located so as to allow the prompt assessment and care of ill travellers, and (ii) adequate staff, equipment and premises;

(b) to provide access to equipment and personnel for the transport of ill travellers to an appropriate medical facility;

(c) to provide trained personnel for the inspection of conveyances;

(d) to ensure a safe environment for travellers using point of entry facilities, including potable water supplies, eating establishments, flight catering facilities, public washrooms,
appropriate solid and liquid waste disposal services and other potential risk areas, by conducting inspection programmes, as appropriate; and

e) to provide as far as practicable a programme and trained personnel for the control of vectors and reservoirs in and near points of entry.

2. For responding to events that may constitute a public health emergency of international concern

The capacities:

(a) to provide appropriate public health emergency response by establishing and maintaining a public health emergency contingency plan, including the nomination of a coordinator and contact points for relevant point of entry, public health and other agencies and services;

(b) to provide assessment of and care for affected travellers or animals by establishing arrangements with local medical and veterinary facilities for their isolation, treatment and other support services that may be required;

(c) to provide appropriate space, separate from other travellers, to interview suspect or affected persons;

(d) to provide for the assessment and, if required, quarantine of suspect travellers, preferably in facilities away from the point of entry;

(e) to apply recommended measures to disinsect, derat, disinfect, decontaminate or otherwise treat baggage, cargo, containers, conveyances, goods or postal parcels including, when appropriate, at locations specially designated and equipped for this purpose;

(f) to apply entry or exit controls for arriving and departing travellers; and

(g) to provide access to specially designated equipment, and to trained personnel with appropriate personal protection, for the transfer of travellers who may carry infection or contamination.

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**ANNEX 2**

**DECISION INSTRUMENT FOR THE ASSESSMENT AND NOTIFICATION OF EVENTS THAT MAY CONSTITUTE A PUBLIC HEALTH EMERGENCY OF INTERNATIONAL CONCERN**

Events detected by national surveillance system (see Annex 1)

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1 As per WHO case definitions.

2 The disease list shall be used only for the purposes of these Regulations.
EXAMPLES FOR THE APPLICATION OF THE DECISION INSTRUMENT FOR THE ASSESSMENT AND NOTIFICATION OF EVENTS THAT MAY CONSTITUTE A PUBLIC HEALTH EMERGENCY OF INTERNATIONAL CONCERN

The examples appearing in this Annex are not binding and are for indicative guidance purposes to assist in the interpretation of the decision instrument criteria.

DOES THE EVENT MEET AT LEAST TWO OF THE FOLLOWING CRITERIA?

I. Is the public health impact of the event serious?

1. Is the number of cases and/or number of deaths for this type of event large for the given place, time or population?
2. Has the event the potential to have a high public health impact?

THE FOLLOWING ARE EXAMPLES OF CIRCUMSTANCES THAT CONTRIBUTE TO HIGH PUBLIC HEALTH IMPACT:

- Event caused by a pathogen with high potential to cause epidemic (infectiousness of the agent, high case fatality, multiple transmission routes or healthy carrier).
- Indication of treatment failure (new or emerging antibiotic resistance, vaccine failure, antidote resistance or failure).
- Event represents a significant public health risk even if no or very few human cases have yet been identified.
- Cases reported among health staff.
- The population at risk is especially vulnerable (refugees, low level of immunization, children, elderly, low immunity, undernourished, etc.).
- Concomitant factors that may hinder or delay the public health response (natural catastrophes, armed conflicts, unfavourable weather conditions, multiple foci in the State Party).
- Event in an area with high population density.
- Spread of toxic, infectious or otherwise hazardous materials that may be occurring naturally or otherwise that has contaminated or has the potential to contaminate a population and/or a large geographical area.

3. Is external assistance needed to detect, investigate, respond and control the current event, or prevent new cases?

THE FOLLOWING ARE EXAMPLES OF WHEN ASSISTANCE MAY BE REQUIRED:

- Inadequate human, financial, material or technical resources – in particular:
  - insufficient laboratory or epidemiological capacity to investigate the event (equipment, personnel, financial resources);
  - insufficient antidotes, drugs and/or vaccine and/or protective equipment, decontamination equipment, or supportive equipment to cover estimated needs;
  - existing surveillance system is inadequate to detect new cases in a timely manner.

II. Is the event unusual or unexpected?

4. Is the event unusual?

THE FOLLOWING ARE EXAMPLES OF UNUSUAL EVENTS:

- The event is caused by an unknown agent or the source, vehicle, route of transmission is unusual or unknown.
- Evolution of cases more severe than expected (including morbidity or case-fatality) or with unusual symptoms.
- Occurrence of the event itself unusual for the area, season or population.

5. Is the event unexpected from a public health perspective?

THE FOLLOWING ARE EXAMPLES OF UNEXPECTED EVENTS:

- Event caused by a disease/agent that had already been eliminated or eradicated from the State Party or not previously reported.

IS THE EVENT UNUSUAL OR UNEXPECTED?

Answer “yes” if you have answered “yes” to questions 4 or 5 above.

III. Is there a significant risk of international spread?

6. Is there evidence of an epidemiological link to similar events in other States?

THE FOLLOWING ARE EXAMPLES OF CIRCUMSTANCES THAT MAY PREDISPOSE TO INTERNATIONAL SPREAD:

- Where there is evidence of local spread, an index case (or other linked cases) with a history within the previous month of:
  - international travel (or time equivalent to the incubation period if the pathogen is known);
  - participation in an international gathering (pilgrimage, sports event, conference, etc.);
  - close contact with an international traveller or a highly mobile population.

7. Is there any factor that should alert us to the potential for cross border movement of the agent, vehicle or host?

THE FOLLOWING ARE EXAMPLES OF CIRCUMSTANCES THAT MAY PREDISPOSE TO INTERNATIONAL SPREAD:

- Event caused by an environmental contamination that has the potential to spread across international borders.
- Event in an area of intense international traffic with limited capacity for sanitary control or environmental detection or decontamination.

IS THERE A SIGNIFICANT RISK OF INTERNATIONAL SPREAD?

Answer “yes” if you have answered “yes” to questions 6 or 7 above.
IV. Is there a significant risk of international travel or trade restrictions?

8. Have similar events in the past resulted in international restriction on trade and/or travel?

9. Is the source suspected or known to be a food product, water or any other goods that might be contaminated that has been exported/imported to/from other States?

10. Has the event occurred in association with an international gathering or in an area of intense international tourism?

11. Has the event caused requests for more information by foreign officials or international media?

IS THERE A SIGNIFICANT RISK OF INTERNATIONAL TRADE OR TRAVEL RESTRICTIONS?

Answer "yes" if you have answered "yes" to questions 8, 9, 10 or 11 above.

States Parties that answer "yes" to the question whether the event meets any two of the four criteria (84) above, shall notify WHO under Article 6 of the International Health Regulations.
### ANNEX 4

**TECHNICAL REQUIREMENTS PERTAINING TO CONVEYANCES AND CONVEYANCE OPERATORS**

**Section A  Conveyance operators**

1. Conveyance operators shall facilitate:
   
   (a) inspections of the cargo, containers and conveyance;
   
   (b) medical examinations of persons on board;
   
   (c) application of other health measures under these Regulations; and
   
   (d) provision of relevant public health information requested by the State Party.

2. Conveyance operators shall provide to the competent authority a valid Ship Sanitation Control Exemption Certificate or a Ship Sanitation Control Certificate or a Maritime Declaration of Health, or the Health Part of an Aircraft General Declaration, as required under these Regulations.

**Section B  Conveyances**

1. Control measures applied to baggage, cargo, containers, conveyances and goods under these Regulations shall be carried out so as to avoid as far as possible injury or discomfort to persons or damage to the baggage, cargo, containers, conveyances and goods. Whenever possible and appropriate, control measures shall be applied when the conveyance and holds are empty.

2. States Parties shall indicate in writing the measures applied to cargo, containers or conveyances, the parts treated, the methods employed, and the reasons for their application. This information shall be provided in writing to the person in charge of an aircraft and, in case of a ship, on the Ship Sanitation Control Certificate. For other cargo, containers or conveyances, States Parties shall issue such information in writing to consignors, consignees, carriers, the person in charge of the conveyance or their respective agents.
1. WHO shall publish, on a regular basis, a list of areas where disinsection or other vector control measures are recommended for conveyances arriving from these areas. Determination of such areas shall be made pursuant to the procedures regarding temporary or standing recommendations, as appropriate.

2. Every conveyance leaving a point of entry situated in an area where vector control is recommended should be disinsected and kept free of vectors. When there are methods and materials advised by the Organization for these procedures, these should be employed. The presence of vectors on board conveyances and the control measures used to eradicate them shall be included:
   (a) in the case of aircraft, in the Health Part of the Aircraft General Declaration, unless this part of the Declaration is waived by the competent authority at the airport of arrival;
   (b) in the case of ships, on the Ship Sanitation Control Certificates; and
   (c) in the case of other conveyances, on a written proof of treatment issued to the consignor, consignee, carrier, the person in charge of the conveyance or their agent, respectively.

3. States Parties should accept disinsecting, deratting and other control measures for conveyances applied by other States if methods and materials advised by the Organization have been applied.

4. States Parties shall establish programmes to control vectors that may transport an infectious agent that constitutes a public health risk to a minimum distance of 400 metres from those areas of point of entry facilities that are used for operations involving travellers, conveyances, containers, cargo and postal parcels, with extension of the minimum distance if vectors with a greater range are present.

5. If a follow-up inspection is required to determine the success of the vector control measures applied, the competent authorities for the next known port or airport of call with a capacity to make such an inspection shall be informed of this requirement in advance by the competent authority advising such follow-up. In the case of ships, this shall be noted on the Ship Sanitation Control Certificate.

6. A conveyance may be regarded as suspect and should be inspected for vectors and reservoirs if:
   (a) it has a possible case of vector-borne disease on board;
   (b) a possible case of vector-borne disease has occurred on board during an international voyage; or
   (c) it has left an affected area within a period of time where on-board vectors could still carry disease.

7. A State Party should not prohibit the landing of an aircraft or berthing of a ship in its territory if the control measures provided for in paragraph 3 of this Annex or otherwise recommended by the Organization are applied. However, aircraft or ships coming from an affected area may be required to land at airports or divert to another port specified by the State Party for that purpose.

8. A State Party may apply vector control measures to a conveyance arriving from an area affected by a vector-borne disease if the vectors for the foregoing disease are present in its territory.
VACCINATION, PROPHYLAXIS AND RELATED CERTIFICATES

1. Vaccines or other prophylaxis specified in Annex 7 or recommended under these Regulations shall be of suitable quality; those vaccines and prophylaxis designated by WHO shall be subject to its approval. Upon request, the State Party shall provide to WHO appropriate evidence of the suitability of vaccines and prophylaxis administered within its territory under these Regulations.

2. Persons undergoing vaccination or other prophylaxis under these Regulations shall be provided with an international certificate of vaccination or prophylaxis (hereinafter the “certificate”) in the form specified in this Annex. No departure shall be made from the model of the certificate specified in this Annex.

3. Certificates under this Annex are valid only if the vaccine or prophylaxis used has been approved by WHO.

4. Certificates must be signed in the hand of the clinician, who shall be a medical practitioner or other authorized health worker, supervising the administration of the vaccine or prophylaxis. The certificate must also bear the official stamp of the administering centre; however, this shall not be an accepted substitute for the signature.

5. Certificates shall be fully completed in English or in French. They may also be completed in another language, in addition to either English or French.

6. Any amendment of this certificate, or erasure, or failure to complete any part of it, may render it invalid.

7. Certificates are individual and shall in no circumstances be used collectively. Separate certificates shall be issued for children.

8. A parent or guardian shall sign the certificate when the child is unable to write. The signature of an illiterate shall be indicated in the usual manner by the person’s mark and the indication by another that this is the mark of the person concerned.

9. If the supervising clinician is of the opinion that the vaccination or prophylaxis is contraindicated on medical grounds, the supervising clinician shall provide the person with reasons, written in English or French, underlying that opinion, which the competent authorities on arrival should take into account.

10. An equivalent document issued by the Armed Forces to an active member of those Forces shall be accepted in lieu of an international certificate in the form shown in this Annex if:

(a) it embodies medical information substantially the same as that required by such form; and

(b) it contains a statement in English or in French and where appropriate in another language in addition to English or French recording the nature and date of the vaccination or prophylaxis and to the effect that it is issued in accordance with this paragraph.

MODEL INTERNATIONAL CERTIFICATE OF VACCINATION OR PROPHYLAXIS

This is to certify that [name] ................................, date of birth ..........., sex ..........., nationality ..........., national identification document, if applicable ..........., whose signature follows ........................................

has on the date indicated been vaccinated or received prophylaxis against:

(name of disease or condition) ........................................

in accordance with the International Health Regulations.

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<tr>
<th>Vaccine or prophylaxis</th>
<th>Date</th>
<th>Signature and professional status of supervising clinician</th>
<th>Manufacturer and batch No. of vaccine or prophylaxis</th>
<th>Certificate valid from ...... until ........</th>
<th>Official stamp of administering centre</th>
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ANNEX 7

REQUIREMENTS CONCERNING VACCINATION OR PROPHYLAXIS FOR SPECIFIC DISEASES

1. In addition to any recommendation concerning vaccination or prophylaxis, the following diseases are those specifically designated under these Regulations for which proof of vaccination or prophylaxis may be required for travellers as a condition of entry to a State Party:

Vaccination against yellow fever.

2. Recommendations and requirements for vaccination against yellow fever:

(a) For the purpose of this Annex:

(i) the incubation period of yellow fever is six days;

(ii) yellow fever vaccines approved by WHO provide protection against infection starting 10 days following the administration of the vaccine;

(iii) this protection continues for 10 years; and

(iv) the validity of a certificate of vaccination against yellow fever shall extend for a period of 10 years, beginning 10 days after the date of vaccination or, in the case of a revaccination within such period of 10 years, from the date of that revaccination.

(b) Vaccination against yellow fever may be required of any traveller leaving an area where the Organization has determined that a risk of yellow fever transmission is present.

(c) If a traveller is in possession of a certificate of vaccination against yellow fever which is not yet valid, the traveller may be permitted to depart, but the provisions of paragraph 2(h) of this Annex may be applied on arrival.

(d) A traveller in possession of a valid certificate of vaccination against yellow fever shall not be treated as suspect, even if coming from an area where the Organization has determined that a risk of yellow fever transmission is present.

(e) In accordance with paragraph 1 of Annex 6 the yellow fever vaccine used must be approved by the Organization.

(f) States Parties shall designate specific yellow fever vaccination centres within their territories in order to ensure the quality and safety of the procedures and materials employed.

(g) Every person employed at a point of entry in an area where the Organization has determined that a risk of yellow fever transmission is present, and every member of the crew of a conveyance using any such point of entry, shall be in possession of a valid certificate of vaccination against yellow fever.

(h) A State Party, in whose territory vectors of yellow fever are present, may require a traveller from an area where the Organization has determined that a risk of yellow fever transmission is present, who is unable to produce a valid certificate of vaccination against yellow fever, to be quarantined until the certificate becomes valid, or until a period of not more than six days, reckoned from the date of last possible exposure to infection, has elapsed, whichever occurs first.

(i) Travellers who possess an exemption from yellow fever vaccination, signed by an authorized medical officer or an authorized health worker, may nevertheless be allowed entry, subject to the provisions of the foregoing paragraph of this Annex and to being provided with information regarding protection from yellow fever vectors. Should the travellers not be quarantined, they may be required to report any feverish or other symptoms to the competent authority and be placed under surveillance.
ANNEX 8
MODEL OF MARITIME DECLARATION OF HEALTH

To be completed and submitted to the competent authorities by the masters of ships arriving from foreign ports.

Submitted at the port of ……………………………………….. Date …………

Name of ship or inland navigation vessel ………........……… Registration/IMO No ................... arriving from ……..….…sailing to ...............

(Nationality)(Flag of vessel) …………………………………….   Master's name ..............................................................................................

Gross tonnage (ship) …………….. Tonnage (inland navigation vessel) …………………

Valid Sanitation Control/Exemption/Control Certificate carried on board?  Yes ............ No ….........  Issued at ….....…..…… date ……..........

Re-inspection required? Yes …….  No …….

Has ship/vessel visited an affected area identified by the World Health Organization? Yes .....  No …..

Port and date of  visit …………………….…….........................

List ports of call from commencement of voyage with dates of departure, or within past thirty days, whichever is shorter:

................................................................................................................................................................................................................................

Upon request of the competent authority at the port of arrival, list crew members, passengers or other persons who have joined ship/vessel since international voyage began or within past thirty days, whichever is shorter, including all ports/countries visited in this period (add additional names to the attached schedule):

(1) Name ……………………………… joined from: (1) …………..……....…..

(2) Name ……………………………… joined from: (1) …………………........

(3) Name ……………………………… joined from: (1) ……………….....…...

Number of crew members on board …………

Number of passengers on board …………….

Health questions

(1) Has any person died on board during the voyage otherwise than as a result of accident? Yes ....      No .....

(2) Is there on board or has there been during the international voyage any case of disease which you suspect to be of an infectious nature? Yes........  No.....

(3) Has the total number of ill passengers during the voyage been greater than normal/expected? Yes ....      No .....

(4) Is there any ill person on board now? Yes ........  No ....

(5) Was a medical practitioner consulted? Yes .......  No ...   If yes, state particulars of medical treatment or advice provided in attached schedule.

(6) Are you aware of any condition on board which may lead to infection or spread of disease? Yes ........  No ....

(7) Has any sanitary measure (e.g. quarantine, isolation, disinfection or decontamination) been applied on board? Yes .......  No ...

(8) Have any stowaways been found on board? Yes .......  No ...

(9) Is there a sick animal or pet on board? Yes ...... No ........

Note: In the absence of a surgeon, the master should regard the following symptoms as grounds for suspecting the existence of a disease of infectious nature:

(a) fever, persisting for several days or accompanied by (i) prostration; (ii) decreased consciousness; (iii) glandular swelling; (iv) jaundice; (v) cough or shortness of breath; (vi) unusual bleeding; or (vii) paralysis.

(b) with or without fever: (i) any acute skin rash or eruption; (ii) severe vomiting (other than sea sickness); (iii) severe diarrhoea; or (iv) recurrent convulsions.

I hereby declare that the particulars and answers to the questions given in this Declaration of Health (including the schedule) are true and correct to the best of my knowledge and belief.

Signed ……………………………………….

Master

Countersigned ……………………………………….

Ship’s Surgeon (if carried)

Date ……………………………………….

ATTACHMENT TO MODEL OF MARITIME DECLARATION OF HEALTH

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<thead>
<tr>
<th>Name</th>
<th>Class or rating</th>
<th>Age</th>
<th>Sex</th>
<th>Nationality</th>
<th>Port, date of joined ship/vessel</th>
<th>Nature of illness</th>
<th>Date of onset of symptoms</th>
<th>Reported to a port medical officer?</th>
<th>Disposal of case</th>
<th>Drugs, medicines or other treatment given to patient</th>
<th>Comments</th>
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1 State: (1) whether the person recovered, is still ill or dead; and (2) whether the person is still on board, was evacuated (including the name of the port or airport), or was buried at sea.
Declaration of Health

Name and seat number or function of persons on board with illnesses other than airsickness or the effects of accidents, who may be suffering from a communicable disease (a fever - temperature 38°C/100 °F or greater - associated with one or more of the following signs or symptoms, e.g. appearing obviously unwell; persistent coughing; impaired breathing; persistent diarrhoea; persistent vomiting; skin rash; bruising or bleeding without previous injury; or confusion of recent onset, increases the likelihood that the person is suffering a communicable disease) as well as such cases of illness disembarked during a previous stop

Details of each disinsecting or sanitary treatment (place, date, time, method) during the flight. If no disinsecting has been carried out during the flight, give details of most recent disinsecting

Signature, if required, with time and date

Crew member concerned

APPENDIX 1

STATES PARTIES TO THE INTERNATIONAL HEALTH REGULATIONS (2005) 1

Except as otherwise indicated, the International Health Regulations (2005) entered into force on 15 June 2007 for the following States:

Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China1, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Côte d’Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece2, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India (8 August 2007)2, Indonesia, Iran (Islamic Republic of)2, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kuwait, Kyrgyzstan, Lao People’s Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Moldova, Monaco, Mongolia, Montenegro (5 February 2008), Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Niue, Norway, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal2, Qatar, Republic of Korea, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Timor-Leste, Tonga, Tonga2, Trinidad and Tobago, Tunisia, Turkey2, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America (18 July 2007)2, Uruguay, Uzbekistan, Vanuatu, Venezuela (Bolivarian Republic of), Viet Nam, Yemen, Zambia, Zimbabwe.

1 At 5 February 2008.

Indicates that a State Party has submitted, to the Director-General of WHO, documentation related to the International Health Regulations (2005), which has been circulated by the Director-General to all Member States of WHO as well as to other States eligible to become Parties to the Regulations pursuant to Article 64 thereof.
APPENDIX 2

RESERVATIONS AND UNDERSTANDINGS
OTHER STATE PARTY COMMUNICATIONS IN CONNECTION WITH THE INTERNATIONAL HEALTH REGULATIONS (2005) 1, 2

1. RESERVATIONS AND UNDERSTANDINGS

INDIA

I am directed to refer to Reservations in respect of India mentioned in Annexure-II to IHR 1969 (Revised upto 1983) (copy enclosed) and to request you to notify the following Reservations in respect of India for notification under Article 62 of the recently circulated IHR 2005:

Proposed Reservation to IHR 2005:

1. The Government of India reserves the right to consider the whole territory of a country as infected with yellow fever whenever yellow fever has been notified under Article 6 and other relevant articles in respect of India for notification under Article 62 of the recently circulated IHR 2005.

2. The Government of India reserves the right to continue to regard an area as infected with yellow fever until there is definite evidence that yellow-fever infection has been completely eradicated from that area.

UNITED STATES OF AMERICA

The Mission, by means of this note, informs the Acting Director-General of the World Health Organization that the Government of the United States of America accepts the IHRs, subject to the reservation and understandings referred to below.

The Mission, by means of this note, and in accordance with Article 22 of the Constitution of the World Health Organization and Article 59(1) of the IHRs, submits the following reservation on behalf of the Government of the United States of America:

The Government of the United States of America reserves the right to assume obligations under these Regulations in a manner consistent with its fundamental principles of federalism. With respect to obligations concerning the development, strengthening, and maintenance of the core capacity requirements set forth in Annex 1, these Regulations shall be implemented by the Federal Government or the state governments, as appropriate and in accordance with our Constitution, to the extent that the implementation of these obligations comes under the legal jurisdiction of the Federal Government. To the extent that such obligations come under the legal jurisdiction of the state governments, the Federal Government shall bring such obligations with a favorable recommendation to the notice of the appropriate state authorities.

The Mission, by means of this note, also submits three understandings on behalf of the Government of the United States of America. The first understanding relates to the application of the IHRs to incidents involving natural, accidental or deliberate release of chemical, biological or radiological materials:

In view of the definitions of "disease," "event," and "public health emergency of international concern" as set forth in Article 1 of these Regulations, the notification requirements of Articles 6 and 7, and the decision instrument and guidelines set forth in Annex 2, the United States understands that States Parties to these Regulations have assumed an obligation to notify to WHO potential public health emergencies of international concern, irrespective of origin or source, whether they involve the natural, accidental or deliberate release of biological, chemical or radiological materials.

The second understanding relates to the application of Article 9 of the IHRs:

Article 9 of these Regulations obligates a State Party "as far as practicable" to notify the World Health Organization (WHO) of evidence received by that State of a public health risk occurring outside of its territory that may result in the international spread of disease. Among other notifications that could prove to be impractical under this article, it is the United States' understanding that any notification that would undermine the ability of the U.S. Armed Forces to operate effectively in pursuit of U.S. national security interests would not be considered practical for purposes of this Article.

The third understanding relates to the question of whether the IHRs create judicially enforceable private rights. Based on its delegation's participation in the negotiations of the IHRs, the Government of the United States of America does not believe that the IHRs were intended to create judicially enforceable private rights:

The United States understands that the provisions of the Regulations do not create judicially enforceable private rights.

II. OBJECTIONS TO RESERVATIONS AND UNDERSTANDINGS

IRAN (Islamic Republic of)

The Permanent Mission of the Islamic Republic of Iran to the United Nations Office and other International Organizations in Geneva presents its compliments to the World Health Organization and with reference to note verbale No. C.L.2.2007 dated 17 January 2007 concerning the Reservation and Understandings of the Government of the United States of America on the International Health Regulations (IHR), has the honor to convey the official objection of the Government of the Islamic Republic of Iran to the same Reservation and Understandings, based on the following:

According to the IHR, while "States may make reservations to these Regulations", "such reservations shall not be incompatible with the object and purpose of these Regulations". Furthermore, in accordance with the IHR, "the implementation of these Regulations shall be guided by the goal of their universal application for the protection of all people of the world from the international spread of disease".

1 At 5 February 2008.

2 This Appendix reproduces the relevant parts of the communications submitted by States, which have been edited by the Secretariat of WHO, or translations thereof. Copies of the original communications are available at http://www.who.int/ihr.
The Government of the Islamic Republic of Iran believes that, by giving more prominence to federalism than its obligations under the IHR, the reserving Government attempts to evade its due responsibilities and obligations. The aforementioned Government, by adopting a selective approach, provides its states with the option of exempting themselves from full compliance with the provisions and implementing the IHR. Such reservation is considered to be incompatible with the object and purpose of the IHR and is therefore, unacceptable.

Moreover, the understandings and interpretations assumed by a government, too, should not affect the obligations to be undertaken by that government and must not be incompatible with the object and purpose of the Regulations.

As regards to the first Understanding of the reserving Governments, it must be recalled that the majority of W.H.O. Member States participating in the IHR negotiations, categorically rejected the inclusion of the related interpretation within the provisions of the IHR. Their rejections were prompted by the refusal of the Government of Iran to comply with the obligations of the IHR and by the threat to alter the interpretation of its obligations, thereby, in violation of the U.S. obligations under the IHR and is incompatible with the object and purpose of these Regulations, to which the Government of the Islamic Republic of Iran seriously objects.

The second Understanding attempts to dilute the obligations of the U.S. Government under the IHR. It is an attempt to place national interests above the treaty obligations by excluding the U.S. Armed Forces from the IHR's jurisdiction. The universal application of the IHR is not applicable to the protection of all risks abroad. Such an exemption could not be accepted, taking into account the inherent risk of public health emergencies of international concern.

Furthermore, concerning the reference made in the aforementioned Note Verbale of the Permanent Mission of Turkey to the IHR negotiations, the majority of W.H.O. Member States participating in the IHR negotiations, the regulation of maritime traffic through the straits is governed by international law, particular the Montreux Convention of 1936. The Turkish statement seeks to elicit tacit acceptance or recognition of the national regulations, adopted by Turkey, concerning maritime traffic through the straits.

The Government of the Islamic Republic of Iran reiterates that it does not consider the Reservation and the two Understandings stated by the U.S. Government, as legally binding.

The Permanent Mission of Greece to the United Nations Office and other International Organizations in Geneva, on behalf of all the European Union member States, describes the U.S. reservations and the two Understandings as being in contradiction with the object and purpose of the Regulations. The Government of Greece is firmly committed to the provisions of the IHR, applies them in its national regulations and has established an inter-agency information-sharing and coordination mechanism for implementing the IHR. It has conducted cooperation and exchanges with relevant states parties in order to implement the IHR.

On the other hand, the Government of the People's Republic of China endorses and will implement the resolution of the 59th World Health Assembly calling upon its member states to comply immediately, on a voluntary basis, with provisions of the IHR considered relevant to the risk posed by the avian influenza and pandemic influenza.
Concerning its precise content, the statement goes on to assert that Turkey rightly points out that Turkey "informed IMO of the safety measures taken in the Straits", whereas Turkey has consistently refused to officially submit its national regulations to IMO for discussion and examination. The Turkish Government further states that as far as the implementation of the new International Health Regulations for maritime traffic in the Straits is concerned, this should be done in accordance with the provisions of the Montreux Convention of 1936. From the point of view of its existing accountability, Turkey considers that the new Health Regulations do not influence the existing international regime of navigation through the Straits, neither the new Regulations, thus having no legal effect as to the latter's implementation. Furthermore, the Turkish Authorities reserve the right to also take into account any further revision of their national traffic regulations, to be adopted in the same unilateral way in the future. In fact, this would seem simply that, in so far as the Straits are concerned, Turkey may implement the new International Health Regulations, as if they were its own national law.

Furthermore, the Turkish Authorities choose to adopt the new Regulations in the same manner, in order to implement the provisions of the Montreux Convention. The Turkish Regulations by, amongst other things, imposing a compulsory reporting system (Reg. 6, 25 and al.) and, particularly, by providing for the possibility of the total suspension of traffic (Reg. 20) are incompatible with the Montreux Convention. The reference, therefore, to national legislation and to any future revisions of this legislation, while irrelevant to the subject at hand, is nonetheless problematic because it seeks to subject international obligations to national laws and regulations.

B. Furthermore, the Turkish Regulations concerning traffic in the Straits are not in conformity with:

The 1936 Montreux Convention: this Convention enshrines full freedom of navigation (articles 1 and 2) through the Straits without any restrictions whatsoever (apart from sanitary control) and the Government of the United States of America concerning the International Health Regulations (IHR) in no way intend to question the obligations stemming from the IHR. The EC and its 27 Member States have strongly supported the revised IHR, which recently came into force, and we will continue this support for the implementation of the IHR in full and without any restrictions.

The International Health Regulations (IHR) are a very effective tool for reinforcing the connection between the surveillance systems and in establishing rapid reaction mechanisms. The EC and its 27 Member States have strongly supported the revised IHR, which recently came into force, and we will continue this support for the implementation of the IHR in full and without any restrictions.

The EC and its 27 Member States take note of the above mentioned reservation and declare that they understand it to mean that, in accordance with the principle that a Party may not invoke the provisions of its internal law as justification for its failure to perform its international obligations, this reservation under no circumstances change the obligations stemming from the IHR. The EC and its 27 Member States understand that the Federal Government of the United States of America, in no way intend to question the obligations stemming from the IHR. The EC and its 27 Member States understand that the Federal Government of the United States of America.

C. As to the Turkish Note dated 1 March 2007 (Ref. No: 530-2007/BMCO DT/JD 701), the EC and its 27 Member States take note of Turkey's intention to implement the provisions of the International Health Regulations (IHR) in accordance with the Convention regarding the regime of the Straits, signed at Montreux on 20 July 1936.

The EC and its 27 Member States have strongly supported the revised IHR, which recently came into force, and we will continue this support for the implementation of the IHR in full and without any restrictions.

The international law of the sea regarding navigation through international straits: such law encourages cooperation in order to ensure the safe transit of vessels through the Straits and, to this extent, the EC and its 27 Member States have strongly supported the revised IHR, which recently came into force, and we will continue this support for the implementation of the IHR in full and without any restrictions.

The EC and its 27 Member States have strongly supported the revised IHR, which recently came into force, and we will continue this support for the implementation of the IHR in full and without any restrictions.
The EC and its 27 Member States understand the desire of the Turkish authorities to respect their international obligations, such as the Montreux Convention regarding traffic in the Straits. In this respect they would expect the provisions of the IHR to be compatible. The provisions of the IHR shall not affect the rights and obligations of any State party deriving from other international agreements.

The EC and its 27 Member States nevertheless expect that their reservations to the IHR shall not affect the rights and obligations of any State party deriving from other international agreements.

Concerning the reference by Turkey to internal legislation which has no direct bearing on the implementation of the IHR, the EC and its 27 Member States understand that Turkey will ensure that the implementation of the IHR is not affected by any internal legislation.

The Permanent Mission of the Republic of Turkey to the United Nations Office at Geneva and other International Organizations in Switzerland presents in its Note dated 16 April 2007 (Ref. no: 6395(3160)/22/AS 783) the following.

The Permanent Mission would like to point out that the arguments and assertions raised in the Greek Delegation’s above-mentioned Note are unfounded. Turkey’s position on the Maritime Traffic Regulations for the Turkish Straits is also acknowledged by the International Maritime Organization (IMO) and remains unchanged. In fact, Turkish Straits Vessel Traffic Services (TSVTS) center is effectively providing traffic information, navigational assistance and traffic organization under the existing regulations to all vessels passing through the Straits.

Furthermore, the Permanent Mission would like to point out that the arguments and assertions raised in the Greek Delegation’s above-mentioned Note are unfounded. Turkey’s position on the Maritime Traffic Regulations for the Turkish Straits is also acknowledged by the International Maritime Organization (IMO) and remains unchanged. In fact, Turkish Straits Vessel Traffic Services (TSVTS) center is effectively providing traffic information, navigational assistance and traffic organization under the existing regulations to all vessels passing through the Straits.
IV. DECLARATIONS UNDER ARTICLE 59, PARAGRAPH 3, OF THE IHR (2005)

TONGA

Following their adoption by the World Health Assembly in May 2005, the International Health Regulations (IHR) 2005 will enter into force on 15 June 2007.

The Kingdom of Tonga supports the important contribution the IHR 2005 will make to the strengthening of national and global systems for the protection of public health from the spread of disease.

The Kingdom of Tonga understands that in order to be effective, the IHR 2005 will need to operate at various levels within each country, as well as between countries internationally and the World Health Organization. With this in mind, Tonga has, with support from regional partners including WHO, taken a number of steps to prepare for the entry into force of the new regime. However, it is not possible to confirm that all the required adjustments will be able to be achieved by 15 June 2007.

Therefore, on behalf of the Kingdom of Tonga, and in accordance with paragraph 3 of Article 59 of the IHR 2005, I declare that the following adjustments may not be completed by June 2007. The outstanding adjustments are as follows:

1. Complete the review of the Public Health Act 1992 to ensure legislative consistency with the IHR 2005;
2. Strengthen existing systems for the regular, national reporting of notifiable diseases, including the reporting of any events of potential public health significance, irrespective of their source;
3. Various enhancements to border health protection functions, including improved reporting and response capacities for public health events at Fua'amotu Airport and surveillance and control of vector/reservoir species at Nuku'alofa and the seaport at Nuku'alofa.

The Kingdom of Tonga is, and will remain, committed to playing its part in the collective actions that contribute to the protection of public health for all people of the world. It is my intention that the outstanding adjustments will be achieved by 31 December 2007, and certainly no later than 15 June 2008.
cooperation by WHO, intergovernmental organizations/international bodies
crew (persons on a conveyance, not passengers)

decision instrument, application/definition of risks/emergencies
decontamination (elimination of infectious/toxic agents)
departure (act of leaving a territory)
deratting (control/killing of rodents)
disease (illness/condition presenting harm)
disinfection (control of infectious agents)
dissection (control of insects)
edemics – see public health risks/emergencies
Emergency Committee
procedure
terms of reference/composition

event (disease/potential for disease)
experts, IHR Roster of Experts

final provisions
amendments
authentic texts
entry into force, period for rejection/reservations
international sanitary agreements/regulations
New Member States of WHO
notifications by Director-General
rejection
relationship with other international agreements
reporting/review
reservations
settlement of disputes
States not Members of WHO
withdrawal of rejection/reservation
Focal Point (national centre for communication with WHO)
free pratique (permission for a ship to enter port)

health documents
certificates of vaccination/other prophylaxis
Health Part of the Aircraft General Declaration
Maritime Declaration of Health
Ship Sanitation Certificates
health measures (prevention of spread of disease/contamination)
biological substances, reagents/material for diagnostic purposes

collaboration/assistance

ill person (individual posing a health risk)
India, Reservation
infection (infectious agents in humans/animals constituting health risks)
inspection (examination of areas/items for transport)

intergovernmental organizations, cooperation with WHO
International Health Regulations (IHR)
Annexes
Charges
Declaration under Article 59 para. 3 (2005)
Declarations and Statements
Definitions, Purpose and Scope
Emergency Committee
Final Provisions
General Provisions
Health Documents
Information and Public Health Response
National Focal Points (communication with WHO)
Objections to Reservations and Understandings
origins
Points of Entry
principles of IHR
Public Health Measures
purpose and scope
Recommendations
Review Committee
Revision (preamble)
Roster of Experts
States Parties
WHO Contact Point (access for communications)
international traffic (movement of persons/items across an international border)
international voyage, conveyances between more than one State
intrusion, intrusive (discomfort caused by intimate contact/questioning)
invasion, invasive (puncture/incision of skin or insertion of instruments/foreign material
into the body)

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personal data (information relating to identifiable persons) 8
health measures 30
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ground crossings 7, 19
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State Party obligations 18
ports (seaports for ships) 9, 18
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WHO certification 18
Portugal 65–66
postal parcel (addressed article/package carried by postal/courier services) 9
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affected conveyances 22
treatment 22
civilian lorries/trains/coaches
at points of entry 23
in transit 21
container/container loading areas 25
conveyance operators 21
goods in transit 25
inspection of items of transport 20
ships/aircraft
at points of entry 22–23
in transit 21

Q
quarantine (restriction/separation of suspect persons/items of transport) 9

R
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permanent residence (meaning as determined by national law) 8
personal data (information relating to identifiable persons) 8
health measures 30
points of entry (passage for entry/exit of travellers/items for transport) 9, 18–20
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affected conveyances 22
treatment 22
civilian lorries/trains/coaches
at points of entry 23
in transit 21
container/container loading areas 25
conveyance operators 21
goods in transit 25
inspection of items of transport 20
ships/aircraft
at points of entry 22–23
in transit 21

quarantine (restriction/separation of suspect persons/items of transport) 9

recommendations 16–18
criteria 16
persons/items of transport 17
temporary, public health emergency 16
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scientific evidence (level of proof based on scientific methods) 9
scientific principles (laws/facts of nature known through scientific methods) 9
Ship Sanitation Control
Certificates 18, 26–27
Exemption Certificate 47–48
ship (seagoing/inland navigation vessel on an international voyage) (see also points of entry; ports) 9
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The purpose and scope of the International Health Regulations (2005) are “to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade”. Because the IHR (2005) are not limited to specific diseases but apply to new and ever-changing public health risks, they are intended to have long-lasting relevance in the international response to the emergence and spread of disease. The IHR (2005) also provide the legal basis for important health documents applicable to international travel and transport and sanitary protections for the users of international airports, ports, and ground crossings.

This second edition contains the text of the IHR (2005), the text of World Health Assembly resolution WHA58.3, the version of the Health Part of the Aircraft General Declaration that entered into force on 15 July 2007, appendices containing a list of States Parties and State Party reservations and other communications in connection with the IHR (2005).

2 June 2008
Resolution 1816 (2008)

Adopted by the Security Council at its 5902nd meeting on 2 June 2008

The Security Council,

Recalling its previous resolutions and the statements of its President concerning the situation in Somalia,

Gravely concerned by the threat that acts of piracy and armed robbery against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, the safety of commercial maritime routes and to international navigation,

Expressing its concerns at the quarterly reports from the International Maritime Organization (IMO) since 2005, which provide evidence of continuing piracy and armed robbery in particular in the waters off the coast of Somalia,

Affirming that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 ("the Convention"), sets out the legal framework applicable to combating piracy and armed robbery, as well as other ocean activities,

Reaffirming the relevant provisions of international law with respect to the repression of piracy, including the Convention, and recalling that they provide guiding principles for cooperation to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state, including but not limited to boarding, searching, and seizing vessels engaged in or suspected of engaging in acts of piracy, and to apprehending persons engaged in such acts with a view to such persons being prosecuted,

Reaffirming its respect for the sovereignty, territorial integrity, political independence and unity of Somalia,

Taking into account the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia's territorial waters,

Deploring the recent incidents of attacks upon and hijacking of vessels in the territorial waters and on the high seas off the coast of Somalia including attacks upon and hijackings of vessels operated by the World Food Program and numerous commercial vessels and the serious adverse impact of these attacks on the prompt, safe and effective delivery of food aid and other humanitarian assistance to the people of Somalia, and the grave dangers they pose to vessels, crews, passengers, and cargo,

Noting the letters to the Secretary-General from the Secretary-General of the IMO dated 5 July 2007 and 18 September 2007 regarding the piracy problems off the coast of Somalia and the IMO Assembly resolution A.1002 (25), which strongly urged Governments to increase their efforts to prevent and repress, within the provisions of international law, acts of piracy and armed robbery against vessels irrespective of where such acts occur, and recalling the joint communiqué of the IMO and the World Food Programme of 10 July 2007,

Taking note of the Secretary-General's letter of 9 November 2007 to the President of the Security Council reporting that the Transitional Federal Government of Somalia (TFG) needs and would welcome international assistance to address the problem,

Taking further note of the letter from the Permanent Representative of the Somali Republic to the United Nations to the President of the Security Council dated 27 February 2008, conveying the consent of the TFG to the Security Council for urgent assistance in securing the territorial and international waters off the coast of Somalia for the safe conduct of shipping and navigation,

Determining that the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region,

Acting under Chapter VII of the Charter of the United Nations,

1. Condemns and deplores all acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia;

2. Urges States whose naval vessels and military aircraft operate on the high seas and airspace off the coast of Somalia and on the high seas off the coast of Somalia, and to render assistance to vessels threatened by or under attack by pirates or armed robbers, in accordance with relevant international law;

3. Urges all States to cooperate with each other, with the IMO and, as appropriate, with the relevant regional organizations in connection with, and share information about, acts of piracy and armed robbery in the territorial waters and on the high seas off the coast of Somalia, and to render assistance to vessels threatened by or under attack by pirates or armed robbers, in accordance with relevant international law;

4. Further urges States to work in cooperation with interested organizations, including the IMO, to ensure that vessels entitled to fly their flag receive appropriate guidance and training on avoidance, evasion, and defensive techniques and to avoid the area whenever possible;
5. Calls upon States and interested organizations, including the IMO, to provide technical assistance to Somalia and nearby coastal States upon their request to enhance the capacity of these States to ensure coastal and maritime security, including combating piracy and armed robbery off the Somali and nearby coastlines;

6. Affirms that the measures imposed by paragraph 5 of resolution 733 (1992) and further elaborated upon by paragraphs 1 and 2 of resolution 1425 (2002) do not apply to supplies of technical assistance to Somalia solely for the purposes set out in paragraph 5 above which have been exempted from those measures in accordance with the procedure set out in paragraphs 11 (b) and 12 of resolution 1772 (2007);

7. Decides that for a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:

   (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and

   (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery;

8. Requests that cooperating states take appropriate steps to ensure that the activities they undertake pursuant to the authorization in paragraph 7 do not have the practical effect of denying or impairing the right of innocent passage to the ships of any third State;

9. Affirms that the authorization provided in this resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law, and affirms further that this authorization has been provided only following receipt of the letter from the Permanent Representative of the Somali Republic to the United Nations to the President of the Security Council dated 27 February 2008 conveying the consent of the TFG;

10. Calls upon States to coordinate their actions with other participating States taken pursuant to paragraphs 5 and 7 above;

11. Calls upon all States, and in particular flag, port and coastal States, States of the nationality of victims and perpetrators of piracy and armed robbery, and other States with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international human rights law, and to render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this resolution;

12. Requests States cooperating with the TFG to inform the Security Council within 3 months of the progress of actions undertaken in the exercise of the authority provided in paragraph 7 above;

13. Requests the Secretary-General to report to the Security Council within 5 months of adoption of this resolution on the implementation of this resolution and on the situation with respect to piracy and armed robbery in territorial waters and the high seas off the coast of Somalia;

14. Requests the Secretary-General of the IMO to brief the Council on the basis of cases brought to his attention by the agreement of all affected coastal states, and duly taking into account the existing bilateral and regional cooperative arrangements, on the situation with respect to piracy and armed robbery;

15. Expresses its intention to review the situation and consider, as appropriate, renewing the authority provided in paragraph 7 above for additional periods upon the request of the TFG;

16. Decides to remain seized of the matter.

16 December 2008
Resolution 1851 (2008)

Adopted by the Security Council at its 6046th meeting, on 16 December 2008

The Security Council,

Recalling its previous resolutions concerning the situation in Somalia, especially resolutions 1814 (2008), 1816 (2008), 1838 (2008), 1844 (2008), and 1846 (2008),

Continuing to be gravely concerned by the dramatic increase in the incidents of piracy and armed robbery at sea off the coast of Somalia in the last six months, and by the threat that piracy and armed robbery at sea against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, and noting that pirate attacks off the coast of Somalia have become more sophisticated and daring and have expanded in their geographic scope, notably evidenced by the hijacking of the M/V Sirius Star 500 nautical miles off the coast of Kenya and subsequent unsuccessful attempts well east of Tanzania,

Reaffirming its respect for the sovereignty, territorial integrity, political independence and unity of Somalia, including Somalia’s rights with respect to offshore natural resources, including fisheries, in accordance with international law,

Further reaffirming that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities,

Again taking into account the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict, or upon interdiction to prosecute pirates or to patrol and secure the waters off the coast of Somalia, including the international sea lanes and Somalia’s territorial waters,

Noting the several requests from the TFG for international assistance to counter piracy off its coast, including the letter of 9 December 2008 from the President of Somalia requesting the international community to assist the TFG in taking all necessary measures to interdict those who use Somali territory and airspace to plan, facilitate or undertake acts of piracy and armed robbery at sea, and the 1 September 2008 letter from the President of Somalia to the Secretary-General of the UN expressing the appreciation of the TFG to the Security Council for its assistance and expressing the TFG’s willingness to consider working with other

States and regional organizations to combat piracy and armed robbery off the coast of Somalia,

Welcoming the launching of the EU operation Atalanta to combat piracy off the coast of Somalia and to protect vulnerable ships bound for Somalia, as well as the efforts by the North Atlantic Treaty Organization, and other States acting in a national capacity in cooperation with the TFG to suppress piracy off the coast of Somalia,

Also welcoming the recent initiatives of the Governments of Egypt, Kenya, and the Secretary-General’s Special Representative for Somalia, and the United Nations Office on Drugs and Crime (UNODC) to achieve effective measures to remedy the causes, capabilities, and incidents of piracy and armed robbery off the coast of Somalia, and emphasizing the need for current and future counter-piracy operations to effectively coordinate their activities,

Noting with concern that the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture, has hindered more robust international action against the pirates off the coast of Somalia and in some cases led to pirates being released without facing justice, and reiterating that the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention") provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation,

Welcoming the report of the Monitoring Group on Somalia of 20 November 2008 (S/2008/769), and noting the role piracy may play in financing embargo violations by armed groups,

Determining that the incidents of piracy and armed robbery at sea in the waters off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region,

Acting under Chapter VII of the Charter of the United Nations,

1. Reiterates that it condemns and deplores all acts of piracy and armed robbery against vessels in waters off the coast of Somalia;

2. Calls upon States, regional and international organizations that have the capacity to do so, to take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia, in particular, consistent with this resolution, resolution 1846 (2008), and international law, by deploying naval vessels and military aircraft and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use;

3. Invites all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials ("shiprider") from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the coast of Somalia, provided that the advance consent of the TFG is obtained for the
exercise of third state jurisdiction by shipriders in Somali territorial waters and that such agreements or arrangements do not prejudice the effective implementation of the SUA Convention;

4. Encourages all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among states, regional and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia’s coast; and recalls that future recommendations on ways to ensure the long-term security of international navigation off the coast of Somalia, including the long-term security of WFP maritime deliveries to Somalia and a possible coordination and leadership role for the United Nations in this regard to rally Member States and regional organizations to counter piracy and armed robbery at sea off the coast of Somalia are to be detailed in a report by the Secretary-General no later than three months after the adoption of resolution 1846;

5. Further encourages all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to consider creating a centre in the region to coordinate information relevant to piracy and armed robbery at sea off the coast of Somalia, to increase regional capacity with assistance of UNODC to arrange effective shiprider agreements or arrangements consistent with UNODC and to implement the SUA Convention, the United Nations Convention against Transnational Organized Crime and other relevant instruments to which States in the region are party, in order to effectively investigate and prosecute piracy and armed robbery at sea offences;

6. In response to the letter from the TFG of 9 December 2008, encourages Member States to continue to cooperate with the TFG in the fight against piracy and armed robbery at sea, notes the primary role of the TFG in rooting out piracy and armed robbery at sea, and decides that for a period of twelve months from the date of adoption of resolution 1846, States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law;

7. Calls on Member States to assist the TFG, at its request and with notification to the Secretary-General, to strengthen its operational capacity to bring to justice those who are using Somali territory to plan, facilitate or undertake criminal acts of piracy and armed robbery at sea, and decides that for a period of twelve months from the date of adoption of resolution 1846, States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international human rights law;

8. Welcomes the communiqué issued by the International Conference on Piracy around Somalia held in Nairobi, Kenya, on 11 December 2008 and encourages Member States to work to enhance the capacity of relevant states in the region to combat piracy, including judicial capacity;

9. Notes with concern the findings contained in the 20 November 2008 report of the Monitoring Group on Somalia that escalating ransom payments are fuelling the growth of piracy in waters off the coast of Somalia, and that the lack of enforcement of the arms embargo established by resolution 733 (1992) has permitted ready access to the arms and ammunition used by the pirates and driven in part the phenomenal growth in piracy;

10. Affirms that the authorization provided in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under UNCLOS, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law, and affirms further that such authorizations have been provided only following the receipt of the 9 December 2008 letter conveying the consent of the TFG;

11. Affirms that the measures imposed by paragraph 5 of resolution 733 (1992) and further elaborated upon by paragraphs 1 and 2 or resolution 1425 (2002) shall not apply to weapons and military equipment destined for the sole use of Member States and regional organizations undertaking measures in accordance with paragraph 6 above;

12. Urges States in collaboration with the shipping and insurance industries, and the IMO to continue to develop avoidance, evasion, and defensive best practices and advisories to take when under attack or when sailing in waters off the coast of Somalia, and further urges States to make their citizens and vessels available for forensic investigation as appropriate at the first port of call immediately following an act or attempted act of piracy or armed robbery at sea or release from captivity;

13. Decides to remain seized of the matter.
Application of South Sudan for United Nations Membership

Annex

Letter dated 9 July 2011 from the President of the Republic of South Sudan to the Secretary-General

In accordance with Article 4 of the Charter of the United Nations and in compliance with rule 58 of the provisional rules of procedure of the Security Council and rule 134 of the rules of procedure of the General Assembly relating to the admission of new Members to the United Nations, I have the honour, on behalf of the Republic of South Sudan and its people, in my capacity as President, to submit this application for membership in this esteemed body as a full Member State. The Republic of South Sudan would appreciate if you would arrange for the present letter to be submitted to the Security Council and the General Assembly for consideration as soon as practicable.

On 9 January 2005, the Sudan People’s Liberation Movement/Army signed the historic Comprehensive Peace Agreement with the Government of the Republic of the Sudan, bringing to a close 21 years of conflict that had ravaged the country. The Comprehensive Peace Agreement guaranteed the people of South Sudan the right of self-determination through an internationally monitored referendum to determine their future, to be held six years after the signing of the Agreement. The terms of the Agreement were witnessed and supported by the United Nations, the Intergovernmental Authority on Development, Egypt, Italy, the Netherlands, Norway, the United Kingdom of Great Britain and Northern Ireland, the United States of America, the African Union, the European Union and the League of Arab States.

Beginning on 9 January 2011, the people of South Sudan participated in a referendum to determine their fate, consistent with the terms of the Comprehensive Peace Agreement. By an overwhelming margin of more than 98 per cent, the people chose a peaceful separation from the Sudan, expressing their desire to establish an independent sovereign State in the South. As stipulated by the Comprehensive Peace Agreement, 9 July 2011 shall witness the establishment of the Republic of South Sudan, as a sovereign independent partner in the community of nations.

The Republic of South Sudan accepts the obligations contained in the Charter of the United Nations and solemnly undertakes to fulfil them. The Republic of South Sudan supports fully the United Nations and the enhancement of its role in promoting international peace, security and justice as enshrined in the principles and purposes of the Charter.

(Signed) Salva Kiir Mayardit
President of the Republic of South Sudan
Resolution 1999 (2011)

Adopted by the Security Council at its 6582nd meeting, on 13 July 2011

The Security Council,

Having examined the application of the Republic of South Sudan for admission to the United Nations (S/2011/418),

 Recommends to the General Assembly that the Republic of South Sudan be admitted to membership in the United Nations.
Resolution adopted by the General Assembly on 14 July 2011

[without reference to a Main Committee (A/65/L.84 and Add.1)]

65/308. Admission of the Republic of South Sudan to membership in the United Nations

The General Assembly,

Having received the recommendation of the Security Council of 13 July 2011 that the Republic of South Sudan should be admitted to membership in the United Nations, ¹

Having considered the application for membership of the Republic of South Sudan, ²

Decides to admit the Republic of South Sudan to membership in the United Nations.

108th plenary meeting
14 July 2011

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¹ A/65/905.
Legality of the Threat or Use of Nuclear Weapons

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 69, 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 the 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.

ADVISE OPINION

Present: President Bediaou; Vice-President Schwebel; Judges Oda, Guillaume, Shahabudeen, Weeramantry, Ranjeva, Herzegh, Shi, Fleschauer, Koroma, Vereshchegin, 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 Destruction and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction,

Convinced that the complete elimination of nuclear weapons is the only guarantee against the threat of nuclear war,

Noting the concerns expressed in the Fourth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons that insufficient progress had been made towards the complete elimination of nuclear weapons at the earliest possible time,

Recalling that, convinced of the need to strengthen the rule of law in international relations, it has declared the period 1990-1999 the United Nations Decade of International Law,

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' 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 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 2826 (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 Soedarmananto Kadarisman, Ambassador of Indonesia to the Netherlands;

for Mexico:
H.E. Mr. Sergio González Gálvez, Ambassador, Under-Secretary of Foreign Relations;

for the Islamic Republic of Iran:
H.E. Mr. Mohammad J. Zarif, Deputy Minister, Legal and International Affairs, Ministry of Foreign Affairs;

for Italy:
Mr. Umberto Lanza, 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. Icho Itoh, Mayor of Nagasaki;

for Malaysia:
H.E. Mr. Tan Sri Razali Ismail, Ambassador, Permanent Representative of Malaysia to the United Nations,
Dato' Mohdar Abdullah, Attorney-General;

for New Zealand:
The Honourable Paul East, Q.C., Attorney-General of New Zealand,
Mr. Allan Bracegirdle, Deputy Director of Legal Division of the New Zealand Ministry for Foreign Affairs and Trade;

for the Philippines:
H.E. Mr. Rodolfo S. Sanchez, Ambassador of the Philippines to the Netherlands,
Professor Merlin N. Magallona, Dean, College of Law, University of the Philippines;

for Qatar:
H.E. Mr. Najeeb Ibn Mohammed Al-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 Counselor, Official in Charge of Political Directorate, Department of Foreign Affairs;

for Samoa:
H.E. Mr. Neroni Slade, Ambassador and Permanent Representative of Samoa to the United Nations,
Miss Laurence Boisson de Chazournes, Assistant Professor, Graduate Institute of International Studies, Geneva,
Mr. Roger S. Clark, Distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey;

for the Marshall Islands:
The Honourable Theodore G. Krommiller, Legal Counsel, Embassy of the Marshall Islands to the United States of America,
Mrs. Lijon Eknial, 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;


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 occasioned to indicate that questions “framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law . . .
[and] appear...to be questions of a legal character” (Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 18, para. 15).

The question put to the Court by the General Assembly is indeed a legal one, since the Court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law.

The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a “legal question” and to “deprive the Court of a competence expressly conferred on it by its Statute” (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, pp. 61-62; Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, pp. 6-7; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155).

Furthermore, as the Court said in the Opinion it gave in 1980 concerning the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt:

“Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate...” (I.C.J. Reports 1980, p. 87, para. 35.)

The Court moreover considers that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion.

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 Judgment 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. 19.). There has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion in the history of the present Court; in the case concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, the refusal to give the World Health Organization the advisory opinion requested by it was justified by the Court’s lack of jurisdiction in that case. The Permanent Court of International Justice took the view on only one occasion that it could not reply to a question put to it, having regard to the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was
neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way (Status of Eastern Carelia, P.C.I.J., Series B, No. 5).

15. Most of the reasons adduced in these proceedings in order to persuade the Court that in the exercise of its discretionary power it should decline to render the opinion requested by General Assembly resolution 49/75 K were summarized in the following statement made by one State in the written proceedings:

"The question presented is vague and abstract, addressing complex issues which are the subject of consideration among interested States and within other bodies of the United Nations which have an express mandate to address these matters. An opinion by the Court in regard to the question presented would provide no practical assistance to the General Assembly in carrying out its functions under the Charter. Such an opinion has the potential of undermining progress already made or being made on this sensitive subject and, therefore, is contrary to the interests of the United Nations Organization." (United States of America, Written Statement, pp. 1-2; cf. pp. 3-7, II. See also United Kingdom, Written Statement, pp. 9-20, paras. 2.23-2.45; France, Written Statement, pp. 13-20, paras. 5-9; Finland, Written Statement, pp. 1-2; Netherlands, Written Statement, pp. 3-4, paras. 6-13; Germany, Written Statement, pp. 3-6, para. 2 (b).)

In contending that the question put to the Court is vague and abstract, some States appeared to mean by this that there exists no specific dispute on the subject-matter of the question. In order to respond to this argument, it is necessary to distinguish between requirements governing contentious procedure and those applicable to advisory opinions. The purpose of the advisory function is not to settle — at least directly — disputes between States, but to offer legal advice to the organs and institutions requesting the opinion (cf. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 71). The fact that the question put to the Court does not relate to a specific dispute should consequently not lead the Court to decline to give the opinion requested.

Moreover, it is the clear position of the Court that to contend that it should not deal with a question couched in abstract terms is "a mere affirmation devoid of any justification", and that "the Court may give an advisory opinion on any legal question, abstract or otherwise" (Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, p. 61; see also Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954, p. 51; and Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 27, para. 40).

16. Certain States have observed that the General Assembly has no authority to submit the Court for what precise purpose it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.

Equally, once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution.

17. It has also been submitted that a reply from the Court in this case might adversely affect disarmament negotiations and would, therefore, be contrary to the interest of the United Nations. The Court is aware that, no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation. The Court has heard contrary positions advanced and there are no evident criteria by which it can prefer one assessment to another. That being so, the Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

18. Finally, it has been contended by some States that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a law-making capacity. It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principle 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 because, 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 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 its "Lotus" case that "restrictions upon the independance 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, whereb

22. The Court notes that the nuclear-weapon States appearing before it either accepted, or did not dispute, that their independence to act was indeed restricted by the principles and rules of international law, more particularly humanitarian law (see below, paragraph 86), as did the other States which took part in the proceedings.

Hence, the argument concerning the legal conclusions to be drawn from the use of the word "permitted", and the questions of burden of proof to which it was said to give rise, are without particular significance for the disposal of the issues before the Court.

* * *

23. In seeking to answer the question put to it by the General Assembly, the Court must decide, after consideration of the great corpus of international law norms available to it, what might be the relevant applicable law.

24. Some of the proponents of the illegality of the use of nuclear weapons have argued that such use would violate the right to life as guaranteed in Article 6 of the International Covenant on Civil and Political Rights, as well as in certain regional instruments for the protection of human rights. Article 6, paragraph 1, of the International Covenant provides as follows: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

In reply, others contended that the International Covenant on Civil and Political Rights made no mention of war or weapons, and that it had never been envisaged that the legality of nuclear weapons was regulated by that instrument. It was suggested that the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict.
25. The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, often falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

26. Some States also contended that the prohibition against genocide, contained in the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, is a relevant rule of customary international law which the Court must apply. The Court recalls that in Article II of the Convention genocide is defined as

"any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group."

It was maintained before the Court that the number of deaths occasioned by the use of nuclear weapons would be enormous; that the victims could, in certain cases, include persons of a particular national, ethnic, racial or religious group; and that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would have omitted to take account of the well-known effects of the use of such weapons.

The Court would point out in that regard that the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by the provision quoted above. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.

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 Test 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 seized, is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant.

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 particu-
lar their destructive capacity, their capacity to cause untold human suf-
fering, 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 Char-
ter relating to the threat or use of force.

38. The Charter contains several provisions relating to the threat and
use of force. In Article 2, paragraph 4, the threat or use of force against
the territorial integrity or political independence of another State or in
any other manner consistent with the purposes of the United Nations is
prohibited. That paragraph provides:

“All Members shall refrain in their international relations from
the threat or use of force against the territorial integrity or political
independence of any State, or in any other manner inconsistent with
the Purposes of the United Nations.”

This prohibition of the use of force is to be considered in the light of
other relevant provisions of the Charter. In Article 51, the Charter
recognizes the inherent right of individual or collective self-defence if
an armed attack occurs. A further lawful use of force is envisaged in
Article 42, whereby the Security Council may take military enforcement
measures in conformity with Chapter VII of the Charter.

39. These provisions do not refer to specific weapons. They apply to
any use of force, regardless of the weapons employed. The Charter
neither expressly prohibits, nor permits, the use of any specific weapon,
including nuclear weapons. A weapon that is already unlawful per se,
whether by treaty or custom, does not become lawful by reason of its
being used for a legitimate purpose under the Charter.

40. The entitlement to resort to self-defence under Article 51 is subject
to certain constraints. Some of these constraints are inherent in the very
concept of self-defence. Other requirements are specified in Article 51.

41. The submission of the exercise of the right of self-defence to the
conditions of necessity and proportionality is a rule of customary inter-
national 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 interna-
tional 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 appli-
cable 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 escala-
tion of nuclear exchanges, mean that there is an extremely strong risk
of devastation. The risk factor is said to negate the possibility of the con-
tdition 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 Coun-
cil; 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-Prolifera-
tion of Nuclear Weapons, resolution 984 (1995) by the terms of which, on
the one hand, it

“[t]akes note with appreciation of the statements made by each
S/1995/264, S/1995/265), in which they give security assurances
against the use of nuclear weapons to non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons”,

and, on the other hand, it

“welcomes 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);

(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 reconfirmed its commitment not to be the first to make use of nuclear weapons. The Soviet Union reserved “the right to review” the obligations imposed upon it by Additional Protocol II, particularly in the event of an attack by a State party either “in support of a nuclear-weapon State or jointly with that State”. None of these statements drew comment or objection from the parties to the Treaty of Tlatelolco.

(b) the Treaty of Rarotonga of 6 August 1985 establishes a South Pacific Nuclear Free Zone in which the Parties undertake not to manufacture, acquire or possess any nuclear explosive device (Art. 3). Unlike the Treaty of Tlatelolco, the Treaty of Rarotonga does not expressly prohibit the use of such weapons. But such a prohibition is for the States parties the necessary consequence of the prohibitions stipulated by the Treaty. The Treaty has a number of protocols. Protocol 2, open to the five nuclear-weapon States, specifies in its Article 1 that:

“Each Party undertakes not to use or threaten to use any nuclear explosive device against:

(a) Parties to the Treaty; or
(b) any territory within the South Pacific Nuclear Free Zone for which a State that has become a Party to Protocol I is internationally responsible.”

China and Russia are parties to that Protocol. In signing it, China and the Soviet Union each made a declaration by which they reserved the “right to reconsider” their obligations under the said Protocol; the Soviet Union also referred to certain circumstances in which it would consider itself released from those obligations. France, the United Kingdom and the United States, for their part, signed Protocol 2 on 25 March 1996, but have not yet ratified it. On that occasion, France declared, on the one hand, that no provision in that Protocol “shall impair the full exercise of the inherent right of self-defence provided for in Article 51 of the . . . Charter” and, on the other hand, that “the commitment set out in Article 1 of [that] Protocol amounts to the negative security assurances given by France to non-nuclear-weapon States which are parties to the Treaty on . . . Non-Proliferation”, and that “these assurances shall not apply to States which are not parties” to that Treaty. For its part, the United Kingdom made a declaration setting out the precise circumstances in which it “will not be bound by [its] undertaking under Article 1” of the Protocol.

(c) as to the Treaty on the Non-Proliferation of Nuclear Weapons, at the time of its signing in 1968 the United States, the United Kingdom and the USSR gave various security assurances to the non-nuclear-weapon States that were parties to the Treaty. In resolution 255 (1968) the Security Council took note with satisfaction of the intention expressed by those States to “provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation . . . that is a victim of an act of, or an object of, a threat of, aggression in which nuclear weapons are used”.

On the occasion of the extension of the Treaty in 1995, the five nuclear-weapon States gave their non-nuclear-weapon partners, by means of separate unilateral statements on 5 and 6 April 1995, positive and negative security assurances against the use of such weapons. All the five nuclear-weapon States first undertook not to use nuclear weapons against non-nuclear-weapon States that were parties to the Treaty on the Non-Proliferation of Nuclear Weapons. However, these States, apart from China, made an exception in the case of an invasion or any other attack against them, their territories, armed forces or allies, or on a State towards which they had a security commitment, carried out or sustained by a non-nuclear-weapon State party to the Non-Proliferation Treaty in association or alliance with a nuclear-weapon State. Each of the nuclear-weapon States further undertook, as a permanent member of the Security Council, in the event of an attack with the use of nuclear weapons, or threat of such attack, against a non-nuclear-weapon State, to refer the matter to the Security Council without delay and to act within it in order that it might take immediate measures with a view to supplying, pursuant to the Charter, the necessary assistance to the victim State (the commitments assumed comprising minor variations in wording). The Security Council, in unanimously adopting resolution 984 (1995) of 11 April 1995, cited above, took note of those statements with appreciation. It also recognized

“that the nuclear-weapon State permanent members of the Security Council will bring the matter immediately to the attention of the Council and seek Council action to provide, in accordance with the Charter, the necessary assistance to the State victim”.
and welcomed the fact that

"the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used".

60. Those States that believe that recourse to nuclear weapons is illegal stress that the conventions that include various rules providing for the limitation or elimination of nuclear weapons in certain areas (such as the Antarctic Treaty of 1959 which prohibits the deployment of nuclear weapons in the Antarctic, or the Treaty of Tlatelolco of 1967 which creates a nuclear-weapon-free zone in Latin America) or the conventions that apply certain measures of control and limitation to the existence of nuclear weapons (such as the 1963 Partial Test-Ban Treaty or the Treaty on the Non-Proliferation of Nuclear Weapons) all set limits to the use of nuclear weapons. In their view, these treaties bear witness, in their own way, to the emergence of a rule of complete legal prohibition of all uses of nuclear weapons.

61. Those States who defend the position that recourse to nuclear weapons is legal in certain circumstances see a logical contradiction in reaching such a conclusion. According to them, those Treaties, such as the Treaty on the Non-Proliferation of Nuclear Weapons, as well as Security Council resolutions 255 (1968) and 984 (1995) which take note of the security assurances given by the nuclear-weapon States to the non-nuclear-weapon States in relation to any nuclear aggression against the latter, cannot be understood as prohibiting the use of nuclear weapons, and such a claim is contrary to the very text of those instruments. For those who support the legality in certain circumstances of recourse to nuclear weapons, there is no absolute prohibition against the use of such weapons. The very logic and construction of the Treaty on the Non-Proliferation of Nuclear Weapons, they assert, confirm this. This Treaty, whereby, they contend, the possession of nuclear weapons by the five nuclear-weapon States has been accepted, cannot be seen as a treaty banning their use by those States; to accept the fact that those States possess nuclear weapons is tantamount to recognizing that such weapons may be used in certain circumstances. Nor, they contend, could the security assurances given by the nuclear-weapon States in 1968, and more recently in connection with the Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons in 1995, have been conceived without its being supposed that there were circumstances in which nuclear weapons could be used in a lawful manner. For those who defend the legality of the use, in certain circumstances, of nuclear weapons, the acceptance of those instruments by the different non-nuclear-weapon States confirms and reinforces the evident logic upon which those instruments are based.

62. The Court notes that the treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing of nuclear weapons, without specifically addressing their threat or use, certainly point to an increasing concern in the international community with these weapons; the Court concludes from this that these treaties could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves. As to the treaties of Tlatelolco and Tarotonga and their Protocols, and also the declarations made in connection with the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons, it emerges from these instruments that:

(a) a number of States have undertaken not to use nuclear weapons in specific zones (Latin America; the South Pacific) or against certain other States (non-nuclear-weapon States which are parties to the Treaty on the Non-Proliferation of Nuclear Weapons);

(b) nevertheless, even within this framework, the nuclear-weapon States have reserved the right to use nuclear weapons in certain circumstances; and

(c) these reservations met with no objection from the parties to the Tlatelolco or Tarotonga Treaties or 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 international law to determine whether a prohibition of the threat or use of nuclear weapons as such flows from that source of law. As the Court has stated, the substance of that law must be "looked for primarily in the actual practice and opinio juris of States" (Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 29, para. 27).

65. States which hold the view that the use of nuclear weapons is illegal have endeavoured to demonstrate the existence of a customary rule prohibiting this use. They refer to a consistent practice of non-utilization of nuclear weapons by States since 1945 and they would see in that prac-
tice the expression of an opinio juris on the part of those who possess such weapons.

66. Some other States, which assert the legality of the threat and use of nuclear weapons in certain circumstances, invoked the doctrine and practice of deterrence in support of their argument. They recall that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests. In their view, if nuclear weapons have not been used since 1945, it is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen.

67. The Court does not intend to pronounce here upon the practice known as the “policy of deterrence”. It notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an opinio juris. Under these circumstances the Court does not consider itself able to find that there is such an opinio juris.

68. According to certain States, the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of 24 November 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons. According to other States, however, the resolutions in question have no binding character on their own account and are not declaratory of any customary rule of prohibition of nuclear weapons; some of these States have 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 intransgressive principles of international customary law.
80. The Nuremberg International Military Tribunal had already found in 1945 that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 "were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war" (Trial of the Major War Criminals, 14 November 1945-1 October 1946, Nuremberg, 1947, Vol. 1, p. 254).

81. The Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), with which he introduced the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and which was unanimously approved by the Security Council (resolution 827 (1993)), stated:

"In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law . . .

The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945."

82. The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States.

83. It has been maintained in these proceedings that these principles and rules of humanitarian law are part of jus cogens as defined in Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969. The question whether a norm is part of the jus cogens relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter.

84. Nor is there any need for the Court to elaborate on the question of the applicability of Additional Protocol I of 1977 to nuclear weapons. It need only observe that while, at the Diplomatic Conference of 1974-1977, there was no substantive debate on the nuclear issue and no specific solution concerning this question was put forward, Additional Protocol I in no way replaced the general customary rules applicable to all means and methods of combat including nuclear weapons. In particular, the Court recalls that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol I. The fact that certain types of weapons were not specifically dealt with by the 1974-1977 Conference does not permit the drawing of any legal conclusions relating to the substantive issues which the use of such weapons would raise.

85. Turning now to the applicability of the principles and rules of humanitarian law to a possible threat or use of nuclear weapons, the Court notes that doubts in this respect have sometimes been voiced on the ground that these principles and rules had evolved prior to the invention of nuclear weapons and that the Conferences of Geneva of 1949 and 1974-1977 which respectively adopted the four Geneva Conventions of 1949 and the two Additional Protocols thereto did not deal with nuclear weapons specifically. Such views, however, are only held by a small minority. In the view of the vast majority of States as well as writers there can be no doubt as to the applicability of humanitarian law to nuclear weapons.

86. The Court shares that view. Indeed, nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future. In this respect it seems significant that the thesis that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the latter, has not been advocated in the present proceedings. On the contrary, the newness of nuclear weapons has been expressly rejected as an argument against the application to them of international humanitarian law:

"In general, international humanitarian law bears on the threat or use of nuclear weapons as it does of other weapons."
International humanitarian law has evolved to meet contemporary circumstances, and is not limited in its application to weaponry of an earlier time. The fundamental principles of this law endure: to mitigate and circumscribe the cruelty of war for humanitarian reasons.” (New Zealand, Written Statement, p. 15, paras. 63-64.)

None of the statements made before the Court in any way advocated a freedom to use nuclear weapons without regard to humanitarian constraints. Quite the reverse; it has been explicitly stated,

“Restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons” (Russian Federation, CR 95/29, p. 52);

“So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the 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 95/34, p. 85).

87. Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons.

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88. The Court will now turn to the principle of neutrality which was raised by several States. In the context of the advisory proceedings brought before the Court by the WHO concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, the position was put as follows by one State:

“The principle of neutrality, in its classic sense, was aimed at preventing the incursion of belligerent forces into neutral territory, or attacks on the persons or ships of neutrals. Thus: ‘the territory of neutral powers is inviolable’ (Article I 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 I 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 trans-border incursions of armed forces and to the trans-border damage caused to a neutral State by the use of a weapon in a belligerent State.” (Nauru, Written Statement (I), p. 35, IV E.)

The principle so circumscribed is presented as an established part of the customary international law.

89. The Court finds that as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.

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90. Although the applicability of the principles and rules of humanitarian law and of the principle of neutrality to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are, on the other hand, controversial.

91. According to one point of view, the fact that recourse to nuclear weapons is subject to and regulated by the law of armed conflict does not necessarily mean that such recourse is as such prohibited. As one State put it to the Court:

“Assuming that a State's use of nuclear weapons meets the requirements of self-defence, it must then be considered whether it conforms to the fundamental principles of the law of armed conflict regulating the conduct of hostilities” (United Kingdom, Written Statement, p. 40, para. 3.44);

“the legality of the use of nuclear weapons must therefore be assessed in the light of the applicable principles of international law regarding the use of force and the conduct of hostilities, as is the case with other methods and means of warfare” (ibid., p. 75, para. 4.2 (3));

and

“The reality ... is that nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties. It is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties.”
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.

Virtually the whole of this community appears moreover to have been involved when resolutions of the United Nations General Assembly concerning nuclear disarmament have repeatedly been unanimously adopted. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States.

101. Even the very first General Assembly resolution, unanimously adopted on 24 January 1946 at the London session, set up a commission whose terms of reference included making specific proposals for, among other things, “the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction”. In a large number of subsequent resolutions, the General Assembly has reaffirmed the need for nuclear disarmament. Thus, in resolution 808 A (IX) of 4 November 1954, which was likewise unanimously adopted, it concluded

“that a further effort should be made to reach agreement on comprehensive and co-ordinated proposals to be embodied in a draft international disarmament convention providing for: . . . (b) The total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type, together with the conversion of existing stocks of nuclear weapons for peaceful purposes.”

The same conviction has been expressed outside the United Nations context in various instruments.

102. The obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons includes its fulfilment in accordance with the basic principle of good faith. This basic principle is set forth in Article 2, paragraph 2, of the Charter. It was reflected in the Declaration on Friendly Relations between States (resolution 2625 (XXV) of 24 October 1970) and in the Final Act of the Helsinki Conference of 1 August 1975. It is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969, according to which “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”.

Nor has the Court omitted to draw attention to it, as follows:

“One of the basic principles governing the creation and perform-
(2) Replies in the following manner to the question put by the General Assembly:

A. Unanimously,

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B. By eleven votes to three,

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judges Shahabuddeen, Weeramantry, Koroma;

C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President’s casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;

IN FAVOUR: President Bedjaoui; Judges Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo;

AGAINST: Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins;

F. Unanimously,

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighth day of July, one thousand nine hundred and ninety-six, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Mohammed BEDJAOUI,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

President BEDJAOUI, Judges HERCZEZH, SHI, VERESHCHETIN and FERRARI BRAVO append declarations to the Advisory Opinion of the Court.

Judges GUILLAUME, RANJEVA AND FLEISCHHAUER append separate opinions to the Advisory Opinion of the Court.

Vice-President SCHWEBEL, Judges ODA, SHAHABUDEEN, WEERAMANTRY, KOROMA and HIGGINS append dissenting opinions to the Advisory Opinion of the Court.

(Initialed) M.B.
(Initialed) E.V.O.
Arrest Warrant of 11 April 2000
(Democratic Republic of the Congo v. Belgium)

Judgment, I.C.J. Reports 2002, pp. 3-34
COUR INTERNATIONALE DE JUSTICE
RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE AU MANDAT D'ARRÊT
DU 11 AVRIL 2000
(RÉPUBLIQUE DÉMOCRATIQUE DU CONGO c. BELGIQUE)

ARRÊT DU 14 FÉVRIER 2002

2002

INTERNATIONAL COURT OF JUSTICE
REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE ARREST WARRANT
OF 11 APRIL 2000
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CASE CONCERNING THE ARREST WARRANT
OF 11 APRIL 2000
(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

Facts of the case — Issue by a Belgian investigating magistrate of “an international arrest warrant in absentia” against the incumbent Minister for Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity — International circulation of arrest warrant through Interpol — Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.

* * *

First objection of Belgium — Jurisdiction of the Court — Statute of the Court, Article 36, paragraph 2 — Existence of a “legal dispute” between the Parties at the time of filing of the Application instituting proceedings — Events subsequent to the filing of the Application do not deprive the Court of jurisdiction.

Second objection of Belgium — Mootness — Fact that the person concerned had ceased to hold office as Minister for Foreign Affairs does not put an end to the dispute between the Parties and does not deprive the Application of its object.

Third objection of Belgium — Admissibility — Facts underlying the Application instituting proceedings not changed in a way that transformed the dispute originally brought before the Court into another which is different in character.

Fourth objection of Belgium — Admissibility — Congo not acting in the context of protection of one of its nationals — Inapplicability of rules relating to exhaustion of local remedies.

Subsidiary argument of Belgium — Non ultra petita rule — Claim in Application instituting proceedings that Belgium’s claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law — Claim not made in final submissions of the Congo — Court unable to rule on that ques-
tion in the operative part of its Judgment but not prevented from dealing with certain aspects of the question in the reasoning of its Judgment.

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Immunity from criminal jurisdiction in other State and also inviolability of an incumbent Minister for Foreign Affairs — Vienna Convention on Diplomatic Relations of 18 April 1961, preamble, Article 32 — Vienna Convention on Consular Relations of 24 April 1963 — New York Convention on Special Missions of 8 December 1969, Article 21, paragraph 2 — Customary international law rules — Nature of the functions exercised by a Minister for Foreign Affairs — Functions such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability — No distinction in this context between acts performed in an "official" capacity and those claimed to have been performed in a "private capacity".

No exception to immunity from criminal jurisdiction and inviolability where an incumbent Minister for Foreign Affairs suspected of having committed war crimes or crimes against humanity — Distinction between jurisdiction of national courts and jurisdictional immunities — Distinction between immunity from jurisdiction and immunity.

Issuing of arrest warrant intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs — Merit of issuing warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs — Purpose of the international circulation of the arrest warrant to establish a legal basis for the arrest of Minister for Foreign Affairs abroad and his subsequent extradition to Belgium — International circulation of the warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs.

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Remedies sought by the Congo — Finding by the Court of international responsibility of Belgium making good the moral injury complained of by the Congo — Belgium required by means of its own choosing to cancel the warrant in question and so inform the authorities to whom it was circulated.

**JUDGMENT**

Present: President Guillaume; Vice-President Sh. Judges Oda, Ranjeva, Herczegh, Fleischhauer, Koroma, Veres-Czetin, Higgins, Parrara-Aranguren, Koudjans, Rezek, Al-Khasawneh, Beugenhals; Judges ad hoc Bula-Bula, Van den Wyngaert; Registrar Couvreur.

In the case concerning the arrest warrant of 11 April 2000,

between

the Democratic Republic of the Congo,

represented by

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

H.E. Mr. Ngele Masudi, Minister of Justice and Keeper of the Seals, Maître Kossiaka Kombe, Legal Adviser to the Presidency of the Republic, Mr. François Rigaux, Professor Emeritus at the Catholic University of Louvain, Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot), Mr. Pierre d’Argent, Chargé de cours, Catholic University of Louvain, Mr. Moka N’Golo, Bâtonnier, Mr. Djéina Wembo, Professor at the University of Abidjan, as Counsel and Advocates;

Mr. Mazzyambo Makengo, Legal Adviser to the Ministry of Justice, as Counsellor,

and

the Kingdom of Belgium,

represented by

Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs, as Agent;

Mr. Eric David, Professor of Public International Law, Université libre de Bruxelles, Mr. Daniel Bethlehem, Barrister, Bar of England and Wales, Fellow of Clare Hall and Deputy Director of the Lauterpacht Research Centre for International Law, University of Cambridge, as Counsel and Advocates;

H.E. Baron Olivier Gillèes de Pélichy, Permanent Representative of the Kingdom of Belgium to the Organization for the Prohibition of Chemical Weapons, responsible for relations with the International Court of Justice, Mr. Claude Debrulle, Director-General, Criminal Legislation and Human Rights, Ministry of Justice, Mr. Pierre Morlet, Advocate-General, Brussels Cour d’Appel, Mr. Wouter Detavernier, Deputy Counsellor, Directorate-General Legal Matters, Ministry of Foreign Affairs, Mr. Rodney Neufeld, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge, Mr. Tom Vanderhaeghe, Assistant at the Université libre de Bruxelles,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:
1. On 17 October 2000 the Democratic Republic of the Congo (hereinafter referred to as “the Congo”) filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter referred to as “Belgium”) in respect of a dispute concerning an ‘international arrest warrant’ issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulye Yerodia Ndombasi”.

In that Application the Congo contended that Belgium had violated the “principle that a State may not exercise its authority on the territory of another State”, the “principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations”, as well as “the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations”.

In order to found the Court’s jurisdiction the Congo invoked in the aforementioned Application the fact that “Belgium [had] accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signifies [had] acceptance of that jurisdiction by the Democratic Republic of the Congo”.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of Belgium by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge ex officio to sit in the case; the Congo chose Mr. Sayeman Bula-Bula, and Belgium Ms Christine Van den Wyngaert.

4. On 17 October 2000, the day on which the Application was filed, the Government of the Congo also filed in the Registry of the Court a request for the indication of a provisional measure based on Article 41 of the Statute of the Court. At the hearings on that request, Belgium, for its part, asked that the case be removed from the List.

By Order of 5 December 2000 the Court, on the one hand, rejected Belgium’s request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Court also held that “it was desirable that the issues before the Court should be determined as soon as possible” and that “it was therefore appropriate to ensure that a decision on the Congo’s Application be reached with all expedition”.

5. By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 12 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.

6. By Order of 27 June 2001, the Court, on the one hand, rejected a request by Belgium for authorization, in derogation from the previous Orders of the President of the Court, to submit preliminary objections involving suspension of the proceedings on the merits and, on the other, extended the time-limit prescribed in the Order of 12 April 2001 for the filing by Belgium of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits. The Counter-Memorial of Belgium was filed on 28 September 2001 within the time-limit thus extended.

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

8. Public hearings were held from 15 to 19 October 2001, at which the Court heard the oral arguments and replies of:

For the Congo: H.E. Mr. Jacques Masangu-a-Mwanza,
H.E. Mr. Ngele Masudi,
Maître Kossaka Kombé,
Mr. François Rigaux,
Ms Monique Chemillier-Gendreau,
Mr. Pierre d’Argent.

For Belgium: Mr. Jan Devadder,
Mr. Daniel Bethelhem,
Mr. Eric David.

9. At the hearings, Members of the Court put questions to Belgium, to which replies were given orally or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Congo provided its written comments on the reply that was given in writing to one of these questions, pursuant to Article 72 of the Rules of Court.

10. In its Application, the Congo formulated the decision requested in the following terms:

“The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels Tribunal de première instance against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulye Yerodia Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting ‘serious violations of international humanitarian law’, that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000.’’

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

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

“In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:”
1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdoulaye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;
3. the violation of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 precludes any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant.

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

"For the reasons stated in Part II of this Counter-Memorial, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the preceding submission, the Court concludes that it does have jurisdiction in this case and that the application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the application."

At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Congo,

"In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. by issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdoulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;
2. a formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;
3. the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

On behalf of the Government of Belgium,

"For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the submissions of Belgium with regard to the Court's jurisdiction and the admissibility of the Application, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the Application."

** * * * **

13. On 11 April 2000 an investigating judge of the Brussels Tribunal de première instance issued "an international arrest warrant in absentia" against Mr. Abdoulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity.

At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.

14. The arrest warrant was transmitted to the Congo on 7 June 2000, being received by the Congolese authorities on 12 July 2000. According to Belgium, the warrant was at the same time transmitted to the International Criminal Police Organization (Interpol), an organization whose function is to enhance and facilitate cross-border criminal police co-operation worldwide; through the latter, it was circulated internationally.

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 "concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto", as amended by the Law of 10 February 1999 "concerning the Punishment of Serious Violations of International Humanitarian Law" (hereinafter referred to as the "Belgian Law").

Article 7 of the Belgian Law provides that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed". In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which
the arrest warrant relates were committed outside Belgian territory, that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia’s alleged offences was also uncontested.

Article 5, paragraph 3, of the Belgian Law further provides that “[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law”.

16. At the hearings, Belgium further claimed that it offered “to entrust the case to the competent authorities [of the Congo] for enquiry and possible prosecution”, and referred to a certain number of steps which it claimed to have taken in this regard from September 2000, that is, before the filling of the Application instituting proceedings. The Congo for its part stated the following: “We have scant information concerning the form [of these Belgian proposals].” It added that: “these proposals . . . appear to have been made very belatedly, namely after an arrest warrant against Mr. Yerodia had been issued”.

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragraph 1 above), in which the Court was requested “to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000”. The Congo relied in its Application on two separate legal grounds. First, it claimed that “[t]he universal jurisdiction that the Belgian State attributes to itself under Article 7 of the Law in question” constituted a violation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations”.

Secondly, it claimed that “[t]he non-recognition, on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office” constituted a violation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations”.

18. On the same day that it filed its Application instituting proceedings, the Congo submitted a request to the Court for the indication of a provisional measure under Article 41 of the Statute of the Court. During the hearings devoted to consideration of that request, the Court was informed that in November 2000 a ministerial reshuffle had taken place in the Congo, following which Mr. Yerodia had ceased to hold office as Minister for Foreign Affairs and had been entrusted with the portfolio of Minister of Education. Belgium accordingly claimed that the Congo’s Application had become moot and asked the Court, as has already been recalled, to remove the case from the List. By Order of 8 December 2000, the Court rejected both Belgium’s submissions to that effect and also the Congo’s request for the indication of provisional measures (see paragraph 4 above).

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today.

20. On 12 September 2001, the Belgian National Central Bureau of Interpol requested the Interpol General Secretariat to issue a Red Notice in respect of Mr. Yerodia. Such notices concern individuals whose arrest is requested with a view to extradition. On 19 October 2001, at the public sittings held to hear the oral arguments of the Parties in the case, Belgium informed the Court that Interpol had responded on 27 September 2001 with a request for additional information, and that no Red Notice had yet been circulated.

21. Although the Application of the Congo originally advanced two separate legal grounds (see paragraph 17 above), the submissions of the Congo in its Memorial and the final submissions which it presented at the end of the oral proceedings refer only to a violation “in regard to the . . . Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers” (see paragraphs 11 and 12 above).

* * *

22. In their written pleadings, and in oral argument, the Parties addressed issues of jurisdiction and admissibility as well as the merits (see paragraphs 5 and 6 above). In this connection, Belgium raised certain objections which the Court will begin by addressing.

* * *

23. The first objection presented by Belgium reads as follows:

“That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], there is no longer a ‘legal dispute’ between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case.”

24. Belgium does not deny that such a legal dispute existed between the Parties at the time when the Congo filed its Application instituting proceedings, and that the Court was properly seised by that Application. However, it contends that the question is not whether a legal dispute
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25. The Court rejects this objection of Belgium. It contends that there is indeed a legal dispute between the Parties, in that the Congo claims that the arrest warrant was issued in violation of the immunity of its Minister for Foreign Affairs, that that warrant was unlawful ab initio, and that this legal defect persists despite the subsequent changes in the position occupied by the individual concerned, while Belgium maintains that the issue and circulation of the arrest warrant were not contrary to international law. The Congo adds that the termination of Mr. Yerodia’s official duties in no way operated to efface the wrongful act and the injury that flowed from it, for which the Congo continues to seek redress.

26. The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction (see Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953, p. 122; Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957, p. 142; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 23-24, para. 38; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 129, para. 37).

27. Article 36, paragraph 2, of the Statute of the Court provides:

“The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation.”

On 17 October 2000, the date that the Congo’s Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with the above provision: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case.

Moreover, it is not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. Such a dispute was clearly a legal dispute within the meaning of the Court’s jurisprudence, namely “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons” in which “the claim of one party is positively opposed by the other” (Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 17, para. 22; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 122-123, para. 21).

28. The Court accordingly concludes that at the time that it was seised
of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium’s first objection must therefore be rejected.

* * *

29. The second objection presented by Belgium is the following:

“...That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or minister occupying any other position in the . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case.”

30. Belgium also relies on support of this objection on the Northern Cameroons case, in which the Court considered that it would not be a proper discharge of its duties to proceed further in a case in which any judgment that the Court might pronounce would be “without object” (I.C.J. Reports 1963, p. 38), and on the Nuclear Tests cases, in which the Court saw “no reason to allow the continuance of proceedings which it knows are bound to be fruitless” (I.C.J. Reports 1974, p. 271, para. 38; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. Belgium is in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo — to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered — remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

* * *

32. The Court has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon (see Questions of Interpretation and Application of the 1971 Mont-


However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo’s submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium’s second objection must accordingly be rejected.

* * *

33. The third Belgian objection is put as follows:

“...That the case as it now stands materially different to that set out in the [Congo]’s Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible.”

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual dimension on which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until the very last moment, of the substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (see Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to initiate proceedings afresh or, at the very least, apply to the Court for permission to amend its initial Application.
35. In response, the Congo denies that there has been a substantial amendment of the terms of its Application, and insists that it has presented no new claim, whether of substance or of form, that would have transformed the subject-matter of the dispute. The Congo maintains that it has done nothing through the various stages in the proceedings but "condense and refine" its claims, as do most States that appear before the Court, and that it is simply making use of the right of parties to amend their submissions until the end of the oral proceedings.

* *

36. The Court notes that, in accordance with settled jurisprudence, it "cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character" (Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78, p. 173; A. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 427, para. 80; see also Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 264-267, in particular paras. 69 and 70). However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international law. The Congo's final submissions arise "directly out of the question which is the subject-matter of that Application" (Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 203, para. 72; see also Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962, p. 36).

In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium's third objection must accordingly be rejected.

* *

37. The fourth Belgian objection reads as follows:

"That, in the light of the new circumstances concerning Mr. Yerodia Ndombusi, the case has assumed the character of an action of diplomatic protection but one in which the individual being pro-
tected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

38. In this respect, Belgium accepts that, when the case was first instituted, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name in respect of the alleged violation by Belgium of the immunity of the Congo's Foreign Minister. However, according to Belgium, the case was radically transformed after the Application was filed, namely on 15 April 2001, when Mr. Yerodia ceased to be a member of the Congolese Government. Belgium maintains that two of the requests made of the Court in the Congo's final submissions in practice now concern the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fall within the realm of an action of diplomatic protection. It adds that the individual concerned has not exhausted all available remedies under Belgian law, a necessary condition before the Congo can expose the cause of one of its nationals in international proceedings.

39. The Congo, on the other hand, denies that this is an action for diplomatic protection. It maintains that it is bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs. The Congo further denies the availability of remedies under Belgian law. It points out in this regard that it is only when the Crown Prosecutor has become seized of the case file and makes submissions to the Chambre du conseil that the accused can defend himself before the Chambre and seek to have the charge dismissed.

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40. The Court notes that the Congo has never sought to invoke before it Mr. Yerodia's personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application (see Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959, p. 26; Eletronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989, p. 42, para. 49). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed
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(see Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 25-26, paras. 43-44; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 130-131, paras. 42-43). Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium’s fourth objection must accordingly be rejected.

* * *

41. As a subsidiary argument, Belgium further contends that “[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, . . . the non ultra petita rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo’s] final submissions”. Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge’s lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction in absentia. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the “exercise of an excessive universal jurisdiction” being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can “represent a valid counterweight to the observance of immunities”.

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43. The Court would recall the well-established principle that “it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions” (Asylum, Judgment, I.C.J. Reports 1650, p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the non ultra petita rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

* * *

44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo’s Application, that the Application is not without object and that accordingly the case is not moot and that the Application is admissible. Thus, the Court now turns to the merits of the case.

* * *

45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium’s claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo’s submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

* * *

47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability
and to immunity from criminal process being "absolute or complete", that is to say, they are subject to no exception. Accordingly, the Congo contends that no criminal prosecution may be brought against a Minister for Foreign Affairs in a foreign court as long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign State representative enjoying such immunity to perform his or her functions freely and without let or hindrance. The Congo adds that the immunity thus accorded to Ministers for Foreign Affairs when in office covers all their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as "official acts".

48. The Congo states further that it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused's official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a "ground of exemption from his criminal responsibility or a ground for mitigation of sentence". The Congo then stresses that the fact that an immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.

49. Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.

50. Belgium further states that, in the circumstances of the present case, Mr. Yerodia enjoyed no immunity at the time when he is alleged to have committed the acts of which he is accused, and that there is no evidence that he was then acting in any official capacity. It observes that the arrest warrant was issued against Mr. Yerodia personally.

51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

52. A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preamble that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing States". It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963, to which the Congo and Belgium are also parties.

The Congo and Belgium further cite the New York Convention on Special Missions of 8 December 1969, to which they are not, however, parties. They recall that under Article 21, paragraph 2, of that Convention:

"The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law."

These conventions provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government's diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (see, for
example, Article 7, paragraph 2 (a), of the 1969 Vienna Convention on the Law of Treaties. In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State’s relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence; to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that chargés d’affaires are accredited.

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an “official” capacity, and those claimed to have been performed in a “private” capacity, or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an “official” visit or a “private” visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an “official” capacity or a “private” capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

56. The Court will now address Belgium’s argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the Pinochet and Qaddafi cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the Pinochet decision recognizes an exception to the immunity rule when Lord Millett stated that “[t]he international law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose”, or when Lord Phillips of Worth Matravers said that “no established rule of international law requires state immunity ratione materiae to be accorded in respect of prosecution for an international crime”. As to the French Court of Cassation, Belgium contends that, in holding that, “under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State”, the Court explicitly recognized the existence of such exceptions.

57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the Pinochet and Qaddafi cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the Pinochet case, the Congo cites Lord Browne-Wilkinson’s statement that “[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . . ”. According to the Congo, the
French Court of Cassation adopted the same position in its Qaddafi judgment, in affirming that “international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State”.

As regards the instruments creating international criminal tribunals and the latter’s jurisprudence, these, in the Congo’s view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

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58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium’s argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions or the prevention and punishment of certain serious crimes impose or States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy immunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries’ courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as long as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter’s Statute expressly provides, in Article 27, paragraph 2, that “[i]mmunities or special procedural rules which may attach to the
official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

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62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

“[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdoulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States.”

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a “coercive legal act” which violates the Congo’s immunity and sovereign rights, inasmuch as it seeks “subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach” and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo’s view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium “thus cast upon one of the most prominent members of its Government”. The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo’s former President. In the Congo’s view, Belgium “[t]hus manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition”. The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly

“no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related” to that of the Belgian State. The Congo observes that, in such circumstances, “there [would be] a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere”.

65. Belgium rejects the Congo’s argument on the ground that “the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the [Congo].”

With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium, Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.

66. In respect of the legal effects of the arrest warrant outside Belgium, Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly “to establish a legal basis for the arrest of Mr. Yerodia . . . and his subsequent extradition to Belgium”, the warrant had no legal effect unless it was validated or completed by some prior act “requiring the arrest of Mr. Yerodia by the relevant authorities in a third State”. Belgium further argues that “[i]f a State had executed the arrest warrant, it might infringe [Yerodia’s] criminal immunity”, but that “the Party directly responsible for that infringement would have been that State and not Belgium”.

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67. The Court will first recall that the “international arrest warrant in absentia”, issued on 11 April 2000 by an investigating judge of the Brussels Tribunal de première instance, is directed against Mr. Yerodia,
stating that he is “currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa”. The warrant states that Mr. Yerodia is charged with being “the perpetrator or co-perpetrator” of:

“— Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)

— Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)."

The warrant refers to “various speeches inciting racial hatred” and to “particularly virulent remarks” allegedly made by Mr. Yerodia during “public addresses reported by the media” on 4 August and 27 August 1998. It adds:

“These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunts (the Tutsi enemy) and lynchings. The speeches inciting racial hatred thus are said to have resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials.”

68. The warrant further states that “the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement”. The investigating judge does, however, observe in the warrant that “the rule concerning the absence of immunity under humanitarian law would appear... to require some qualification in respect of immunity from enforcement” and explains as follows:

“Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on ‘official visits’). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for harassing the individual concerned in what would then have to be labelled a trap. In the contrary case, failure to respect this undertaking could give rise to the host State’s international responsibility.”

69. The arrest warrant concludes with the following order:

“We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;

We order the warden of the prison to receive the accused and to keep him (her) in custody in the detention centre pursuant to this arrest warrant;

We require all those exercising public authority to whom this warrant shall be shown to lend all assistance in executing it.”

70. The Court notes that the issuance, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. The fact that the warrant is enforceable is clearly apparent from the order given to “all bailiffs and agents of public authority... to execute this arrest warrant” (see paragraph 69 above) and from the assertion in the warrant that “the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement”. The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court concludes, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo’s incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

71. The Court also notes that Belgium admits that the purpose of the international circulation of the disputed arrest warrant was “to establish a legal basis for the arrest of Mr. Yerodia... abroad and his subsequent extradition to Belgium”. The Respondent maintains, however, that the enforcement of the warrant in third States was “dependent on some further preliminary steps having been taken” and that, given the “inchoate” quality of the warrant as regards third States, there was no “infringement of the sovereignty of the (Congo)”. It further points out that no Interpol Red Notice was requested until 12 September 2001, when Mr. Yerodia no longer held ministerial office.

The Court cannot subscribe to this view. As in the case of the warrant’s issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yero-
diation as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations. Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant, even in the absence of "further steps" by Belgium, could have resulted, in particular, in his arrest while abroad. The Court observes in this respect that Belgium itself cites information to the effect that Mr. Yerodia, "on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium", adding that "[t]his, moreover, is what the [Congo] . . . hints when it writes that the arrest warrant 'sometimes forced Minister Yerodia to travel by roundabout routes'". Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

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72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo requests the Court to adjudge and declare that:

"A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo.

The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;

Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to relieve the wrongful act and the injury flowing from it, which continue to exist. It argues that the warrant is unlawful ab initio, that "[i]t is fundamentally flawed" and that it cannot therefore have any legal effect today. It points out that the purpose of its request is reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It states that, inasmuch as the wrongful act consisted in an internal legal instrument, only the "withdrawal" and "cancellation" of the latter can provide appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court itself to withdraw or cancel the warrant, nor to determine the means whereby Belgium is to comply with its decision. It explains that the withdrawal and cancellation of the warrant, by the means that Belgium deems most suitable, "are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/restitution itself". The Congo maintains that the Court is consequently only being requested to declare that Belgium, by way of reparation for the injury to the rights of the Congo, be required to withdraw and cancel this warrant by the means of its choice.

74. Belgium for its part maintains that a finding by the Court that the immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had been violated would in no way entail an obligation to cancel the arrest warrant. It points out that the arrest warrant is still operative and that "there is no suggestion that it presently infringes the immunity of the Congo's Minister for Foreign Affairs'. Belgium considers that what the Congo is in reality asking of the Court in its third and fourth final submissions is that the Court should direct Belgium as to the method by which it should give effect to a judgment of the Court finding that the warrant had infringed the immunity of the Congo's Minister for Foreign Affairs.

* *

75. The Court has already concluded (see paragraphs 70 and 71) that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the Factory at Chorzów:

"[t]he essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the conse-
quences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (P.C.I.J., Series A, No. 17, p. 47).

In the present case, "the situation which would, in all probability, have existed if the illegal act had not been committed" cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment's implications might be for third States, and the Court cannot therefore accept the Congo's submissions on this point.

* * *

78. For these reasons,

THE COURT,

(1) (A) By fifteen votes to one,

Rejects the objections of the Kingdom of Belgium relating to jurisdiction, mootness and admissibility;

in favour: President Guillaume; Vice-President Shi, Judges Ranjeva, Hervezegh, Fleischhauer, Koroma, Vereshchchin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

against: Judge Oda;

(B) By fifteen votes to one,

Finds that it has jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 17 October 2000;

in favour: President Guillaume; Vice-President Shi, Judges Ranjeva, Hervezegh, Fleischhauer, Koroma, Vereshchchin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

against: Judge Oda;

(C) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is not without object and that accordingly the case is not moot;

in favour: President Guillaume; Vice-President Shi, Judges Ranjeva, Hervezegh, Fleischhauer, Koroma, Vereshchchin, Higgins, Parra-Aranguren.

D. By fifteen votes to one.

Finds that the Application of the Democratic Republic of the Congo is admissible;

in favour: President Guillaume; Vice-President Shi, Judges Ranjeva, Hervezegh, Fleischhauer, Koroma, Vereshchchin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

against: Judge Oda;

(2) By thirteen votes to three,

Finds that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law:

in favour: President Guillaume; Vice-President Shi, Judges Ranjeva, Hervezegh, Fleischhauer, Koroma, Vereshchchin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; Judge ad hoc Bula-Bula;

against: Judges Oda, Al-Khasawneh; Judge ad hoc Van den Wyngaert;

(3) By ten votes to six,

Finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.

in favour: President Guillaume; Vice-President Shi, Judges Ranjeva, Hervezegh, Fleischhauer, Koroma, Vereshchchin, Parra-Aranguren, Rezek, Judge ad hoc Bula-Bula;

against: Judges Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; Judge ad hoc Van den Wyngaert.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Demo-
cratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

President GUILLAUME appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a declaration to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges HIGGINS, KOUMANS and BUERGENTHAL append a joint separate opinion to the Judgment of the Court; Judge REZEK appends a separate opinion to the Judgment of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judge ad hoc BULA-BULA appends a separate opinion to the Judgment of the Court; Judge ad hoc VAN DEN WYNGAERT appends a dissenting opinion to the Judgment of the Court.

(Initialized) G.G.
(Initialized) Ph.C.
Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, Arrest Warrant of 11 April 2000
(Democratic Republic of the Congo v. Belgium)

Judgment, I.C.J. Reports 2002, pp. 63-90
JOINT SEPARATE OPINION OF JUDGES HIGGINS, KOOIJMANS AND BUERGENTHAL

Necessity of a finding on jurisdiction — Reasoning on jurisdiction not precluded by ultra petita rule.

Status of universal jurisdiction to be tested by reference to the sources of international law — Few examples of universal jurisdiction within national legislation or case law of national courts — Examination of jurisdictional basis of multilateral treaties on grave offences do not evidence established practice of either obligatory or voluntary universal criminal jurisdiction — Aut dedere aut prosequi — Contemporary trends suggesting universal jurisdiction in absentia not precluded — The “Lotus” case — Evidence that national courts and international tribunals intended to have parallel roles in acting against impunity — Universal jurisdiction not predicated upon presence of accused in territory, nor limited to piracy — Necessary safeguards in exercising such a jurisdiction — Rejection of Belgian’s argument that it had in fact exercised its extraterritorial criminal jurisdiction.

The immunities of an incumbent Minister for Foreign Affairs and their role in society — Rejection of assimilation with Head of State immunities — Trend to preclude immunity when charged with international crimes — Immunity not precluded in the particular circumstances of this case — Role of international law to balance values it seeks to protect — Narrow interpretation to be given to “official acts” when immunities of an ex-Minister for Foreign Affairs under review.

No basis in international law for Court’s order to withdraw warrant.

1. We generally agree with what the Court has to say on the issues of jurisdiction and admissibility and also with the conclusions it reaches. There are, however, reservations that we find it necessary to make, both on what the Court has said and what it has chosen not to say when it deals with the merits. Moreover, we consider that the Court erred in ordering Belgium to cancel the outstanding arrest warrant.

* * *

2. In its Judgment the Court says nothing on the question of whether — quite apart from the status of Mr. Yerodia at the relevant time — the Belgian magistracy was entitled under international law to issue an arrest warrant for someone not at that time within its territory and pass it to Interpol. It has, in effect, acceded to the common wish of the Parties that the Court should not pronounce upon the key issue of jurisdiction that divided them, but should rather pass immediately to the question of immunity as it applied to the facts of this case.

3. In our opinion it was not only desirable, but indeed necessary, that the Court should have stated its position on this issue of jurisdiction. The reasons are various. “Immunity” is the common shorthand phrase for “immunity from jurisdiction”. If there is no jurisdiction en principe, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise. The Court, in passing over the question of jurisdiction, has given the impression that “immunity” is a free-standing topic of international law. It is not. “Immunity” and “jurisdiction” are inextricably linked. Whether there is “immunity” in any given instance will depend not only upon the status of Mr. Yerodia but also upon what type of jurisdiction, and on what basis, the Belgian authorities were seeking to assert it.

4. While the notion of “immunity” depends, conceptually, upon a pre-existing jurisdiction, there is a distinct corpus of law that applies to each. What can be cited to support an argument about the one is not always relevant to an understanding of the other. In by-passing the issue of jurisdiction the Court has encouraged a regrettable current tendency (which the oral and written pleadings in this case have not wholly avoided) to confl ate the two issues.

5. Only if it is fully appreciated that there are two distinct norms of international law in play (albeit that the one — immunity — can arise only if the other — jurisdiction — exists) can the larger picture be seen. One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights. The difficult task that international law today faces is to provide that stability in international relations by a means other than the impunity of those responsible for major human rights violations. This challenge is reflected in the present dispute and the Court should surely be engaged in this task, even as it fulfils its function of resolving a dispute that has arisen before it. But through choosing to look at half the story — immunity — it is not in a position to do so.

6. As Mr. Yerodia was a non-national of Belgium and the alleged offences described in the arrest warrant occurred outside of the territory over which Belgium has jurisdiction, the victims being non-Belgians, the arrest warrant was necessarily predicated on a universal jurisdiction. Indeed, both it and the enabling legislation of 1993 and 1999 expressly say so. Moreover, Mr. Yerodia himself was outside of Belgium at the time the warrant was issued.

7. In its Application instituting proceedings (p. 7), the Democratic Republic of the Congo complained that Article 7 of the Belgian Law:
“establishes the universal applicability of the Law and the universal jurisdiction of the Belgian courts in respect of ‘serious violations of international humanitarian law’, without even making such applicability and jurisdiction conditional on the presence of the accused on Belgian territory.

It is clearly this unlimited jurisdiction which the Belgian State confers upon itself which explains the issue of the arrest warrant against Mr. Yerodia Ndombasi, against whom it is patently evident that no basis of territorial or in personam jurisdiction, nor any jurisdiction based on the protection of the security or dignity of the Kingdom of Belgium, could have been invoked.”

In its Memorial, the Congo denied that

“international law recognized such an enlarged criminal jurisdiction as that which Belgium purported to exercise, namely in respect of incidents of international humanitarian law when the accused was not within the prosecuting State’s territory” (Memorial of Congo, para. 87). [Translation by the Registry.]

In its oral submissions the Congo once again stated that it was not opposed to the principle of universal jurisdiction per se. But the assertion of a universal jurisdiction over perpetrators of crimes was not an obligation under international law, only an option. The exercise of universal jurisdiction required, in the Congo’s view, that the sovereignty of the other State be not infringed and an absence of any breach of an obligation founded in international law (CR 2001/6, p. 33). Further, according to the Congo, States who are not under any obligation to prosecute if the perpetrator is not present on their territory, nonetheless are free to do so in so far as this exercise of jurisdiction does not infringe the sovereignty of another State and is not in breach of international law (ibid.). The Congo stated that it had no intention of discussing the existence of the principle of universal jurisdiction, nor of placing obstacles in the way of any emerging custom regarding universal jurisdiction (ibid., p. 30). As the oral proceedings drew to a close, the Congo acknowledged that the Court might have to pronounce on certain aspects of universal jurisdiction, but it did not request the Court to do so, as the question did not interest it directly (CR 2001/10, p. 11). It was interested to have a ruling from the Court on Belgium’s obligations to the Congo in the light of Mr. Yerodia’s immunity at the relevant time. The final submissions as contained in the Application were amended so as to remove any request for the Court to make a determination on the issue of universal jurisdiction.

8. Belgium in its Counter-Memorial insisted that there was a general obligation on States under customary international law to prosecute perpetrators of crimes. It conceded, however, that where such persons were non-nationals, outside of its territory, there was no obligation but rather an available option (Counter-Memorial of Belgium, para. 3.3.25). No territorial presence was required for the exercise of jurisdiction where the offence violated the fundamental interests of the international community (Counter-Memorial of Belgium, paras. 3.3.44-3.3.52). In Belgium’s view an investigation or prosecution mounted against a person outside its territory did not violate any rule of international law, and was accepted both in international practice and in the internal practice of States, being a necessary means of fighting impunity (Counter-Memorial of Belgium, paras. 3.3.28-3.3.74).

9. These submissions were reprised in oral argument, while noting that the Congo “no longer contest[ed] the exercise of universal jurisdiction by default” (CR 2001/9, pp. 8-13), Belgium, too, was eventually content that the Court should pronounce simply on the immunity issue.

10. That the Congo should have gradually come to the view that its interests were best served by reliance on its arguments on immunity, was understandable. So was Belgium’s satisfaction that the Court was being asked to pronounce on immunity and not on whether the issue and circulations of an international arrest warrant required the presence of the accused on its territory. Whether the Court should accommodate this consensus is another matter.

11. Certainly it is not required to do so by virtue of the ultra petita rule. In the Counter-Memorial Belgium quotes the locus classicus for the non ultra petita rule, the Asylum (Interpretation) case:

“it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions” (Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, Judgment, I.C.J. Reports 1950, p. 402; Counter-Memorial of Belgium, para. 2.75; emphasis added).

It also quotes Rosennie who said: “It does not confer jurisdiction on the Court or detract jurisdiction from it. It limits the extent to which the Court may go in its decision.” (Counter-Memorial of Belgium, para. 2.77.)

12. Close reading of these quotations shows that Belgium is wrong if it wishes to convey to the Court that the non ultra petita rule would bar it from addressing matters not included in the submissions. It only precludes the Court from deciding upon such matters in the operative part of the Judgment since that is the place where the submissions are dealt with. But it certainly does not prevent the Court from considering in its reasoning issues which it deems relevant for its conclusions. As Sir Gerald Fitzmaurice said:
16. For all the reasons expounded above, the Court should have "found it appropriate" to deal with the question of whether the issue and international circulation of a warrant based on universal jurisdiction in the absence of Mr. Yerodia's presence on Belgian territory was unlawful. This should have been done before making a finding on immunity from jurisdiction, and the Court should indeed have "examined in some detail various problems raised" by the request as formulated by the Congo in its final submissions.

17. In agreeing to pronounce upon the question of immunity without addressing the question of a jurisdiction from which there could be immunity, the Court has allowed itself to be manoeuvred into answering a hypothetical question. During the course of the oral pleadings Belgium drew attention to the fact that Mr. Yerodia had ceased to hold any ministerial office in the Government of the Democratic Republic of the Congo. In Belgium's view, this meant that the Court should declare the request to pronounce upon immunity to be inadmissible. In Belgium's view the case had become one "about legal principle and the speculative consequences for the immunities of Foreign Ministers from the possible action of a Belgian judge" (CR 2001/8, p. 26, para. 43). The dispute was "a difference of opinion of an abstract nature" (CR 2001/8, p. 36, para. 71). The Court should not "enter into a debate which it may well come to see as essentially an academic exercise" (CR 2001/9, p. 7, para. 4 [translation by the Registry]).

18. In its Judgment the Court rightly rejects those contentions (see Judgment, paras. 30-32). But nothing is more academic, or abstract, or speculative, than pronouncing on an immunity from a jurisdiction that may, or may not, exist. It is regrettable that the Court has not followed the logic of its own findings in the Certain Expenses case, and in this Judgment addressed in the necessary depth the question of whether the Belgian authorities could legitimately have invoked universal jurisdiction in issuing and circulating the arrest warrant for the charges contained therein, and for a person outside the territorial jurisdiction at the moment of the issue of the warrant. Only if the answer to these is in the affirmative does the question arise: "Nevertheless, was Mr. Yerodia immune from such exercise of jurisdiction, and by reference to what moment of time is that question to be answered?"

**

19. We therefore turn to the question whether States are entitled to exercise jurisdiction over persons having no connection with the forum State when the accused is not present in the State's territory. The necessary point of departure must be the sources of international law identified in Article 38, paragraph 1 (c), of the Statute of the Court, together with obligations imposed upon all United Nations Members by Security Council resolutions, or by such General Assembly resolutions as meet the
criteria enunciated by the Court in the case concerning *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (I.C.J. Reports 1996, p. 226, para. 70).

20. Our analysis may begin with national legislation, to see if it evidences a State practice. Save for the Belgian legislation of 10 February 1999, national legislation, whether in fulfilment of international treaty obligations to make certain international crimes offences also in national law, or otherwise, does not suggest a universal jurisdiction over these offences. Various examples typify the more qualified practice. The Australian War Crimes Act of 1945, as amended in 1986, provides for the prosecution in Australia of crimes committed between 1 September 1939 and 8 May 1945 by persons who were Australian citizens or residents at the times of being charged with the offences (Arts. 9 and 11). The United Kingdom War Crimes Act of 1991 enables proceedings to be brought for murder, manslaughter or culpable homicide, committed between 1 September 1935 and 5 June 1945, in a place that was part of Germany or under German occupation, and in circumstances where the accused was at the time, or has become, a British citizen or resident of the United Kingdom. The statutory jurisdiction provided for by France, Germany and (in even broader terms) the Netherlands, refer for their jurisdictional basis to the jurisdictional provisions in those international treaties to which the legislation was intended to give effect. It should be noted, however, that the German Government on 16 January 2002 has submitted a legislative proposal to the German Parliament, section 1 of which provides:

“This Code governs all the punishable acts listed herein violating public international law, [and] in the case of felonies listed herein [this Code governs] even if the act was committed abroad and does not show any link to [Germany].”

The Criminal Code of Canada 1985 allows the execution of jurisdiction when at the time of the act or omission the accused was a Canadian citizen or “employed by Canada in a civilian or military capacity”; or the “victim is a Canadian citizen or a citizen of a State that is allied with Canada in an armed conflict”, or when “at the time of the act or omission Canada could, in conformity with international law, exercise jurisdiction over the person on the basis of the person’s presence in Canada” (Art. 7).

21. All of these illustrate the trend to provide for the trial and punishment under international law of certain crimes that have been committed extraterritorially. But none of them, nor the many others that have been studied by the Court, represent a classical assertion of a universal jurisdiction over particular offences committed elsewhere by persons having no relationship or connection with the forum State.

22. The case law under these provisions has largely been cautious so far as reliance on universal jurisdiction is concerned. In the *Pinochet* case in the English courts, the jurisdictional basis was clearly treaty based, with the double criminality rule required for extradition being met by English legislation in September 1988, after which date torture committed abroad was a crime in the United Kingdom as it already was in Spain. In Australia the Federal Court referred to a group of crimes over which international law granted universal jurisdiction, even though national enabling legislation would also be needed (*Nulyarimma*, 1999; genocide). The High Court confirmed the authority of the legislature to confer jurisdiction on the courts to exercise a universal jurisdiction over war crimes (*Polyukhovich*, 1991). In Austria (whose Penal Code emphasizes the double-criminality requirement), the Supreme Court found that it had jurisdiction over persons charged with genocide, given that there was not a functioning legal system in the State where the crimes had been committed nor a functioning international criminal tribunal at that point in time (*Cvjetkovic*, 1994). In France it has been held by a juge d'instruction that the Genocide Convention does not provide for universal jurisdiction (*in re Javor*, reversed in the Cour d'Appel on other grounds, the Cour de Cassation ruling equally does not suggest universal jurisdiction). The *Muryeshyaka* finding by the Cour d'Appel (1998) relies for a finding — at first sight inconsistent — upon cross-reference into the Statute of the International Tribunal for Rwanda as the jurisdictional basis. In the *Qudiaifi* case the Cour d'Appel relied on passive personality and not on universal jurisdiction (in the Cour de Cassation it was immunity that assumed central importance).

23. In the *Bouterse* case the Amsterdam Court of Appeal concluded that torture was a crime against humanity, and as such an “extraterritorial jurisdiction” could be exercised over a non-national. However, in the Hoge Raad, the Dutch Supreme Court attached conditions to this exercise of extraterritorial jurisdiction (nationality, or presence within the Netherlands at the moment of arrest) on the basis of national legislation.

24. By contrast, a universal jurisdiction has been asserted by the Bavarian Higher Regional Court in respect of a prosecution for genocide (the accused in this case being arrested in Germany). And the case law of the United States has been somewhat more ready to invoke “universal jurisdiction”, though considerations of passive personality have also been of key importance (*Yunis*, 1988; *Bin Laden*, 2000).

25. An even more ambiguous answer is to be derived from a study of the provisions of certain important treaties of the last 30 years, and the obligations imposed by the parties themselves.

26. In some of the literature on the subject it is asserted that the great international treaties on crimes and offences evidence universality as a ground for the exercise of jurisdiction recognized in international law. (See the interesting recent article of Luis Benavides, “The Universal Juris-


27. Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, provides:

“Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

This is an obligation to assert territorial jurisdiction, though the *travaux préparatoires* do reveal an understanding that this obligation was not intended to affect the right of a State to exercise criminal jurisdiction on its own nationals for acts committed outside the State (A/C.6/SR.134, p. 5). Article VI also provides a potential grant of non-territorial competence to a possible future international tribunal — even this not being automatic under the Genocide Convention but being restricted to those Contracting Parties which would accept its jurisdiction. In recent years it has been suggested in the literature that Article VI does not prevent a State from exercising universal jurisdiction in a genocide case. (And see, more generally, *Restatement (Third) of the Foreign Relations Law of the United States* (1987), §404.)

28. Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention, all of 12 August 1949, provide:

“Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.”

29. Article 85, paragraph 1, of the First Additional Protocol to the 1949 Geneva Convention incorporates this provision by reference.

30. The stated purpose of the provision was that the offences would not be left unpunished (the extradition provisions playing their role in this objective). It may immediately be noted that this is an early form of the *aut dedere aut proseguere* to be seen in later conventions. But the obligation to prosecute is primary, making it even stronger.

31. No territorial or nationality linkage is envisaged, suggesting a true

universality principle (see also Henzelin, *Le principe de l’universalité en droit pénal international: droit et obligation pour les États de poursuivre et juger selon le principe de l’universalité*, 2000, pp. 354-356). But a different interpretation is given in the authoritative Pictet Commentary: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1952, which contends that this obligation was understood as being an obligation upon States parties to search for offenders who may be on their territory. Is it a true example of universality, if the obligation to search is restricted to the own territory? Does the obligation to search imply a permission to prosecute *in absentia*, if the search had no result?

32. As no case has touched upon this point, the jurisdictional matter remains to be judicially tested. In fact, there has been a remarkably modest corpus of national case law emanating from the jurisdictional possibilities provided in the Geneva Conventions or in Additional Protocol I.

33. The Single Convention on Narcotics and Drugs, 1961, provides in Article 36, paragraph 2, that:

“(a) (iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgment given.”

34. Diverse views were expressed as to whether the State where the offence was committed should have first right to prosecute the offender (ECN.7/AC.3/9, 11 September 1958, p. 17, fn. 43; cf. ECN.7/AC.3/9 and Add 1, ECN.7/AC.3/9 and Add 1, E/CONF.34/I/Add.1, 6 January 1961, p. 32). Nevertheless, the principle of “primary universal repression” found its way into the text, notwithstanding the strong objections of States such as the United States, New Zealand and India that their national laws only envisaged the prosecution of persons for offences occurring within their national borders. (The development of the concept of “impact jurisdiction” or “effects jurisdiction” has in more recent years allowed continued reliance on territoriality while stretching far the jurisdictional arm.) The compromise reached was to make the provisions of Article 36, paragraph 2 (iv), “subject to the constitutional limitations of a Party, its legal system and domestic law”. But the possibility of a universal jurisdiction was not denounced as contrary to international law.

35. The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, making preambular reference to the “urgent need” to make such acts “punishable as an offence and to provide for appropriate measures with respect to prosecution and extradition of
offenders”, provided in Article 4 (1) for an obligation to take such measures as may be necessary to establish jurisdiction over these offences and other acts of violence against passengers or crew:

“(a) when the offence is committed on board an aircraft registered in that State;
(b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
(c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State”.

Article 4 (2) provided for a comparable obligation to establish jurisdiction where the alleged offender was present in the territory and if he was not extradited pursuant to Article 8 by the territory. Thus here too was a treaty provision for aut dedere aut prossequi, of which the limb was in turn based on the principle of “primary universal repression”. The jurisdictional bases provided for in Article 4 (1) (b) and 4 (2), requiring no territorial connection beyond the landing of the aircraft or the presence of the accused, were adopted only after prolonged discussion. The travaux préparatoire show States for whom mere presence was an insufficient ground for jurisdiction beginning reluctantly to support this particular type of formula because of the gravity of the offence. Thus the representative of the United Kingdom stated that his country “would see great difficulty in assuming jurisdiction merely on the ground that an aircraft carrying a hijacker had landed in United Kingdom territory”. Further,

“normally his country did not accept the principle that the mere presence of an alleged offender within the jurisdiction of a State entitled that State to try him. In view, however, of the gravity of the offence ... he was prepared to support ... [the proposal on mandatory jurisdiction on the part of the State where a hijacker is found].” (Hague Conference, p. 75, para. 18.)

36. It is also to be noted that Article 4, paragraphs 1 and 2, provides for the mandatory exercise of jurisdiction in the absence of extradition; but does not preclude criminal jurisdiction exercised on alternative grounds of jurisdiction in accordance with national law (though those possibilities are not made compulsory under the Convention).

37. Comparable jurisdictional provisions are to be found in Articles 5 and 8 of the International Convention against the Taking of Hostages of 17 December 1979. The obligation enunciated in Article 8 whereby a State party shall “without exception whatsoever and whether or not the offence was committed in its territory” submit the case for prosecution if it does not extradite the alleged offender, was again regarded as necessary by the majority, given the nature of the crimes (Summary Record, Ad Hoc Committee on the Drafting of an International Convention against the Taking of Hostages (A/AC.188/SR.5, 7, 8, 11, 14, 15, 16, 17, 23, 24 and 35)). The United Kingdom cautioned against moving to universal criminal jurisdiction (ibid., A/AC.188/SR.24, para. 27) while others (Poland, A/AC.188/SR.23, para. 18; Mexico, A/AC.188/SR.16, para. 11) felt the introduction of the principle of universal jurisdiction to be essential. The USSR observed that no State could exercise jurisdiction over crimes committed in another State by nationals of that State without contravening Article 2, paragraph 7, of the Charter. The Convention provisions were in their view to apply only to hostage taking that was a manifestation of international terrorism — another example of initial and understandable positions on jurisdiction being modified in the face of the exceptional gravity of the offence.

38. The Convention against Torture, of 10 December 1984, establishes in Article 5 an obligation to establish jurisdiction

“(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
(b) When the alleged offender is a national of that State;
(c) When the victim is a national of that State if that State considers it appropriate.”

If the person alleged to have committed the offence is found in the territory of a State party and is not extradited, submission of the case to the prosecuting authorities shall follow (Art. 7). Other grounds of criminal jurisdiction exercised in accordance with the relevant national law are not excluded (Art. 5, para. 3), making clear that Article 5, paragraphs 1 and 2, must not be interpreted a contrario. (See J. H. Burgers and H. Danelius, The United Nations Convention against Torture, 1988, p. 133.)

39. The passage of time changes perceptions. The jurisdictional ground that in 1961 had been referred to as the principle of “primary universal repression” came now to be widely referred to by delegates as “universal jurisdiction” — moreover, a universal jurisdiction thought appropriate, since torture, like piracy, could be considered an “offence against the law of nations” (United States: E/CN.4/1367, 1980). Australia, France, the Netherlands and the United Kingdom eventually dropped their objection that “universal jurisdiction” over torture would create problems under their domestic legal systems. (See E/CN.4/1984/72.)

40. This short historical survey may be summarized as follows.

41. The parties to these treaties agreed both to grounds of jurisdiction
and as to the obligation to take the measures necessary to establish such jurisdiction. The specified grounds relied on links of nationality of the offender, or the ship or aircraft concerned, or of the victim. See, for example, Article 4 (1), Hague Convention; Article 3 (1), Tokyo Convention; Article 5, Hostages Convention; Article 5, Torture Convention. These may properly be described as treaty-based broad extraterritorial jurisdiction. But in addition to these were the parallel provisions whereby a State party in whose jurisdiction the alleged perpetrator of such offences is found shall prosecute him or extradite him. By the loose use of language the latter has come to be referred to as “universal jurisdiction”, though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.

* * *

42. Whether this obligation (whether described as the duty to establish universal jurisdiction, or, more accurately, the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events) is an obligation only of treaty law, 

inter partes,

or whether it is now, at least as regards the offences articulated in the treaties, an obligation of custom, 

international law was pleaded by the Parties in this case but not addressed in any great detail.

43. Nor was the question of whether any such general obligation applies to crimes against humanity, given that those too are regarded everywhere as comparably heinous crimes. Accordingly, we offer no view on these aspects.

44. However, we note that the inaccurately termed “universal jurisdiction principle” in these treaties is a principle of 

obligation, while the question in this case is whether Belgium had the right to issue and circulate the arrest warrant if it so chose.

If a dispassionate analysis of State practice and Court decisions suggests that no such jurisdiction is presently being exercised, the writings of eminent jurists are much more mixed. The large literature contains vigorous exchanges of views (which have been duly studied by the Court) suggesting profound differences of opinion. But these writings, important and stimulating as they may be, cannot of themselves and without reference to the other sources of international law, evidence the existence of a jurisdictional norm. The assertion that certain treaties and court decisions rely on universal jurisdiction, which in fact they do not, does not evidence an international practice recognized as custom. And the policy arguments advanced in some of the writings can certainly suggest why a practice or a court decision should be regarded as desirable, or indeed lawful; but contrary arguments are advanced, too, and in any event these also cannot serve to substantiate an international practice where virtually none exists.

45. That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable. As we have seen, virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction. This does not necessarily indicate, however, that such an exercise would be unlawful. In the first place, national legislation reflects the circumstances in which a State provides in its own law the ability to exercise jurisdiction. But a State is not required to legislate up to the full scope of the jurisdiction allowed by international law. The war crimes legislation of Australia and the United Kingdom afford examples of countries making more confined choices for the exercise of jurisdiction. Further, many countries have no national legislation for the exercise of well recognized forms of extraterritorial jurisdiction, sometimes notwithstanding treaty obligations to enable themselves so to act. National legislation may be illuminating as to the issue of universal jurisdiction, but not conclusive as to its legality. Moreover, while none of the national case law to which we have referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an 
opinio juris on the illegality of such a jurisdiction. In short, national legislation and case law — that is, State practice — is neutral as to exercise of universal jurisdiction.

46. There are, moreover, certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful. The duty to prosecute under those treaties which contain the 

aut dedere aut proseguere provisions opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality (whether as perpetrator or victim). The 1949 Geneva Conventions lend support to this possibility, and are widely regarded as today reflecting customary international law. (See, for example, Cherif Bassiouni, International Criminal Law, Vol. III: Enforcement, 2nd ed., 1999, p. 228; Theodor Meron, “International Criminalization of Internal Atrocities”, 89 AJIL (1995), p. 576.)

47. The contemporary trends, reflecting international relations as they stand at the beginning of the new century, are striking. The movement is towards bases of jurisdiction other than territorial. “Effects” or “impact” jurisdiction is embraced both by the United States and, with certain qualifications, by the European Union. Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in
the legislation of various countries (the United States, Ch. 113A, 1986 Omnibus Diplomatic and Antiterrorism Act; France, Art. 689, Code of Criminal Procedure, 1975), and today meets with relatively little opposition, at least so far as a particular category of offences is concerned.

48. In civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction. Under the Alien Tort Claims Act, the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas. Such jurisdiction, with the possibility of ordering payment of damages, has been exercised with respect to torts committed in a variety of countries (Paraguay, Chile, Argentina, Guatemala), and with respect to other major human rights violations in yet other countries. While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.

49. Belgium — and also many writers on this subject — find support for the exercise of a universal criminal jurisdiction in absentia in the “Lotus” case. Although the case was clearly decided on the basis of jurisdiction over damage to a vessel of the Turkish navy and to Turkish nationals, in the famous dictum of the Permanent Court which has attracted particular attention. The Court stated that:

“[T]he first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.” (P.C.I.J., Series A, No. 10, pp. 18-19.)

The Permanent Court acknowledged that consideration had to be given as to whether these principles would apply equally in the field of criminal jurisdiction, or whether closer connections might there be required. The Court noted the importance of the territorial character of criminal law but also the fact that all or nearly all systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. After examining the issue the Court finally concluded that for an exercise of extraterritorial criminal jurisdiction (other than within the territory of another State) it was equally necessary to “prove the existence of a principle of international law restricting the discretion of States as regards criminal legislation”.

50. The application of this celebrated dictum would have clear attendant dangers in some fields of international law. (See, on this point, Judge Shahabuddin’s dissenting opinion in the case concerning Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, pp. 394-396.) Nevertheless, it represents a continuing potential in the context of jurisdiction over international crimes.

51. That being said, the dictum represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies. The underlying idea of universal jurisdiction properly so-called (as in the case of piracy, and possibly in the Geneva Conventions of 1949), as well as the aut dedere aut prossequi variation, is a common endeavour in the face of atrocities. The series of multilateral treaties with their special jurisdictional provisions reflect a determination by the international community that those engaged in war crimes, hijacking, hostage taking, torture should not go unpunished. Although crimes against humanity are not yet the object of a distinct convention, a comparable international indignation at such acts is not to be doubted. And those States and academic writers who claim the right to act unilaterally to assert a universal criminal jurisdiction over persons committing such acts, invoke the concept of acting as “agents for the international community”. This vertical notion of the authority of action is significantly different from the horizontal system of international law envisaged in the “Lotus” case.

At the same time, the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play. We reject the suggestion that the battle against impunity is “made over” to international treaties and tribunals, with national courts having no com-
petence in such matters. Great care has been taken when formulating the relevant treaty provisions not to exclude other grounds of jurisdiction that may be exercised on a voluntary basis. (See Article 4 (3), Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Article 5 (3), International Convention against Taking of Hostages, 1979; Article 5 (3), Convention against Torture: Article 9, Statute of the International Criminal Tribunal for the former Yugoslavia; and Article 19, Rome Statute of the International Criminal Court.)

52. We may thus agree with the authors of Oppenheim’s International Law (9th ed., p. 998), that:

“While no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect.”

* * *

53. This brings us once more to the particular point that divides the Parties in this case: is it a precondition of the assertion of universal jurisdiction that the accused be within the territory?

54. Considerable confusion surrounds this topic, not helped by the fact that legislators, courts and writers alike frequently fail to specify the precise temporal moment at which any such requirement is said to be in play. Is the presence of the accused within the jurisdiction said to be required at the time the offence was committed? At the time the arrest warrant is issued? Or at the time of the trial itself? An examination of national legislation, cases and writings reveals a wide variety of temporal linkages to the assertion of jurisdiction. This incoherent practice cannot be said to evidence a precondition to any exercise of universal criminal jurisdiction. The fact that in the past the only clear example of an agreed exercise of universal jurisdiction was in respect of piracy, outside of any territorial jurisdiction, is not determinative. The only prohibitive rule (repeated by the Permanent Court in the ‘Lotus’ case) is that criminal jurisdiction should not be exercised, without permission, within the territory of another State. The Belgian arrest warrant envisaged the arrest of Mr. Yerodia in Belgium, or the possibility of his arrest in third States at the discretion of the States concerned. This would in principle seem to violate no existing prohibiting rule of international law.

55. In criminal law, in particular, it is said that evidence-gathering requires territorial presence. But this point goes to any extraterritoriality, including those that are well established and not just to universal jurisdiction.

56. Some jurisdictions provide for trial in absentia; others do not. If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law.

57. On what basis is it claimed, alternatively, that an arrest warrant may not be issued for non-nationals in respect of offences occurring outside the jurisdiction? The textual provisions themselves of the 1949 Geneva Convention and the First Additional Protocol give no support to this view. The great treaties on aerial offences, hijacking, narcotics and torture are built around the concept of aut dedere aut prossequi. Definitionally, this envisages presence on the territory. There cannot be an obligation to extradite someone you choose not to try unless that person is within your reach. National legislation, enacted to give effect to these treaties, quite naturally also may make mention of the necessity of the presence of the accused. These sensible realities are critical for the obligatory exercise of aut dedere aut prossequi jurisdiction, but cannot be interpreted in contrariwise so as to exclude a voluntary exercise of a universal jurisdiction.

58. If the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the aut dedere principle) which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction.

* * *

59. If, as we believe to be the case, a State may choose to exercise a universal criminal jurisdiction in absentia, it must also ensure that certain safeguards are in place. They are absolutely essential to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations between States.

No exercise of criminal jurisdiction may occur which fails to respect the inviolability or infringes the immunities of the person concerned. We return below to certain aspects of this facet, but will say at this juncture that commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate those principles. The function served by the international law of immunities does not require that States fail to keep themselves informed.

A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned. The Court makes reference to these elements in the context of this case at paragraph 16 of its Judgment.

Further, such charges may only be laid by a prosecutor or juge d'instruction who acts in full independence, without links to or control
by the government of that State. Moreover, the desired equilibrium between the battle against impunity and the promotion of good inter-
State relations will only be maintained if there are some special circumstances that do require the exercise of an international criminal jurisdiction and if this has been brought to the attention of the prosecutor or juge d’instruction. For example, persons related to the victims of the case will have requested the commencement of legal proceedings.

* * *

60. It is equally necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community.

61. Piracy is the classical example. This jurisdiction was, of course, exercised on the high seas and not as an enforcement jurisdiction within the territory of a non-agreeing State. But this historical fact does not mean that universal jurisdiction only exists with regard to crimes committed on the high seas or in other places outside national territorial jurisdiction. Of decisive importance is that this jurisdiction was regarded as lawful because the international community regarded piracy as damaging to the interests of all. War crimes and crimes against humanity are no less harmful to the interests of all because they do not usually occur on the high seas. War crimes (already since 1949 perhaps a treaty-based provision for universal jurisdiction) may be added to the list. The specification of their content is largely based upon the 1949 Conventions and those parts of the 1977 Additional Protocols that reflect general international law. Recent years have also seen the phenomenon of an alignment of national jurisdictional legislation on war crimes, specifying those crimes under the statutes of the ICTY, ICTR and the intended ICC.

62. The substantive content of the concept of crimes against humanity, and its status as crimes warranting the exercise of universal jurisdiction, is undergoing change. Article 6 (c) of the Charter of the International Military Tribunal of 8 August 1945 envisaged them as a category linked with those crimes over which the Tribunal had jurisdiction (war crimes, crimes against the peace). In 1950 the International Law Commission defined them as murder, extermination, enslavement, deportation or other inhuman acts perpetrated on the citizen population, or persecutions on political, racial or religious grounds if in exercise of, or connection with, any crime against peace or a war crime (Yearbook of the International Law Commission, 1950, Principle VI (c), pp. 374-377). Later definitions of crimes against humanity both widened the subject-matter, to include such offences as torture and rape, and de-coupled the link to other earlier established crimes. Crimes against humanity are now regarded as a distinct category. Thus the 1996 Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission at its 45th session, provides that crimes against humanity

“means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or any organization or group:

(a) Murder;
(b) Extermination;
(c) Torture;
(d) Enslavement;
(e) Persecution on political, racial, religious or ethnic grounds;

(f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;

(g) Arbitrary deportation or forcible transfer of population;

(h) Arbitrary imprisonment;
(i) Forced disappearance of persons;
(j) Rape, enforced prostitution and other forms of sexual abuse;

(k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm”.

63. The Belgian legislation of 1999 asserts a universal jurisdiction over acts broadly defined as “grave breaches of international humanitarian law”, and the list is a compendium of war crimes and the Draft Codes of Offences listing of crimes against humanity, with genocide being added. Genocide is also included as a listed “crime against humanity” in the 1968 Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity, as well as being included in the ICTY, ICTR and ICC Statutes.

64. The arrest warrant issued against Mr. Yerodia accuses him both of war crimes and of crimes against humanity. As regards the latter, charges of incitement to racial hatred, which are said to have led to murders and Lynchings, were specified. Fitting of this charge within the generally understood substantive context of crimes against humanity is not without its problems. “Racial hatred” would need to be assimilated to “persecution on racial grounds”, or, on the particular facts, to mass murder and extermination. Incitement to perform any of these acts is not in terms listed in the usual definitions of crimes against humanity, nor is it explicitly mentioned in the Statutes of the ICTY or the ICTR, nor in the Rome
Statute for the ICC. However, Article 7 (l) of the ICTY and Article 6 (l) of the ICTR do stipulate that

"any person who planned, instigated, ordered, committed or otherwise aided or abetted in the planning, preparation or execution of a crime referred to [in the relevant articles: crimes against humanity being among them] shall be individually responsible for the crime".

In the Akayesu Judgment (96-4-T) a Chamber of the ICTR has held that liability for a crime against humanity includes liability through incitement to commit the crime concerned (paras. 481-482). The matter is dealt with in a comparable way in Article 25 (3) of the Rome Statute.

65. It would seem (without in any way pronouncing upon whether Mr. Yerodia did or did not perform the acts with which he is charged in the warrant) that the acts alleged do fall within the concept of "crimes against humanity" and would be within that small category in respect of which an exercise of universal jurisdiction is not precluded under international law.

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66. A related point can usefully be dealt with at this juncture. Belgium contended that, regardless of how international law stood on the matter of universal jurisdiction, it had in fact exercised no such jurisdiction. Thus, according to Belgium, there was neither a violation of any immunities that Mr. Yerodia might have, nor any infringement of the sovereignty of the Congo. To this end, Belgium, in its Counter-Memorial, observed that immunity from enforcement of the warrant was carefully provided for "representatives of foreign States who visit Belgium on the basis of any official invitation. In such circumstances, the warrant makes clear that the person concerned would be immune from enforcement in Belgium" (Counter-Memorial of Belgium, para. 1.12). Belgium further observed that the arrest warrant

"has no legal effect at all either in or as regards the DRC. Although the warrant was circulated internationally for information by Interpol in June 2000, it was not the subject of a Red Notice. Even had it been, the legal effect of Red Notices is such that, for the DRC, it would not have amounted to a request for provisional arrest, let alone a formal request for extradition." (Counter-Memorial of Belgium, para. 3.1.12.) [Translation by the Registry]

67. It was explained to the Court that a primary purpose in issuing an international warrant was to learn the whereabouts of a person. Mr. Yerodia’s whereabouts were known at all times.

68. We have not found persuasive the answers offered by Belgium to a question put to it by Judge Koroma, as to what the purpose of the warrant was, if it was indeed so carefully formulated as to render it unenforceable.

69. We do not feel it can be said that, given these explanations by Belgium, there was no exercise of jurisdiction as such that could attract immunity or infringe the Congo’s sovereignty. If a State issues an arrest warrant against the national of another State, that other State is entitled to treat it as such — certainly unless the issuing State draws to the attention of the national State the clauses and provisions said to vacate the warrant of all efficacy. Belgium has conceded that the purpose of the international circulation of the warrant was “to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium”. An international arrest warrant, even though a Red Notice has not yet been linked, is analogous to the locking-on of radar to an aircraft: it is already a statement of willingness and ability to act and as such may be perceived as a threat so to do at a moment of Belgium’s choosing. Even if the action of a third State is required, the ground has been prepared.

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70. We now turn to the findings of the Court on the impact of the issue of circulation of the warrant on the inviolability and immunity of Mr. Yerodia.

71. As to the matter of immunity, although we agree in general with what has been said in the Court’s Judgment with regard to the specific issue put before it, we nevertheless feel that the approach chosen by the Court has to a certain extent transformed the character of the case before it. By focusing exclusively on the immunity issue, while at the same time bypassing the question of jurisdiction, the impression is created that immunity has value per se, whereas in reality it is an exception to a normative rule which would otherwise apply. It reflects, therefore, an interest which in certain circumstances prevails over an otherwise predominant interest, it is an exception to a jurisdiction which normally can be exercised and it can only be invoked when the latter exists. It represents an interest of its own that must always be balanced, however, against the interest of that norm to which it is an exception.

72. An example is the evolution the concept of State immunity in civil law matters has undergone over time. The original concept of absolute immunity, based on status (par in parem non habet imperium) has been replaced by that of restrictive immunity; within the latter a distinction was made between acta jure imperii and acta jure gestionis but immunity is granted only for the former. The meaning of these two notions is not carved in stone, however; it is subject to a continuously changing inter-
pretation which varies with time reflecting the changing priorities of society.

73. A comparable development can be observed in the field of international criminal law. As we said in paragraph 49, a gradual movement towards bases of jurisdiction other than territoriality can be discerned. This slow but steady shifting to a more extensive application of extra-territorial jurisdiction by States reflects the emergence of values which enjoy an ever-increasing recognition in international society. One such value is the importance of the punishment of the perpetrators of international crimes. In this respect it is necessary to point out once again that this development not only has led to the establishment of new international tribunals and treaty systems in which new competences are attributed to national courts but also to the recognition of other, non-territorially based grounds of national jurisdiction (see paragraph 51 above).

74. The increasing recognition of the importance of ensuring that the perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law. Now it is generally recognized that in the case of such crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility. It has also given rise to a tendency, in the case of international crimes, to grant procedural immunity from jurisdiction only for as long as the suspected State official is in office.

75. These trends reflect a balancing of interests. On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity. Moreover, a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited. The law of privileges and immunities, however, retains its importance since immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.

76. Such is the backdrop of the case submitted to the Court. Belgium claims that under international law it is permitted to initiate criminal proceedings against a State official who is under suspicion of having committed crimes which are generally condemned by the international community; and it contends that because of the nature of these crimes the individual in question is no longer shielded by personal immunity. The Congo does not deny that a Foreign Minister is responsible in international law for all of his acts. It asserts instead that he has absolute personal immunity from criminal jurisdiction as long as he is in office and that his status must be assimilated in this respect to that of a Head of State (Memorial of Congo, p. 30).

77. Each of the Parties, therefore, gives particular emphasis in its argument to one set of interests referred to above: Belgium to that of the prevention of impunity, the Congo to that of the prevention of unwarranted outside interference as the result of an excessive curtailment of immunities and an excessive extension of jurisdiction.

78. In the Judgment, the Court diminishes somewhat the significance of Belgium's arguments. After having emphasized — and we could not agree more — that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed (para. 60), the Court goes on to say that these immunities do not represent a bar to criminal prosecution in certain circumstances (para. 61). We feel less sanguine about examples given by the Court of such circumstances. The chance that a Minister for Foreign Affairs will be tried in his own country in accordance with the relevant rules of domestic law or that his immunity will be waived by his own State is not high as long as there has been no change of power, whereas the existence of a competent international criminal court to initiate criminal proceedings is rare; moreover, it is quite risky to expect too much of a future international criminal court in this respect. The only credible alternative therefore seems to be the possibility of starting proceedings in a foreign court after the suspected person ceases to hold the office of Foreign Minister. This alternative, however, can also be easily forestalled by an unco-operative government that keeps the Minister in office for an as yet indeterminate period.

79. We wish to point out, however, that the frequently expressed conviction of the international community that perpetrators of grave and inhuman international crimes should not go unpunished does not ipso facto mean that immunities are unavailable whenever impunity would be the outcome. The nature of such crimes and the circumstances under which they are committed, usually by making use of the State apparatus, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him or her immunity from criminal process. But immunities serve other purposes which have their own intrinsic value and to which we referred in paragraph 77 above. International law
seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other. A State may exercise the criminal jurisdiction which it has under international law, but in doing so it is subject to other legal obligations, whether they pertain to the non-exercise of power in the territory of another State or to the required respect for the law of diplomatic relations or, as in the present case, to the procedural immunities of State officials. In view of the worldwide aversion to these crimes, such immunities have to be recognized with restraint, in particular when there is reason to believe that crimes have been committed which have been universally condemned in international conventions. It is, therefore, necessary to analyse carefully the immunities which under customary international law are due to high State officials and, in particular, to Ministers for Foreign Affairs.

80. Under traditional customary law the Head of State was seen as personifying the sovereign State. The immunity to which he was entitled was therefore predicated on status, just like the State he or she symbolized. Whereas State practice in this regard is extremely scarce, the immunities to which other high State officials (like Heads of Government and Ministers for Foreign Affairs) are entitled have generally been considered in the literature as merely functional. (Cf. Arthur Watts, “The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers”, Recueil des cours de l’Académie de droit international de La Haye, 1994, Vol. 247, pp. 102-103.)

81. We have found no basis for the argument that Ministers for Foreign Affairs are entitled to the same immunities as Heads of State. In this respect, it should be pointed out that paragraph 3.2 of the International Law Commission’s Draft Articles on Jurisdictional Immunities of States and their Property of 1991, which contained a saving clause for the privileges and immunities of Heads of State, failed to include a similar provision for those of Ministers for Foreign Affairs (or Heads of Government). In its commentary, the ILC stated that mentioning the privileges and immunities of Ministers for Foreign Affairs would raise the issues of the basis and the extent of their jurisdictional immunity. In the opinion of the ILC these immunities were clearly not identical to those of Heads of State.

82. The Institut de droit international took a similar position in 2001 with regard to Foreign Ministers. Its resolution on the Immunity of Heads of State, based on a thorough report on all relevant State practice, states expressly that these “shall enjoy, in criminal matters, immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity”. But the Institut, which in this resolution did assimilate the position of Head of Government to that of Head of State, carefully avoided doing the same with regard to the Foreign Minister.

83. We agree, therefore, with the Court that the purpose of the immunities attaching to Ministers for Foreign Affairs under customary international law is to ensure the free performance of their functions on behalf of their respective States (Judgment, para. 53). During their term of office, they must therefore be able to travel freely whenever the need to do so arises. There is broad agreement in the literature that a Minister for Foreign Affairs is entitled to full immunity during official visits in the exercise of his function. This was also recognized by the Belgian investigating judge in the arrest warrant of 11 April 2000. The Foreign Minister must also be immune whenever and wherever engaged in the functions required by his office and when in transit therefor.

84. Whether he is also entitled to immunities during private travels and what is the scope of any such immunities, is far less clear. Certainly, he or she may not be subjected to measures which would prevent effective performance of the functions of a Foreign Minister. Detention or arrest would constitute such a measure and must therefore be considered an infringement of the inviolability and immunity from criminal process to which a Foreign Minister is entitled. The arrest warrant of 11 April 2000 was directly enforceable in Belgium and would have obliged the police authorities to arrest Mr. Yerodia had he visited that country for non-official reasons. The very issuance of the warrant therefore must be considered to constitute an infringement on the inviolability to which Mr. Yerodia was entitled as long as he held the office of Minister for Foreign Affairs of the Congo.

85. Nonetheless, that immunity prevails only as long as the Minister is in office and continues to shield him or her after that time only for “official” acts. It is now increasingly claimed in the literature (see for example, Andrea Bianchi, “Denying State Immunity to Violators of Human Rights”, 46 Austrian Journal of Public and International Law (1994), pp. 227-228) that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform (Goff, J. (as he then was) and Lord Wilberforce articulated this test in the case of I° Congreso del Partido (1978) QB 500 at 528 and (1983) AC 244 at 268, respectively). This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions. (For an early example, see the judgment of the Israel Supreme Court in the Eichmann case; Supreme Court, 29 May 1962, 36 International Law Reports, p. 312.) See also the speeches of Lords Hutton and Phillips of Worth Matravers in R. v. Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet (“Pinochet III”); and of Lords Steyn and Nicholls of Birkenhead in “Pinochet I”, as well as the
judgment of the Court of Appeal of Amsterdam in the Bouterse case (Gerechtshof Amsterdam, 20 November 2000, para. 4.2.)

* * *

86. We have voted against paragraph (3) of the dispositif for several reasons.

87. In paragraph (3) of the dispositif, the Court “[f]inds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated”. In making this finding, the Court relies on the proposition enunciated in the Factory at Chorzów case pursuant to which “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would . . . have existed if that act had not been committed” (P.C.I.J., Series A, No. 17, p. 47).

Having previously found that the issuance and circulation of the warrant by Belgium was illegal under international law, the Court concludes that it must be withdrawn because “the warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs”.

88. We have been puzzled by the Court’s reliance on the Factory at Chorzów case to support its finding in paragraph (3) of the dispositif. It would seem that the Court regards its order for the cancellation of the warrant as a form of restitutio in integrum. Even in the very different circumstances which faced the Permanent Court in the Factory at Chorzów case, restitutio in integrum proved impossible. Nor do we believe that restoration of the status quo ante is possible here, given that Mr. Yerodia is no longer Minister for Foreign Affairs.

89. Moreover — and this is more important — the Judgment suggests that what is at issue here is a continuing illegality, considering that a call for the withdrawal of an instrument is generally perceived as relating to the cessation of a continuing international wrong (International Law Commission, Commentary on Article 30 of the Articles of State Responsibility, A/56/10 (2001), p. 216). However, the Court’s finding in the instant case that the issuance and circulation of the warrant was illegal, a conclusion which we share, was based on the fact that these acts took place at a time when Mr. Yerodia was Minister for Foreign Affairs. As soon as he ceased to be Minister for Foreign Affairs, the illegal consequences attaching to the warrant also ceased. The mere fact that the warrant continues to identify Mr. Yerodia as Minister for Foreign Affairs changes nothing in this regard as a matter of international law, although it may well be that a misnamed arrest warrant, which is all it now is, may be deemed to be defective as a matter of Belgian domestic law; but that is not and cannot be of concern to this Court. Accordingly, we consider that the Court erred in its finding on this point.

(Signed) Rosalyn Higgins.
(Signed) Pieter Kooijmans.
(Signed) Thomas Buergenthal.
Frontier Dispute (Benin/Niger)
Judgment, I.C.J. Reports 2005, pp. 90-151
COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRETS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE
DU DIFFEREND FRONTALIER
(BENIN/NIger)

ARRET DU 12 JUILLET 2005

2005

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
THE FRONTIER DISPUTE
(BENIN/NIger)

JUDGMENT OF 12 JULY 2005

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12 July 2005

CASE CONCERNING
THE FRONTIER DISPUTE
(BENIN/NIGER)

Geographical context — Historical background.
Applicable law — Principle of uti possidetis juris — Course of the boundary to be determined by reference to the physical situation to which French colonial law was applied, as that situation existed at the dates of independence — Consequences of that course on the ground to be assessed in relation to present-day physical realities — Relevance of documents and maps posterior to dates of independence for purposes of applying the uti possidetis juris principle — Legal value of post-colonial effectivités.

Place of colonial law (French droit d’outre-mer) — Powers of colonial authorities to create and abolish colonies and territorial subdivisions.

Evolution of legal status of territories concerned.
Principal documents relevant to the settlement of the dispute.
Cartographic materials — Value of maps as evidence.

* * *

Course of boundary in River Niger sector and the question of to which Party the islands in the river belong.
Examination of regulative and administrative acts invoked by the Parties.
Arrêté of 23 July 1900 of the Governor-General of French West Africa (AOF) and decree of 20 December 1900 of the President of the French Republic did not fix the boundaries of the third military territory — Arrêté of 1900 did not locate the intercolonial boundary on the left bank of the River Niger — Letter of 27 August 1954 from Mr. Raynier, Governor ad interim of Niger — Context of that letter — Letter cannot be seen as authoritative confirmation of a previously established boundary — Benin’s contention that the said letter, in conjunction with the decree of 23 July 1900, constitutes a legal title substantiating its claims cannot be upheld.

12 JUILLET 2005
ARRÊT

DIFFÉREND FRONTALIER
(BÉNIN/NIGER)

FRONTIER DISPUTE
(BENIN/NIGER)
In the case concerning the frontier dispute, in accordance with the terms of the modus vivendi generally respected until 1954 and the Letter from the administateur adjoint Sadoux of 3 July 1914 and the administrative report on the bridges between Gaya and Malanville, the island of Lété administered by Niger was not transferred to or taken over by Dahomey during this period. However, the administration of the island of Lété not transferred to or taken over by Dahomey during this period.

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Mr. François Noudegbessi, Permanent Secretary, National Commission for the Delimitation of Boundaries,
Mr. Jean-Baptiste Monkotan, Legal Adviser to the President of the Republic of Benin,
Mr. Honoré D. Koukoui, Secretary General, Ministry of Justice, Legislation and Human Rights,
Mr. Jacques Migan, Avocat at the Cotonou Bar, Legal Adviser to the President of the Republic of Benin,
Ms Héloïse Bajer-Pellet, Avocat at the Paris Bar, Lysias law firm,
Mr. Luke Vidal, lawyer, Lysias law firm,
Mr. Daniel Müller, lawyer, Researcher at the Centre de droit international de Nanterre (CEDIN),
Ms Christine Terriot, lawyer, Maître Robert M. Dossou law firm,
Mr. Maxime Jean-Claude Hounyovi, Economist, Maître Robert M. Dossou law firm,
Mr. Edouard Roko, First Secretary, Embassy of the Republic of Benin to the Benelux countries,
as Advisers;
Mr. Pascal Lokovi, Cartographer,
Mr. Clément C. Vodouhe, Historian,
as Counsel and Experts;
Ms Collette Tossouko, Secretarial Assistant, Embassy of the Republic of Benin to the Benelux countries,
as Secretary,

the Republic of Niger,
represented by
H.E. Ms Aïchatou Mindaoudou, Minister for Foreign Affairs, Co-operation and African Integration,
as Agent;
H.E. Mr. Maty El Hadji Moussa, Minister of Justice, Keeper of the Seals, as Co-Agent;
H.E. Mr. Souley Hassane, Minister of National Defence;
H.E. Mr. Mounkaila Mody, Minister of the Interior and Decentralization;
Mr. Boukar Ary Maï Tanimoune, Director of Legal Affairs and Litigation, Ministry of Foreign Affairs, Co-operation and African Integration,
as Deputy Agent, Legal Adviser and Co-ordinator;
Mr. Jean Salmon, Professor Emeritus, Université libre de Bruxelles, as Lead Counsel;
Mr. Maurice Kamto, Professor, University of Yaoundé II,
Mr. Gérard Niyingoko, Professor and former Vice-Recteur, University of Burundi, former President of the Constitutional Court of Burundi,
Mr. Amadou Tankoano, Professor, Abdou Moumouni University, Niamey,
Mr. Pierre Klein, Professor, Université libre de Bruxelles,
as Counsel;

Mr. Sadé Elhadji Mahamane, Chief Curator of Libraries and Archives, member of the National Boundaries Commission,
Mr. Amadou Maouli Laminou, Magistrat, Head of Section at the Ministry of Justice,
H.E. Mr. Abdou Abarry, Ambassador of the Republic of Niger to the Kingdom of the Netherlands,
Mr. Abdelkader Dodo, Hydro-geologist, Lecturer at the Faculty of Sciences, Abdou Moumouni University, Niamey,
Mr. Belko Garba, Chief Surveyor, member of the National Boundaries Commission,
Mr. M. Hamadou Mounkaila, Chief Surveyor, Head of Department, Permanent Secretariat of the National Boundaries Commission,
Mr. Idrissa Y Maïga, Chief Curator of Libraries and Archives, Director of National Archives, member of the National Boundaries Commission,
Mr. Mahamane Koraou, Permanent Secretary to the National Boundaries Commission,
Mr. Soumaye Poutia, Magistrat, Technical Adviser to the Office of the Prime Minister,
Colonel Yayé Garba, Secretary General of the Ministry for National Defence,
Mr. Moutari Laouali, Governor of the Region of Dosso,
as Experts;
Mr. Emmanuel Klimis, Research Assistant at the Centre for International Law, Université libre de Bruxelles,
Mr. Bouréima Diambéidou, Chief Surveyor,
Mr. Bachir Hamissou, Administrative Assistant,
Mr. Ouba Adamou, Chief Surveyor, National Geographic Institute of Niger,
as Research Assistants;
Mr. Salissou Mahamane, Accountant,
Mr. Adboulsalam Nouri, Principal Secretary,
Ms Haoua Ibrahim, Secretary,
Mr. Amadou Gagéré, Administrative Officer,
Mr. Amadou Tahirou, Administrative Officer,
Mr. Mamane Chamsou Maïgari, journalist, Director of Voix du Sahel,
Mr. Goussama Saley Madougou, cameraman for national television,
Mr. Ali Moussa, journalist with the Niger Press Agency,
Mr. Issoufou Guéro, journalist,
as Administrative and Technical Staff,

THE CHAMBER OF THE INTERNATIONAL COURT OF JUSTICE formed to deal with the above-mentioned case,
composed as above,
after deliberation,
delivers the following Judgment:

1. By a joint letter of notification dated 11 April 2002, filed in the Registry of the Court on 3 May 2002, the Republic of Benin (hereinafter "Benin") and the
Republic of Niger (hereinafter “Niger”) transmitted to the Registrar a certified copy of a Special Agreement, which was signed on 15 June 2001 in Cotonou and entered into force on 11 April 2002, whereby the Governments of the two States agreed to submit to a Chamber of the Court a dispute concerning “the definitive delimitation of the whole boundary between them”.

2. The Special Agreement of 15 June 2001 provides as follows:


Whereas, pursuant to the Agreement signed on 8 April 1994, having provisionally entered into force on the date of its signing, having been ratified by Benin on 17 July 1997 and by Niger on 1 February 2001, and having definitively entered into force on 15 June 2001, the date on which the instruments of ratification were exchanged, the two Governments created the Joint Delimitation Commission for their boundary;

Whereas, notwithstanding six negotiating sessions held by that Commission, the two States’ experts have been unable to agree on the course of the joint boundary;

Whereas, under Article 15 of that Agreement of 8 April 1994, the contracting Parties agree to submit all disputes or disagreements arising out of the application or interpretation of this Agreement to settlement through diplomatic channels or by the other means of peaceful settlement provided for by the Charters of the Organization of African Unity and the United Nations;

Desiring to achieve as rapidly as possible the settlement of the boundary dispute between them on the basis of the provisions of the Charter and the resolutions of the Organization of African Unity and to submit the question of the definitive delimitation of the whole boundary between them to the International Court of Justice, hereinafter the ‘Court’;

Have agreed as follows:

**Article 1**

**Formation of a Chamber of the International Court of Justice**

1. The Parties submit the dispute defined in Article 2 below to a chamber of the Court, hereinafter the ‘Chamber’, formed in accordance with the provisions of the Statute of the Court and the present Special Agreement.

2. Each of the Parties shall exercise the right granted it by Article 31, paragraph 3, of the Statute of the Court to proceed to choose a judge ad hoc.

**Article 2**

**Subject of the Dispute**

The Court is requested to:

(a) determine the course of the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector;
(b) specify which State owns each of the islands in the said river, and in particular Lété Island;
(c) determine the course of the boundary between the two States in the River Mekrou sector.
FRONTIER DISPUTE (JUDGMENT)

Article 9

7. By the same Order, the Court, acting pursuant to Article 92, paragraph 1, of the Rules of Court, fixed 27 August 2003 as the time-limit for the filing of a Memorial by each Party and reserved the subsequent procedure for further decision. The Memorials were duly filed within the time-limit thus fixed.

8. By Order of 11 September 2003, the President of the Chamber, acting pursuant to Article 92, paragraph 1, of the Rules of Court, fixed 28 May 2004 as the time-limit for the filing of a Counter-Memorial by each Party and reserved the subsequent procedure for further decision. The Parties filed their respective Counter-Memorials in the Registry. During a meeting held by the President of the Chamber with the representatives of the Parties, it was decided to prepare a Reply by each Party and fixed 17 December 2004 as the time-limit therefor, reserving the subsequent procedure for further decision. The Parties filed their Replies in the Registry within the time-limit thus fixed.

9. By Order of 9 July 2004, the President of the Chamber, having regard to Article 3, paragraph 1, of the Special Agreement, authorized the filing of a Reply by each Party and fixed 17 December 2004 as the time-limit therefor, reserving the subsequent procedure for further decision. The Parties filed their Replies in the Registry within the time-limit thus fixed.

10. On 28 May 2004, within the time-limit fixed by the Order of 11 September 2003, the President of the Chamber, having regard to Article 3, paragraph 1, of the Special Agreement, fixed 28 May 2004 as the time-limit for the filing of a Counter-Memorial by each Party and reserved the subsequent procedure for further decision. The Parties filed their respective Counter-Memorials in the Registry.

11. By letter of 11 October 2004, Judge Guillaume, President of the Chamber, informing the Parties through the President of the Court that he had decided to resign from the Chamber, in order to avoid any conflict of interest, acting pursuant to Article 13, paragraph 4, of the Statute and Article 18, paragraph 2, of the Rules of Court, decided to make the solemn declaration required by Article 31, paragraph 6, of the Statute and by Article 8 of the Rules of Court.

12. By a letter of 11 February 2005, the Agent of Niger expressed his Government's wish to produce two new documents pursuant to Article 56 of the Rules of Court. By a letter of 25 February 2005, the Agent of Benin informed the President of the Court that his Government had chosen Mr. Mohammed Bedjaoui to sit as Judge ad hoc. By a letter of 3 March 2005, the Agent of Benin informed the President of the Court that his Government had chosen Mr. Mohamed Bennouna to sit as Judge ad hoc.

13. Pursuant to Article 53, paragraph 2, of the Rules of Court, Judge Guillaume, President of the Chamber, having ascended the views of the Parties, decided to make the documents accessible to the public, with effect from the opening of the oral proceedings. In accordance with Article 53, paragraph 3, of the Rules of Court, copies of the documents annexed hereto were held in the Registry by the President of the Chamber, in accordance with Article 18, paragraph 2, of the Rules of Court.

14. Public sittings were held on 7, 8, 10 and 11 March 2005, at which the Chamber heard the oral arguments and replies of:

H.E. Mr. Rogatien Biaou, for Benin;
Mr. Alain Pellet, for Benin;
Maitre Robert Dossou, for Benin;
Mr. Mohamed Bennouna, for Niger;
Mr. Mohammed Bedjaoui, for Niger;
H.E. Mr. Mohamed Guillaume, President of the Chamber; Judges Bedjaoui and Bennouna; Judges Kooijmans and Abraham; and Judges Ranjeva and Kooijmans.
Mr. Mathias Forteau,
Mr. Jean-Marc Thouvenin.

*For Niger:* H.E. Ms Aïchatou Mindaoudou,
Mr. Jean Salmon,
Mr. Amadou Tankoano,
Mr. Gérard Niyungeko,
Mr. Pierre Klein.

At the hearings questions were put by the Chamber, to which replies were
given in writing pursuant to Article 61, paragraph 4, of the Rules of Court.
Each Party submitted its written comments on the other’s written replies in
accordance with Article 72 of the Rules of Court.

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

*On behalf of the Government of Benin,*
in the Memorial:

“For the reasons set out in its Memorial and in its present Reply, the Republic of Benin maintains its sub-
missions and requests the Chamber of the International Court of Justice to
decide:

(1) that the boundary between the Republic of Benin and the Republic of
Niger takes the following course:
— from the point having co ordinates 11° 54’ 15” latitude North and
2° 25’ 10” longitude East, it follows the median line of the River
Mekrou as far as the point having co ordinates 12° 24’ 29” latitude
North and 2° 49’ 38” longitude East,
— from that point, the boundary follows the left bank of the River
[Niger] as far as the point having co ordinates 11° 41’ 44” North
and 3° 36’ 44” East;
(2) that sovereignty over all of the islands in the River [Niger], and in par-
ticular the island of Lété, lies with the Republic of Benin.”

*On behalf of the Government of Niger,*
in the Memorial:

“For the reasons set out in its Memorial and in the present Counter-Memorial,
as well as in the present Reply, the Republic of Benin maintains its sub-
missions and requests the Chamber of the International Court of Justice to
decide:

(1) that the boundary between the Republic of Benin and the Republic of
Niger takes the following course:
— from the point having co ordinates 11° 54’ 15” latitude North and
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Mekrou as far as the point having co ordinates 12° 24’ 29” latitude
North and 2° 49’ 38” longitude East,
— from that point, the boundary follows the left bank of the River
[Niger] as far as the point having co ordinates 11° 41’ 44” North
and 3° 36’ 44” East;
(2) that sovereignty over all of the islands in the River [Niger], and in par-
ticular the island of Lété, lies with the Republic of Benin.”
in the Counter-Memorial:

"The Republic of Niger requests the Court to adjudge and declare that:

— the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector, from the confluence of the River Mekrou with the River Niger as far as the boundary of Nigeria, follows the line of deepest soundings, on the understanding that, in the event of a future change in the course of that line, the boundary between the Republic of Benin and the Republic of Niger will follow that new course;

— the current course of the line of deepest soundings in this part of the river determines which islands belong to each Party;

— the islands located between the line of deepest soundings and the right bank of the river, namely Pekinga, Koki Barou, Sandi Tounga Barou, Gandégabi Barou Kaina, Dan Koré Guirawa, Barou Elhadji Dan Djoda, Koundou Barou and Elhadji Chaibou Barou Kaina, belong to the Republic of Benin;

— the islands located between the line of deepest soundings and the left bank of the river, namely Boumba Barou Béri, Boumba Barou Kaina, Kouassi Barou, Sansan Goungou, Lété Goungou, Monboyé Tounga Barou, Sini Goungou, Lama Barou, Kotcha Barou, Gagno Goungou, Kata Goungou, Gandégabi Barou Béri, Guirawa Barou, Elhadji Chaibou Barou Béri, Goussou Barou, Beyo Barou and Dolé Barou, belong to the Republic of Niger;

— the attribution of islands to the Republic of Benin and the Republic of Niger according to the line of deepest soundings as determined at the date of independence shall be regarded as final, even in the event of a future change in the course of that line, the boundary between the Republic of Benin and the Republic of Niger shall be regarded as final, even in the event of a future change in the course of the line of deepest soundings;

— the boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows a line comprising two parts:

— the first part is a straight line joining the point of confluence of the River Mekrou with the River Niger to the point where the Paris meridian meets the Atacora mountain range, indicative co-ordinates of which are as follows: latitude: 11° 54′ 15″ North; longitude: 2° 25′ 10″ East;

— the second part of the line joins this latter point to the point where the former boundary between the cercles of Say and Fada meets the former boundary between the cercles of Fada and Atacora, indicative co-ordinates of which are as follows: latitude: 11° 44′ 37″ North; longitude: 2° 18′ 55″ East."

in the Reply:

"The Republic of Niger requests the Court to adjudge and declare that:

— the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector, from the confluence of the River Mekrou with the River Niger as far as the boundary of Nigeria, follows the line of deepest soundings, in so far as that line can be established as it was at the date of independence:

— that line determines which islands belong to each Party:

— the islands between the line of deepest soundings and the right bank of the river, namely Pekinga, Tondi Kwarai Barou, Koki Barou, Sandi Tounga Barou, Gandégabi Barou Kaina, Dan Koré Guirawa, Barou Elhadji Dan Djoda, Koundou Barou and Elhadji Chaibou Barou Kaina, belong to the Republic of Benin;

— the islands located between the line of deepest soundings and the left bank of the river, namely Boumba Barou Béri, Boumba Barou Kaina, Kouassi Barou, Sansan Goungou, Lété Goungou, Monboyé Tounga Barou, Sini Goungou, Lama Barou, Kotcha Barou, Gagno Goungou, Kata Goungou, Gandégabi Barou Béri, Guirawa Barou, Elhadji Chaibou Barou Béri, Goussou Barou, Beyo Barou and Dolé Barou, belong to the Republic of Niger;

— the islands located between the line of deepest soundings and the right bank of the river, namely Pekinga, Tondi Kwarai Barou, Koki Barou, Sandi Tounga Barou, Gandégabi Barou Kaina, Dan Koré Guirawa, Barou Elhadji Dan Djoda, Koundou Barou and Elhadji Chaibou Barou Kaina, belong to the Republic of Benin;

— the islands located between the line of deepest soundings and the left bank of the river, namely Boumba Barou Béri, Boumba Barou Kaina, Kouassi Barou, Sansan Goungou, Lété Goungou, Monboyé Tounga Barou, Sini Goungou, Lama Barou, Kotcha Barou, Gagno Goungou, Kata Goungou, Gandégabi Barou Béri, Guirawa Barou, Elhadji Chaibou Barou Béri, Goussou Barou, Beyo Barou and Dolé Barou, belong to the Republic of Niger;

— the attribution of islands to the Republic of Benin and the Republic of Niger according to the line of deepest soundings as determined at the date of independence shall be regarded as final. It shall be for the Parties to ensure that this channel remains the principal navigable channel by carrying out dredging works as necessary;

— the boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows a line comprising two parts:

— the first part is a straight line joining the point of confluence of the River Mekrou with the River Niger to the point where the Paris meridian meets the Atacora mountain range, indicative co-ordinates of which are as follows: latitude: 11° 54′ 15″ North; longitude: 2° 25′ 10″ East;

— the second part of the line joins this latter point to the point where the former boundary between the cercles of Say and Fada meets the former boundary between the cercles of Fada and Atacora, indicative co-ordinates of which are as follows: latitude: 11° 44′ 37″ North; longitude: 2° 18′ 55″ East."
On behalf of the Government of Niger, "The Republic of Niger requests the Court to adjudge and declare that:

(1) The boundary between the Republic of Benin and the Republic of Niger follows the line of deepest soundings in the River Niger, in so far as that line could be established at the date of independence, from the point having co-ordinates latitude 12° 24′ 27″ North, longitude 2° 49′ 36″ East, as far as the point having co-ordinates latitude 11° 41′ 40.7″ North, longitude 3° 36′ 44″ East. The eastern part of the boundary follows a course running approximately south-west to north-east, passing through woodland composed of transitional Sudano-Sahelian vegetation, from a point marking the boundary between the two States and Burkina Faso, as far as the point having co-ordinates latitude 11° 41′ 50″ North, longitude 2° 20′ 14″ East.

(2) That line determines which islands belong to each Party. — The islands between the line of deepest soundings and the right bank of the river, namely Pekinga, Tondi Kwaria Barou, Koki Barou, Sandi Tounga Barou, Gandégabi Barou Kaïna, Dan Koré Guirawa, Barou Elhadji Dan Djoda, Koundou Barou and Elhadji Chaïbou Barou Kaïna, belong to the Republic of Benin. — The islands located between the line of deepest soundings and the left bank of the river, namely Boumba Barou Béri, Boumba Barou Kaïna, Kouassi Barou, Sansan Goungou, Lété Goungou, ... Barou, Goussou Barou, Beyo Barou and Dolé Barou, belong to the Republic of Niger.

(3) The attribution of islands to each Party shall be regarded as final.

(4) With regard to the Gaya-Malanville bridges, the boundary passes through the middle of each of those structures.

(5) The boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows a line comprising two parts: — the first part is a straight line joining the point of confluence of the River Mekrou with the Atacora mountain range, indicative co-ordinates of which are as follows: latitude: 11° 41′ 50″ North, longitude: 2° 20′ 14″ East; the second part of the line joins the former boundary between the circles of Fada and Nakola, on the Niger-Mekrou meridian, and the point at which the Niger-Mekrou meridian intersects the 3° 36′ 44″ East meridian, indicative co-ordinates of which are as follows: latitude: 11° 44′ 37″ North, longitude: 2° 18′ 55″ East.

** * **

17. The task assigned to the Chamber in the present case by the Special Agreement of 3 June 2001 is to determine the course of the whole boundary between Benin and Niger and to specify the course of the boundary of the islands in the River Niger sector, and in particular the island of Lété.
23. The island are: upstream, 12° 9′ 55″ latitude North and 3° 6′ 47″ longitude East; downstream, 12° 3′ 43″ latitude North and 3° 13′ 39″ longitude East.

24. The island is fertile, with rich pastures, and is permanently inhabited; according to information supplied by Niger, its population numbered some 2,000 in the year 2000.

21. In their written pleadings, both Parties referred to incidents that occurred on the island of Lété on the eve of their independence, in 1959 and 1960. Following those events, the two States set up a process for the friendly settlement of their frontier dispute; in 1961 and 1963 two Dahomey-Niger joint commissions met to discuss the matter. In October 1963 the crisis between Dahomey and Niger deepened, in particular regarding the island of Lété. Each State subsequently published a White Paper setting out, inter alia, their respective positions regarding the frontier dispute. There were fresh attempts to reach a peaceful settlement in the years that followed, culminating in a conference held in Yamoussoukro on 18 January 1965. In the course of which, the Governments of both countries agreed, until the dispute was finally settled, to allow nationals of both countries to live in perfect harmony on that island. However, there were further incidents in subsequent years, notably in 1969. Consequently, the Chamber, in accordance with Article 4 of the Constitutive Act of the African Union, of which Benin and Niger are members, signed at Lomé on 11 July 2000, accorded legal title over the island to the Parties; the frontier was thus determined, in the case before it, by reference to the physical situation that prevailed on the island at the date of independence, namely 1 and 3 August 1960; the Chamber observed that there was no change in the frontier between these two very close dates.

25. The Parties have nonetheless sometimes expressed differing opinions regarding certain aspects of the application of the "uti possidetis juris" principle in the present case.

Firstly, Niger maintains, where appropriate to ensure that the Judgment will have sufficient grounding in the law, that the Chamber should be careful to consider for this purpose only those islands that exist at the present time on the basis of the date of independence of Benin and Niger. Benin, for its part, argues that, if the "uti possidetis juris" principle is to be applied strictly, it would be unacceptable to refer to the present situation in order to determine to which Party the islands belonged at the date of independence. Consequently, the Chamber must take as its reference point the date of independence, to determine the boundary before the date of independence, namely 1 and 3 August 1960. The Chamber observes, in this regard, that the physical situation that prevailed on the island at the date of independence, namely 1 and 3 August 1960, should be determined by reference to the "uti possidetis juris" principle in the present case.
tion to which French colonial law was applied, as that situation existed at the dates of independence. However, the consequences of such a course on the ground, particularly with regard to the question of to which Party the islands in the River Niger belong, must be assessed in relation to present-day physical realities and, in carrying out the task assigned to it under Article 2 of the Special Agreement, the Chamber cannot disregard the possible appearance or disappearance of certain islands in the stretch concerned.

26. Secondly, Benin and Niger have put forward differing views with respect to the documents or maps on which the Chamber should base its determination of their common boundary.

In support of its delimitation claims, Niger relies on certain documents and maps that are posterior to the dates of independence, not only to demonstrate current physical realities but also to establish the situation existing in the colonial era. According to Niger, that situation must be determined on the basis of the studies conducted closest in time to the Parties’ accession to independence, without being confined to those conducted prior to the dates of independence.

Benin considers, to the contrary, that the Chamber should base its decision on research and documents prior to the critical date.

The Chamber cannot exclude a priori the possibility that maps, research or other documents subsequent to that date may be relevant in order to establish, in application of the *uti possidetis juris* principle, the situation that existed at the time. In any event, since the effect of the *uti possidetis* principle is to freeze the territorial title (Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 568, para. 29), the examination of documents posterior to independence cannot lead to any modification of the “photograph of the territory” at the critical date unless, of course, such documents clearly express the Parties’ agreement to such a change.

27. Thirdly, the Parties have discussed the legal value, in the light of the *uti possidetis juris* principle, of post-colonial *effectivités*.

The Chamber notes that both Parties have on occasion sought to confirm the legal title which they claim by relying on acts whereby their authorities allegedly exercised sovereignty over the disputed territories after 1960; such *effectivités* have been invoked by Niger *inter alia* in respect of activities relating to the River Niger and its islands, and by Benin in respect of activities relating to the right bank of the River Mekrou.

Such an approach should not necessarily be excluded. As stated by the Chamber formed in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, it is possible to

“have regard ... in certain instances, to documentary evidence of post-independence *effectivités* when ... they afford indications in respect of the . . . *uti possidetis juris* boundary, providing a relationship exists between the *effectivités* concerned and the determination of that boundary” (Judgment, I.C.J. Reports 1992, p. 399, para. 62).

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28. The Parties both acknowledge that, in accordance with the principle of *uti possidetis juris*, the course of the frontier and the attribution of islands in the River Niger to either one of them must be determined in the light of French colonial law, known as “droit d’outre-mer”. They also agree on the identification of the relevant rules of that law, but do not share the same interpretation thereof.

Before turning to those rules, the Chamber would recall that, when reference is made to domestic law in such a context, that law is applicable “not in itself (as if there were a sort of *continuum juris*, a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of . . . the ‘colonial heritage’ ” (Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 568, para. 30).

29. As the Chamber in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* (I.C.J. Reports 1986, pp. 568-569, para. 31) already observed, the territorial administration of the French possessions in West Africa was centralized by a decree of the President of the French Republic of 16 June 1895 and placed under the authority of a Governor-General. The entity of the AOF thus created was divided into colonies, headed by Lieutenant-Governors and themselves made up of basic units called “cercles” which were administered by *commandants de cercle*; each *cercle* was in turn composed of *subdivisions*, each administered by a *chef de subdivision*. The *subdivisions* consisted of *cantons*, which grouped together a number of villages.

30. The Parties acknowledge that the creation and abolition of colonies fell within the jurisdiction of the authorities of metropolitan France: the President of the French Republic, acting by decree, under the Constitution of the Third Republic, and subsequently the French Parliament, following the adoption of the Constitution of 27 October 1946.

The power to create territorial subdivisions within a single colony, on the other hand, was vested in the AOF until being transferred to the local representative institutions in 1957.

Article 5 of the decree of the President of the French Republic, dated 18 October 1904, providing for the reorganization of the AOF, vested the Governor-General with authority to “determine in government council (*conseil de gouvernement*) , and on the proposal of the Lieutenant-Governors concerned, the administrative districts in each of the colonies”.

In his circular No. 114c of 3 November 1912, concerning the form of
instruments for the organization of administrative districts and subdivisions, the Governor-General interpreted this text as conferring upon him "the right to establish...the number and extent of the cercles which, within the colonies, constitute the actual administrative unit", but pointed out that it was "acknowledged that the Lieutenant-Governors would retain the power to determine the territorial subdivisions created within these cercles by means of their own authority". According to that circular, "any measure concerning the administrative district, the territorial unit proper, i.e. affecting the cercle, in terms of its existence (creation or abolition), its extent, its name, or the location of its administrative centre, [was] to be confirmed by an arrêté général adopted in government council; it lay with the Lieutenant-Governors "to define, by means of arrêtés, the approval of which [was] reserved to [the Governor-General], the exact and detailed topographical boundaries of each of these districts", as well as "within the cercles...the number and extent of the territorial subdivisions...and the location of their centre" by means of local decisions.

Benin submits that, in the light of these texts, the rules applicable to the creation of colonies and their subdivisions should be distinguished from those relating to the establishment of territorial boundaries. At the heart of the matter, indeed, the question is one of the conflicting interpretations of the Said Convention, concluded with Germany on 23 July 1897, to occupy the valley of the River Niger (in particular the sector between Say and Boussa). The French occupation was expressly formalized, as regards the region of north-western Dahomey, by a convention concluded with Germany on 23 July 1897 and as regards north-eastern Dahomey, by a convention concluded on 24 April 1898. By means of an agreement of 19 October 1896, in respect of the territories concluded in 1898 in order to separate the French and British areas of influence. The boundaries of the territories situated between the Niger River, and

By arrêté of 23 July 1900, the Governor-General of the AOF decided to establish a third military territory encompassing the regions on the left bank of the River Niger from Say to Lake Chad. That 1900 arrêté was followed by a decree of the President of the French Republic dated 20 December 1900 with the same object. The boundary between the Third Military Territory and the First Military Territory created in 1899 was subsequently determined by an arrêté of the Governor-General of the AOF, dated 20 March 1901.

By a decree of 18 October 1904, the President of the French Republic established the colony of Haut-Sénégal et Niger comprising the former territories, the territory of Say was also attributed to Dahomey. This territorial incorporation was put into effect by an arrêté of the Governor of Dahomey dated 20 March 1901.

By a decree of 18 October 1904, the President of the French Republic, inter alia, established the colony of Haut-Sénégal et Niger, comprising the former territories, the territory of Say was also attributed to Dahomey. This territorial incorporation was put into effect by an arrêté of the Governor of Dahomey dated 20 March 1901.

23. In the second half of the nineteenth century, France initially established settlements along the coast of Dahomey, at Cotonou and Porto Novo, in order to form a defensive line against the local chieftains in the 1880s. It consolidated its presence in Dahomey under a protectorate (1892), and in 1894, France subsequently established expatriate networks northward from its possessions in Dahomey, and determined the extent and value of the River Niger in particular. The French occupation was expressly formalized, as regards the region of north-western Dahomey, by a convention concluded with Germany on 23 July 1897, and as regards north-eastern Dahomey, by a convention concluded on 24 April 1898. By means of an agreement of 19 October 1896, in respect of the territories concluded in 1898 in order to separate the French and British areas of influence. The boundaries of the territories situated between the Niger River, and

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31 December 1907, 14 December 1908, 23 June 1910, 23 November 1912 and 22 January 1927. On the eve of independence, as a result of an arrêté of 30 March 1956 adding seven new cercles to the colony, Niger comprised 16 cercles.

By decree of 2 March 1907, the cercles of Fada-N’Gourma and Say were detached from Dahomey and incorporated into the colony of Haut-Sénégal et Niger. The administrative centre of which was established at Zinder. Article 1 of the decree of 2 March 1907 created a Military Territory (the Third Military Territory). In the meantime the cercles of Say and Fada-N’Gourma, which had hitherto formed part of Haut-Sénégal et Niger, and were detached from Dahomey, and incorporated into the colony of Haut-Sénégal et Niger.

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The colony under civil administration, as well as the Military Territory, comprised the territories of Haut-Sénégal and Moyen-Niger and those which formed part of the colony of Dahomey and Niger. The intercolonial boundary fixed by the decree of 2 March 1907 placed within the French sphere of influence the left bank of the Niger River and the islands therein, the southern boundary of the colony being the left bank of the river. By decree of 2 March 1907, the altogether seven new cercles of the colony were incorporated into the colony of Haut-Sénégal et Niger, and became an autonomous colony. On the other hand, the territory of Fada-N’Gourma remained as a district of that colony, in order to make it an administrative subdivision under the direct control of the Governor-General of the AOF. The territory of Fada-N’Gourma was then made an autonomous colony by decree of 13 October 1922.

Following its establishment in 1894, the colony of Dahomey and Niger was the subject of several successive enfranchisements. During the colonial period, the administrative organization of Dahomey and Niger was the subject of several successive enfranchisements. Following its establishment in 1894, the colony of Dahomey and Niger was the subject of several successive enfranchisements. During the colonial period, the administrative organization of Dahomey and Niger was the subject of several successive enfranchisements.
this subject, which [was] in Kandi, but [which he] [did] not have in Gaya”;

— arrêté général No. 2812/AP of 8 December 1934 and arrêté général No. 3578/AP of 27 October 1938, both reorganizing the territorial divisions of the colony of Dahomey. The latter, whose text is virtually identical to that of 1934 in the part relevant to the present case, indicated in Article 1 that the cercle of Kandi was bounded

“[in] the east, by the frontier of Nigeria [the 1934 arrêté referred to ‘the frontier of Niger’] as far as the Niger; [in] the north-east, by the course of the Niger to its confluence with the Mekrou . . . .”.

Article 2 stated that the boundaries of the cercles were those drawn on a 1:500,000 map of Dahomey appended to the arrêté (Article 2 of the 1934 arrêté being identical in content). However, neither of the Parties has been able, for the purposes of the present case, to locate the maps on which those boundaries had been drawn;

— letter No. 3722/AP of 27 August 1954, by which Secretary-General Raynier, Governor ad interim of Niger, informed the chef of the subdivision of Gayă (Niger), through the commandant of the cercle of Dosso (Niger), “that the boundary of the Territory of Niger [was] constituted by the line of highest water, on the left bank of the river, from the village of Bandofay to the frontier of Nigeria” and that “consequently, all the islands situated in this part of the river [formed] part of the Territory of Dahomey”. The Parties have drawn the attention of the Chamber to other letters relating to the inter-colonial boundary exchanged between the authorities of Niger, between the authorities of Dahomey and between the two colonies during 1954, as well as in subsequent years (in 1956 for example), which would allegedly make it possible to assess the legal value and the significance of the aforementioned letter.

39. With respect to the River Mekrou sector, the essential documents from the colonial period are, in chronological order, as follows:

— a decree of 2 March 1907, incorporating the cercles of Fada N’Gourma and Say into the colony of Haut-Sénégal et Niger. Article 1 of this decree provided as follows:

“[t]he boundary between the colony of Haut-Sénégal et Niger and the colony of Dahomey is formed, from the boundary of Togo, by the present boundary of the cercle of Gourma until it reaches the Atakora mountain range, whose summit it follows until it meets the Paris meridian, from which point it runs in a straight line in a north-easterly direction, terminating at the confluence of the River Mekrou with the Niger”;

— a decree of 12 August 1909, Article 1 of which provided that “[t]he boundary between the cercle of Gourma (Haut-Sénégal et Niger) and the cercle of Djougou (Dahomey)” was formed, inter alia, by

“[t]he Altacora mountain range, whose summit it follows, or, more precisely, a line parallel to the Konkobiri-Tandangou-Sangou trail running along the foot of the mountain, at a distance of 8 km from the trail”;

— a decree of 23 April 1913, Article 1 of which provided that “[t]he boundary between the cercles of Fada-N’Gourma (Haut-Sénégal et Niger) and Atacora (Dahomey)” was determined, inter alia, by

“a line parallel, in the east, to the Compongou-Konkobiri-Batch-ango trail running along the foot of the Atacora mountain range at a distance of 8 km from the trail and continuing until it meets the upper course of the River Pendjari”;

— a decree of 1 March 1919 dividing the colony of Haut-Sénégal et Niger and creating the colony of Haute-Volta;

— an arrêté général of 16 April 1926 laying down certain conditions for the implementation of the decree of 10 March 1925 regulating hunting and creating game parks in the AOF;

— an arrêté général adopted by the Governor-General ad interim of the AOF on 31 August 1927, fixing the boundaries of the colonies of Haute-Volta and Niger. Although, as stated by its text, this arrêté related to the frontier between Haute-Volta and Niger, it provided, in Article 1, paragraph 2, that the boundaries between the cercle of Say and Haute-Volta were formed

“[i]n the South-West, [by] a line starting approximately from the [River] Sirba at the level of the Say parallel and running as far as the Mekrou;

[i]n the South-East, by the Mekrou from that point as far as its confluence with the Niger”.

This arrêté général was amended, on this point among others, by an erratum of 5 October 1927, published in the Journal officiel of the AOF of 15 October 1927, in which the final subparagraph of Article 1 provided simply that the boundary of the colonies of Niger and Haute-Volta “follows . . . the course of the Tapoa upstream until it meets the former boundary of the cercles of Fada and Say, which it follows as far as its intersection with the course of the Mekrou”;

the aforementioned arrêtés généraux of 8 December 1934 and 27 October 1938, which indicated, inter alia, that the north-western boundary of the cercle of Kandi was formed by “the boundary between Dahomey and the colony of Niger, from the River Niger to the confluence of the Pendjari with the Kompongou southern ‘marigot’ ”;

— local arrêté No. 1464 APA of the Governor ad interim of Dahomey, dated 30 September 1937, laying down certain conditions for the implementation of the decree of 13 October 1936 regulating hunting
in the principal African territories under the jurisdiction of the Ministry of the Colonies;

— local arrêté No. 1302/AE/SZ of the Governor of Niger, dated 13 November 1937, providing that part of the territory of the cercles of Niamey and Fada N’Gourma would be set aside for the “Niger W National Park”;

— arrêté général No. 7640 SE/F of 3 December 1952, designating part of the cercle of Kandi (Dahomey) as the “Niger W Total Reserve”, the boundaries of which it fixed;

— arrêté général No. 4676 SE/F of 25 June 1953, creating the “Niger W Total Game Reserve” in an area situated in the cercle of Niamey (Niger), the boundaries of which it fixed.

The Parties also discussed, in connection with the frontier in the River Mekrou sector, the significance of certain documents that are posterior to the dates of independence, in particular:

— Note Verbale No. 03498, addressed on 29 August 1973 to the Ministry of Foreign Affairs of Dahomey by the Ministry of Foreign Affairs of Niger, concerning the meeting of a joint committee regarding a joint dam project on the River Mekrou;

— the minutes of a meeting of experts of the Governments of Niger and Dahomey, held on 8 February 1974, “concerning the Mekrou and the dam project on that river”;

— the Agreement of 14 January 1999 between Niger and Benin, relating to the development of a hydroelectric facility at Dyodyonga on the River Mekrou.

* *

40. The Parties also produced a large quantity of cartographic and photographic material in support of their respective arguments, varying in date, origin, technical quality and level of accuracy.

41. With regard to the identification of the main channel of the River Niger and the attribution of the islands in that river between the Parties, Niger has relied in particular on the following, among many other maps and sketch-maps: maps of the course of the Niger prepared in 1896 following a mission led by Lieutenant Commander Hourst to study the régime of the river and its navigability; the general 1:10,000 plan from the study on the navigability of the stretch of the Niger between Niamey and Gaya carried out by the mission led by A. Beneyton in 1929-1930; the map annexed to the report on the survey of the river between Niamey and Malanville carried out in 1949 on the instructions of the chef des services of the Benin-Niger region; sheet No. 4 of the study on the navigability of the river (1:10,000 survey of the shoals) prepared in 1965 by the topographic service and land registry of the Republic of Niger; maps Nos. 32 to 37 on a scale of 1:50,000 from the study on the navigability of the River Niger between Tossaye and Yelwa conducted from 1967 onwards by NEDECO, a Dutch firm, at the request of four riparian States (Dahomey, Mali, Niger and Nigeria), the work on the ground being carried out in 1968-1969 and the final report produced in September 1979; and sheets Nos. 1 to 4 on a scale of 1:50,000 from the study of the River Niger in 1979 by the French Institut géographique national (IGN) on the basis of a photographic mission in April 1975. Niger also pointed out that the 1:200,000 maps of West Africa published by the AOF cartographic service in Dakar in 1955 and 1960 situated the intercolonial boundary in the course of the river.

For its part, Benin has referred to cartographic material dating from the colonial period, produced by one or other of the Parties, to demonstrate that the cartographers never took it for granted that the boundary between the colonies of Dahomey and Niger followed the navigable channel of the River Niger. Moreover, according to Benin, the above-mentioned sketch-maps or studies, relied on by Niger in support of its argument, cannot be used to define the navigable channel at the dates of independence or to determine to which of the Parties the islands in the river belong. Finally, Benin relies on a study carried out for the purposes of the present case by IGN-France international in December 2003, which compared the maps of the region published by IGN in 1960 with SPOT images on the same scale recorded in 2002, in order to show the changes in the configuration of the widest channel and islands of the River Niger over the last 50 years.

42. With regard to the River Mekrou sector, each Party has relied on several maps dating from the colonial period to support its position.

According to Benin, these maps (in particular those prepared after 1919, with the exception of a map dated 1922 and republished in 1928 cited by Niger) confirm that the Mekrou was the intercolonial boundary. Benin refers, inter alia, to the following cartographic documentation: the “Kandi” and “Niamey” sheets of the map (1:500,000) prepared and published in October 1926 by the AOF Geographical Service (known as the “Blondel la Rougery map”); the map entitled “New Boundary of Haute-Volta and Niger (according to the erratum of 5 October 1927 to the arrêté of 31 August 1927)” (1:1,000,000); an undated map entitled “Sketch-map of the Colony of Niger prepared by Colonel Abadie of the Colonial Infantry” (1:4,500,000); a Dahomey-Togo road map (1:1,000,000) prepared by the AOF Geographical Service in 1938; and a road sketch-map entitled “Dahomey and Togo” prepared by the same service in 1948.

Niger has relied on a large amount of cartographic material to show that the colonial authorities had only a vague knowledge of the River Mekrou region and of the exact course of that river, and that the boundary established by the decree of 2 March 1907 had never been challenged; in this connection, it drew the attention of the Chamber to a combined
political and administrative map of the AOF published in 1928 (the updated version of a similar map prepared in 1922) on which the dates of 2 March 1907 and 6 September 1909 are placed along the line marking the boundary in the Mekrou sector.

43. Finally, the Parties refer to certain maps in order to determine the indicative co-ordinates of precise points on their common frontier.

Thus Benin measures the co-ordinates of the tripoints with Burkina Faso and Nigeria on the basis of the relevant sheets of what it regards as the most reliable map published on the eve of the independence of the two States, namely a 1:200,000 map of the AOF produced by the IGN in 1955.

Niger has noted that the co-ordinates of the Benin/Niger bipoint and of the tripoint with Burkina Faso that it claims in the River Mekrou sector were plotted on 1:200,000 IGN maps (the Kandi sheet of a map of West Africa published by the IGN which is annexed to its Memorial).

44. The Chamber would recall here the terms in which the probative value of maps was described in the Judgment rendered in the case concerning the Frontier Dispute (Burkina Faso/Republic of Mali):

“maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.” (I.C.J. Reports 1986, p. 582, para. 54.)

In other words,

“except when the maps are in the category of a physical expression of the will of the State, they cannot in themselves alone be treated as evidence of a frontier, since in that event they would form an irrebuttable presumption, tantamount in fact to legal title. The only value they possess is as evidence of an auxiliary or confirmatory kind, and this also means that they cannot be given the character of a rebuttable or juris tantum presumption such as to effect a reversal of the onus of proof.” (Ibid., p. 583, para. 56.)

This principle will also guide the Chamber in its assessment of the maps relied on by the Parties in the present case.

* * *

45. The Chamber is firstly asked, in accordance with Article 2, paragraphs (a) and (b), of the Special Agreement, to determine the course of the boundary in the sector of the River Niger and then to specify to which Party each of the islands in the river belongs.

As the Chamber has recalled (see paragraph 23 above), the Parties have expressly asked it to carry out its task on the basis of, in particular, the principle of the succession of States to the frontiers inherited from colonialism, namely the principle of the intangibility of such frontiers, also known as the principle of uti possidetis juris.

46. In the present case these territorial boundaries were no more than delimitations between different administrative divisions or colonies subject to the same colonial authority. Only at the moment of independence, also called the “critical date”, did these boundaries become international frontiers. Until that time the matter of delimitation was governed by French colonial law, known as “droit d’outre-mer”. As noted above (see paragraph 28), in the application of the principle of uti possidetis juris, French law does not play a role in itself but only as one factual element among others, or as evidence indicative of what has been called the “colonial heritage” at the critical date.

Since the Parties achieved independence virtually simultaneously (see paragraph 20 above), the period between 1 and 3 August 1960 can be considered as the critical date.

47. In accordance with the approach of the Chamber in the Frontier Dispute (Burkina Faso/Republic of Mali) case, the Chamber will first consider the various regulative or administrative acts invoked by the Parties; thus, pre-eminence is to be accorded to legal title over effective possession as a basis of sovereignty (I.C.J. Reports 1986, pp. 586-587, para. 63).

In this respect, it is relevant to recall that the Parties agree that, during the period under consideration, the power to create colonies or territories was vested in the President of the French Republic until 1946 and thereafter in the French Parliament, while colonial subdivisions could be created by the Governor-General of the AOF under the terms of the decree of 18 October 1904. In his circular No. 114 of 3 November 1912, the Governor-General of the AOF determined that the main subdivisions (“cercles”) would be established by the Governor-General, but that the Lieutenant-Governors would be entitled to create further territorial subdivisions within the “cercles” (see paragraph 30 above).

It appears that it is not disputed between the Parties that the competence to create or establish territorial entities included the power to deter-
mine their extent and to delimit them, although during the colonial period this was never made explicit in any regulative or administrative act.

48. As the Chamber has set out above (see paragraphs 32 to 36), the colony of Dahomey was created by decree of 22 June 1894 and incorporated into the AOF by decree of 17 October 1899. It is not contested that, during this period, the colony of Dahomey comprised territories situated on both banks of the River Niger.

49. By arrêté of 23 July 1900 the Governor-General of the AOF established a Third Military Territory, which “will encompass the areas on the left bank of the Niger between Say and Lake Chad that were placed within the French sphere of influence by the [Anglo-French] Convention of 14 June 1898”.

50. On 20 December 1900 a decree of the President of the French Republic was issued which established a Third Military Territory “between the Niger and Lake Chad”. The decree, which was superior to an arrêté in the hierarchy of legal acts, made no reference to the arrêté of 23 July 1900. In the Chamber’s view, the decree must nevertheless be seen as a confirmation of the arrêté of the Governor-General; it covers, albeit in less precise terms, the same area between (the River) Niger and (Lake) Chad.

51. Benin contends that the arrêté of 23 July 1900 established the boundary between the Third Military Territory and the colony of Dahomey at the left bank of the River Niger. According to Benin, by detaching the areas beyond the left bank from Dahomey, the river itself and the islands located therein remained part of that colony. Benin further contends that the boundary thus established was confirmed in 1954 by Mr. Raynier, Secretary-General and Governor ad interim of Niger, in his letter of 27 August (see paragraph 38 above).

52. Niger, for its part, denies that the arrêté of 23 July 1900 established a boundary; in its view the relevant wording was merely intended to indicate the territorial extent of the newly created Territory. It further observes that an understanding soon developed that the boundary was constituted by “the course of the river” and that this could only mean that the boundary was situated within the watercourse of the river. As evidence of this understanding, Niger refers to a letter of the French Minister for the Colonies datied 7 September 1901 (see paragraph 38 above). It further contends that this understanding was formally confirmed in two arrêtés of the Governor-General of the AOF of 8 December 1934 and 27 October 1938.

53. The Chamber is of the view that the arrêté of 23 July 1900 in conjunction with the decree of 20 December 1900, which created the Third Military Territory, cannot be read as determining the boundaries thereof. The geographical references used can only be seen as indicating in general terms the extent of the newly created territory; the words “the areas on the left bank of the Niger” in the arrêté and “the Niger” in the decree make it clear that these areas are detached from the colony of Dahomey to which they previously belonged.

54. The conclusion that the legal instruments of 23 July and 20 December 1900 did not determine any boundary, and were not considered at the time as doing so, is confirmed by the letter of 7 September 1901 of the French Minister for the Colonies addressed to the Governor-General of the AOF. In this letter reference is made to two political reports in which the Governor of Dahomey indicated with regard to the delimitation between Dahomey and the Third Military Territory that “the course of the Niger” would constitute the best demarcation line, both from a geographical and a political point of view. The Governor-General apparently supported this suggestion and in his reply the Minister wrote that he “share[d] [the] view [of the Governor-General] on this point”.

55. Although this letter did not determine the boundary, the Chamber considers that it provides sufficient evidence that a delimitation had not taken place the year before. Nor has the Chamber found any document which shows that a delimitation was carried out in subsequent years. The Chamber notes in this respect that a preparatory draft of the arrêté général of 23 November 1912 on the internal administrative reorganization of the Military Territory of Niger contained a suggestion to locate the boundary at the right bank of the River Niger, thus allocating all islands in the river to this Territory, but that this proposal was not followed in the arrêté itself which did not contain any delimitation clause.

56. The Chamber therefore concludes that Benin’s argument that the arrêté of 23 July 1900 located the boundary at the left bank of the River Niger, and that this delimitation remained in force until the date of independence, cannot be upheld.

57. As noted above (see paragraph 51), Benin contends that the boundary as established in the arrêté of 23 July 1900, was confirmed in a letter of Mr. Raynier, Governor ad interim of Niger, of 27 August 1954. In this letter, Mr. Raynier informed the chef of the subdivision of Gaya (Niger) that “the boundary of the territory of Niger [was] constituted by the
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...s of dispute, "in order to enable [them] to settle once and for all with the line of highest water, on the left bank of the river, from the village of Bandofay to the frontier of Nigeria", and that "[c]onsequently, all the islands situated in this part of the river [formed] part of the territory of Dahomey".

58. According to Benin, this letter both corroborates the existence of the boundary at the left bank and adds the further precision that it is constituted by "the line of highest water". Benin ... confirmed and clarified an already-existing title and constitutive in so far as it contained a specification of that title.

59. Benin further contends that Niger is bound by the letter since it subsequently became the subject of intercolonial correspondence and was relied upon by the authorities of Dahomey. The ... withheld by its author nor was it invalidated by a higher authority. In Benin's view, "for the purposes of applying the uti possidetis principle, it is thus indeed the 1954 correspondence which constitutes the 'colonial heritage', that is to say, the 'photograph' of the territory at the critical date".

60. Niger denies that Mr. Raynier was competent to determine an intercolonial boundary and consequently considers that the letter lacks any legal basis. It further contends that the letter appears to have been of an intra-colonial character and never led to an inter-colonial understanding to which it could be held in good faith.

61. The Chamber will first analyse the context in which the letter of 27 August 1954 was written. From the case file it is clear that in the first half of 1954 difficulties had arisen between the local authorities in the two colonies about the legal status of certain islands in the river.

... the...
63. In his reply, dated 27 August 1954, to the request made by the chef of the subdivision of Gaya, Mr. Raynier, the Governor *ad interim* of Niger (who had arrived in Niamey on 25 August 1954), made the statement referred to above (see paragraph 57). No reasoning was given nor were any references made to earlier regulative or administrative acts. The *commandant* of the *cercle* of Dosso (to which Gaya belonged) sent a copy of this letter to the *commandant* of the *cercle* of Kandi, who in turn transmitted it to the Governor of Dahomey.

64. On 11 December 1954 the Governor of Dahomey asked his counterpart in Niger “to kindly provide [him] with particulars of the instruments or agreements determining [the] boundaries” mentioned in the letter of 27 August. The Governor stated that he sought this clarification “in order that this question might be officially resolved” since “Dahomey’s archives and *arrêté* général No. 3578/AP of 27 October 1938 provide[d] no specific information on the matter”.

The Governor *ad interim* of Niger never responded to that request.

65. The Chamber has already found that the *arrêté* of 23 July 1900 did not establish a boundary; consequently, the letter of 27 August 1954 cannot be seen as an authoritative confirmation of such a boundary.

The Chamber further notes that, under French colonial law, the Lieutenant-Governor of a colony had no competence to unilaterally delimit the external boundaries of the colony. The letter in itself cannot, therefore, be relied on by Benin as a legal title placing the boundary on the left bank of the river.

66. The boundary defined in the letter could have been validated by a higher authority and it was with that in mind that the Governor of Dahomey asked for further information in his letter of 11 December 1954. However, the letter of 11 December 1954 went unanswered. Moreover, no further action was taken by either of the two colonies in order to have the boundary indicated in the letter of 27 August 1954 validated by the Governor-General of the AOF. The Chamber therefore cannot uphold Benin’s claim according to which the letter of 27 August 1954 in conjunction with the *arrêté* of 23 July 1900 provides it with legal title to a boundary on the left bank.

67. With regard to Benin’s contention that the letter led to some sort of informal intercolonial understanding which bound Niger at the critical date in 1960, the Chamber observes that such a legal concept did not exist in French colonial law or “droit d’outre-mer” thus cannot provide Benin with title.

The Chamber is, however, aware of the fact that the letter of 27 August 1954 may have led to certain *effectivités*. Whether or not this is the case will be considered in due course.

* *

68. The Chamber will now turn to the acts invoked by Niger as evidence of its legal title, namely the *arrêtés* issued by the Governor-General of the AOF on 8 December 1934 and 27 October 1938 reorganizing the internal administrative structure of the colony of Dahomey and containing a description of the boundaries of the various *cercles*. In both *arrêtés* the north-west boundary of the *cercle* of Kandi is described as “the course of the Niger as far as its confluence with the Mekrou”.

69. According to Niger these *arrêtés* are the formal and authoritative confirmation that the boundary between Dahomey and the neighbouring colony of Niger was located in the watercourse itself, as had already been indicated in the letter of the Minister for the Colonies dated 7 September 1901. The *arrêtés* thus provide sufficient evidence of Niger’s title, even if the title itself is not explicitly laid down in a prior regulative or administrative act.

70. Benin contends that these *arrêtés* were merely of an intra-colonial character and were not intended to determine the boundary of Dahomey with another colony. Benin further argues that the wording used is imprecise and does not exclude a frontier on the left bank of the river.

* *

71. The Chamber first notes that both *arrêtés* were issued by the Governor-General, who was the authority competent to establish, delimit and reorganize the *cercles* of colonies. In so far as they describe the boundaries of these *cercles* with the neighbouring colonies which also came under his authority, the *arrêtés* do not have an exclusive internal character but may also be relied upon in intercolonial relations. Consequently it can be concluded on the basis of these *arrêtés* that the course of the River Niger constituted the intercolonial boundary.

72. The Chamber is unable, however, to deduce therefrom that that boundary was situated in the river, whether at the thalweg or the median line. The Chamber notes in this regard that the terminology used in the *arrêtés* is identical to that of the 1901 letter and is just as imprecise. The notion of the “course of the river” covers a range of possibilities: a boundary on either river bank or a boundary somewhere within the river.

73. Even if, as Niger contends, a certain practice had evolved on the basis of a boundary within the river (see paragraph 83 below), that practice was not endorsed by the *arrêtés*, although it may be assumed that the Governor-General would have been aware of the practice, which had
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already been in existence for a considerable period of time. In the Chamber’s view, it is evident that the term, “the course of the Niger”, was not intended to indicate the precise location of the boundary but merely to indicate the separation line between the two colonies.

74. The Chamber thus finds that the 1934 and 1938 arrêtés do not establish a boundary in the river; it cannot therefore sustain Niger’s claims as to title.

* * *

75. In view of the foregoing, the Chamber concludes that neither of the Parties has succeeded in providing evidence of title on the basis of regulative or administrative acts during the colonial period.

76. Therefore, the Chamber will now consider whether the evidence furnished by the Parties with respect to effectivités can provide the basis for it to determine the course of the frontier in the sector of the River Niger and to which of the two States each of the islands in the river belongs, in particular the island of Lété.

77. The Chamber recalls in this regard that the Court has previously ruled in a number of cases on the legal relationship between effectivités and title.

The passage most pertinent to the present case can be found in the Judgment in the Frontier Dispute (Burkina Faso/Republic of Mali) case, in which the Chamber of the Court, having noted that “a distinction must be drawn among several eventualities” when evaluating the legal relationship between effectivités and title, stated, inter alia, that: “[i]n the event that the effectivité does not co-exist with any legal title, it must invariably be taken into consideration” (I.C.J. Reports 1986, p. 587, para. 63; see also Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p. 38, paras. 75-76; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p. 353, para. 68; Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002, p. 678, para. 126).

* *

78. Both Parties claim that, during the colonial period, administrative acts were carried out by their local colonial authorities on a number of islands in the river. The Parties mention, in this regard, the provision of licences for grazing, fishing and tree-felling, as well as the levying of taxes, periodic sanitary control of livestock, military patrolling and police activities.

79. With regard to the management of the river, Niger claims that, for a certain period, it carried out management activities over the whole of the relevant stretch of the river. Niger further maintains that, when this task was subsequently entrusted to Dahomey, the latter did not manage the whole of the river and that the colony of Niger continued to perform certain management activities on the part of the river contiguous to it. In Niger’s view, its continued activities negate Dahomey’s alleged rights on the whole of the river.

Benin denies that such river management activities can be relied upon as effectivités since, during the colonial period, such activities, even if carried out by the authorities of individual colonies, were performed in the exercise of a public function on behalf of the AOF as a whole.

80. Aside from documentary evidence, Benin has presented testimony taken from certain individuals in the form of “sommations interpellatives” (replies to official enquiries). According to Niger, such testimony, taken several decades after the period in question, is unreliable and untrustworthy.

The Chamber notes that Benin did not invoke this testimony in the later stages of the proceedings.

81. Finally, both Parties have presented a number of maps in order to support their claims. Neither of them claims, however, that these maps have any “intrinsic legal force” in the sense that they represent the “physical expressions of the will of the State ... concerned” (see Frontier Dispute (Burkina Faso/Republic of Mali), I.C.J. Reports 1986, p. 582, para. 54; see also paragraph 44 above). The Chamber notes that none of these maps were annexes to an official text.

* *

82. The Chamber will first analyse the various activities prior to 1954, presented as effectivités by the Parties.

83. On 3 July 1914 the commandant of the secteur of Gaya (Niger), administrateur adjoint Sadoux, wrote a letter to the commandant of the cercle of Moyen-Niger (Dahomey), in which he referred to the use of certain islands by the local inhabitants of both banks of the river. He wrote this letter “for the sole purpose of clearly determining when grazing permits [should] be issued to the Peuhls from both banks and delimiting the territorial jurisdiction of the indigenous tribunals in the two colonies”. Administrateur adjoint Sadoux attached to his letter a list of islands in the border area, drawn up on the basis of an exploration of the whole stretch of the river between Koulou and the Nigerian border, with an indication of the colony to which each island belonged according to its position with respect to the main navigable channel. Administrateur adjoint Sadoux defined this channel as “the river’s main channel, not the widest channel, but the only channel navigable at low water” (emphasis in the original).

84. In his letter, administrateur adjoint Sadoux invited the commandant of the cercle of Moyen-Niger to come to Gaya for further discus-
87. In the years prior to 1954, the island of Lété seems to have been continuously administered by the subdivision of Gaya. The tax registers of Gaya, in so far as they have been preserved, contain references to "Lété" in the years 1925, 1927, 1928, 1930, 1932, 1935 and 1936.

"Lété" was included in a list of villages situated in the subdivision of Gaya, with an indication of the number of inhabitants, in 1932, 1945, 1946 and 1954. It was also included in census lists in 1944 and 1945.

Finally, the Governor of Niger authorized the felling of palm trees on the island of Lété in 1946.

88. Benin has not submitted any official document from colonial authorities regarding an effective exercise of authority, during the period under consideration, on the island of Lété or on any other island situated to the left of the main navigable channel.

89. The Chamber will now turn to the effectivités in the period from 1954 until the critical date in 1960. It recalls that, on 27 August 1954, the Governor ad interim of Niger wrote a letter in which he stated that the boundary was situated "at the line of highest water, on the left bank of the river, from the village of Bandofay to the frontier of Nigeria" and that "all the islands situated in this part of the river [formed] part of the territory of Dahomey".

90. During this period, the claims of Dahomey to be entitled to administer the island of Lété became more frequent.

In a letter of 23 May 1955 to the commandant of the cercle of Kandi, the chef de poste administratif at Malanville (Dahomey) mentioned certain difficulties which had arisen with respect to the collection of taxes from inhabitants of Niger who held cattle on Lété. He raised the question of "whether the tax collector of Dahomey [was] entitled to operate on the island of Lété".

In a letter of 20 June 1955 to the commandant of the cercle of Dosso, the chef of the subdivision of Gaya referred to the 1914 modus vivendi, He commented that:

"[t]he permanently navigable channel of the Niger was solely adopted as boundary. Those proposals have never been officially approved since 1914. A decision on the matter is desirable." (Emphasis in the original.)
boundary between Dahomey and Niger. In this regard, the chef of the subdivision of Gaya informed the commandant of the cercle of Dosso that he had “rediscovered” the 1914 Sadoux letter, which he called “the only serious document on the matter”.

The commandant of the cercle of Kandi, by letter of 28 June 1956, informed the Director of the Geographical Service that “this question of boundaries [had], to [his] knowledge, never been dealt with in any official text”. He added that there had been disputes in the past and attached in this regard the letter of 27 August 1954 of the Governor ad interim of Niger.


94. Serious troubles arose in 1959, the year before independence. In a letter of 16 June 1959 the chef of the subdivision of Malanville informed the Prime Minister of Dahomey (which was at the time an autonomous republic within the Communauté française) about a dispute between inhabitants of Gouroubéri (Dahomey) and Peuhls from Niger who, in violation of the property rights of the former, had occupied the island of Lété. He added that he had had unsuccessful consultations with his counterpart in Gaya, who seemed to support the Peuhls and “[wa]... unaware of the régime governing the islands”. The chef of the subdivision of Malanville was of the view that the boundary was located on the left bank of the river and stated that, according to his information, the island of Lété had always belonged to the inhabitants of Gouroubéri.

95. In December 1959, the commandant of the cercle of Kandi visited Malanville. The chef of the subdivision of Gaya was invited to meet him on Lété but that meeting did not take place. Although the commandant of the cercle of Kandi visited the island, the chef of the subdivision of Gaya “did not come to the meeting”. It was said later on that he had been unaware of the visit.

96. Riots broke out on the night of 29 June 1960, during which four Peuhls from Niger were killed and a number of dwellings were set on fire. In a letter dated 3 July 1960, the commandant of the cercle of Kandi informed the Minister for the Interior of Dahomey that order had been restored and that both Gaya (Niger) and Malanville (Dahomey) had stationed a small police unit on the island.

97. In a letter dated 13 July 1960 to the Prime Minister of Dahomey, the President of the Council of Ministers of Niger (which was also at the time an autonomous republic within the Communauté française) proposed to settle the dispute for once and for all through a formal agreement on the question of the “island of Lété (subdivision of Gaya, Niger)”.

In his response dated 29 July 1960, the Prime Minister of Dahomey observed that the matter had already been settled by the letter of 27 August 1954 but that he did not object to consultations in order to reach a formal agreement.

In a letter dated 31 July 1960, the Prime Minister of Niger again pressed for a formal settlement. He referred, however, not to the 1954 letter but, inter alia, to the 1914 letter and proposed to take as the boundary “the median line of the river’s permanent channel, or of its deepest channel”.

98. On the basis of the evidence before it, the Chamber finds that, from 1914 to 1954, the terms of the modus vivendi established by the 1914 Sadoux letter were in general respected and that, during this period, the main navigable channel of the River Niger was considered by both sides to be the boundary. As a result, administrative authority was exercised by Niger on the islands to the left and by Dahomey on the islands to the right of that line. The entitlement of Niger to administer the island of Lété was sporadically called into question for practical reasons but was neither legally nor factually contested.

99. With respect to the islands opposite Gaya, the Chamber notes that, on the basis of the modus vivendi established by the 1914 Sadoux letter, these islands were considered to fall under the jurisdiction of Dahomey. It recalls in this regard that in 1925 a proposal was made to Niger by the authorities of Dahomey for the exchange of the three islands opposite Gaya for the island of Lété but that no action was taken on this proposal (see paragraph 85 above). The Chamber has not received any information to indicate that these islands were administered at that time from anywhere else other than the cercle of Kandi (Dahomey). The Chamber therefore concludes that, in this sector of the river, the boundary was regarded as passing to the left of these three islands.

100. The situation is less clear in the period between 1954 and 1960. It is apparent that both Parties periodically claimed rights over the islands, in particular Lété, and also occasionally performed administrative acts as a display of authority. However, on the basis of the evidence before it, the Chamber cannot conclude that the administration of Lété, which before 1954 was undoubtedly carried out by Niger, was effectively transferred to or taken over by Dahomey. In this respect, the Chamber notes that a report of the gendarmerie of Malanville of 1 July 1960 stated that Lété was “currently administered by the subdivision of Gaya”.

101. Benin contends that, even if the local authorities in Niger did administer Lété and other islands during the period between 1914 and 1954, they could not have done so in the belief that they were acting “as of right”.

In Benin’s view, the modus vivendi was merely a temporary and prac-
tical arrangement, pending a definitive settlement of the boundary issue. By its very nature, it precluded the existence of an intention to act “as of right” and these administrative acts cannot therefore be relied on as effectivités.

As regards the period after 1954, Benin contends that Niger had, in the letter of 27 August 1954, relinquished any intention to act “as of right”.

102. The Chamber observes that the concept of the intention and will to act as sovereign, as mentioned in the *Legal Status of Eastern Greenland (Denmark v. Norway)* case (1933, *P.C.I.J.*, Series A/B, No. 53, pp. 45-46), is a concept of international law and cannot be transplanted purely and simply to colonial law. The Chamber’s sole task in applying the principle of *uti possidetis juris* is to ascertain whether it was the colony of Dahomey or that of Niger which effectively exercised authority over the areas which the Parties now claim as sovereign States.

103. For all these reasons and in the circumstances of the case, particularly in light of the evidence furnished by the Parties, the Chamber concludes that the boundary between Benin and Niger follows the main navigable channel of the River Niger as it existed at the dates of independence, it being understood that, in the vicinity of the three islands opposite Gaya, the boundary passes to the left of these islands. Consequently, Benin has title to the islands situated between the boundary thus defined and the right bank of the river and Niger has title to the islands between that boundary and the left bank of the river.

104. The Chamber will now proceed to determine the precise location of the boundary line in the main navigable channel, namely the line of deepest soundings, as it existed at the dates of independence; it will then determine to which of the Parties each of the islands in the river belongs.

105. Benin contends that the navigable channel of the River Niger is unstable and has changed over the years as the result of the siltation of the river and the formation of sandbanks of a virtually permanent character. Benin has highlighted a number of cases in which this phenomenon has allegedly resulted in a change in the position of the main navigable channel around the islands. It referred, in particular, to the islands of Kotcha Barou, Gagno Goungou and Dolé Barou.

106. Niger does not deny the periodic occurrence of siltation which may lead to the formation of sandbanks but contends that, under normal circumstances, these accumulations of sand are washed away during the high-water season when the speed and pressure of the watermass increase considerably. Niger admits that, with respect to the island of Dolé Barou, the main channel has moved to the left side of the island since the accession of the two States to independence, but submits that this may be due to works on dykes carried out upstream on the left bank of the river. It further submits that a number of hydrological surveys, carried out over a period of more than 60 years, have demonstrated that the riverbed is remarkably stable and that the main navigable channel has remained unchanged.

107. The Chamber initially notes that, over the course of time, a number of hydrographic and topographic surveys have taken place. In this respect, the following studies are the most pertinent:

1. the maps produced as a result of the mission of Lieutenant Hourst in 1896;
2. the report of the mission carried out by the engineer A. M. J. Beneyton between 1926 and 1932 on behalf of the AOF;
3. the final report of a study on the navigability of the Middle Niger, carried out by the Netherlands Engineering Consultants (NEDECO) between 1967 and 1970 at the request of the Governments of Dahomey, Mali, Niger and the Federation of Nigeria;

108. The Chamber observes that the position of the main navigable channel as determined by each of the missions is very similar. The Chamber considers that this indicates that the riverbed is relatively stable and that any siltation which has taken place has rarely led to a noticeable change in the location of the main navigable channel. This appears to have been the case in both the colonial and post-independence period.

109. Given that the Chamber has to determine the course of the boundary at the time of independence, the NEDECO report of 1970 provides the most useful information on the situation at the critical date. In view of the proven stability of the riverbed, it may be assumed that the situation between 1967 and 1970 was virtually identical with that in 1960.

110. In this respect, the Chamber considers it of great importance that the 1967-1970 survey was carried out by an independent firm renowned for its expertise and experience and that the results were contained in a report presented to the Governments of four riparian States, including the Parties to the present case. Furthermore, the findings of the NEDECO study were not contested at the time of their publication and they are corroborated by both earlier and later studies.

111. The report of the NEDECO study examines the navigability of the River Niger between Tossaye in Mali and Yelwa in Nigeria. It there-
fore covers the whole stretch of the river between Benin and Niger from its confluence with the Mekrou to the frontier with Nigeria.

112. The maps annexed to the report are very detailed, each of them covering a stretch of 25 km and showing the longitudinal profile of the main navigable channel based on the results of echosounding carried out, using a boat-mounted echo-sounder, on various occasions during the high and low water season. In order to check the position of the channel, cross-sections were made by NEDECO and the deepest point of each section was fixed. Subsequently, the distance was measured from this point to the two banks, or in certain cases to one of them. Finally, these distances were represented on a topographical map on a scale of 1:50,000.

The Chamber observes that the main navigable channel identified by the report of the NEDECO study generally coincides with or is very similar to the one that is represented in the maps and sketch-maps resulting from the 1896 Hourst mission and the 1926-1932 Beneyton mission.

113. The Chamber further notes that map No. 36 of the NEDECO report indicates that in the sector opposite the village of Gaya, the river has two navigable channels. On the basis of the available data, it is not possible to say which one is consistently deeper. This is however without consequence in the present case given the conclusions drawn by the Chamber, in paragraphs 99 and 103 above, from the colonial effectivités in that sector. The Chamber considers that, in the sector of the three islands opposite Gaya, the boundary is constituted by the line of deepest soundings of the left navigable channel. However, in the vicinity of the last of these islands, Kata Goungou, the boundary deviates from that line and passes to the left of that island.

114. With the exception indicated in the previous paragraph, the boundary between the Parties therefore follows the line of deepest soundings of the main navigable channel of the River Niger as it appears in the 1970 NEDECO report, from the intersection of this line with the median line of the River Mekrou until its intersection with the boundary of the Parties with Nigeria.

Opposite Gaya, the boundary is constituted by the line of deepest soundings of the left navigable channel from the point situated at co-ordinates 11°52'29" latitude North and 3°25'34" longitude East until the point located at co-ordinates 11°51'55" latitude North and 3°27'41" longitude East, where the boundary deviates from this channel and passes to the left of the island of Kata Goungou, subsequently rejoining the main navigable channel at the point located at co-ordinates 11°51'41" latitude North and 3°28'53" longitude East.

115. It follows from the foregoing that the boundary line between Benin and Niger in the sector of the River Niger, proceeding downstream, passes through the points numbered from 1 to 154, the co-ordinates of which are indicated in the table below:

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<th>Longitude East</th>
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The points that constitute the boundary line are further represented, purely for illustrative purposes, on sketch-map No. 4 (in six sheets) attached to the present Judgment.

116. The Chamber will now determine to which of the Parties each of the islands in the River Niger belongs, following the course of the river downstream from its confluence with the Mekrou to the frontier with Nigeria.

The Chamber has not received reliable information that new islands formed nor that islands disappeared between 1960 and 1967-1970. As regards subsequent years, it observes that one of the islands identified by Niger, namely Sandi Tounga Barou, which is not represented on any map prepared before 1973, does appear on various aerial photographs and SPOT images taken from 1973 onwards. The Chamber must consequently determine to which of the Parties this island belongs. With respect to the “island” of Pekinga, which Niger in its final submissions attributed to Benin, the Chamber notes that it is not identifiable as a separate island on the maps annexed to the NEDECO report, but instead appears to be part of the river bank on the Benin side.

117. The Chamber finds, on the basis of paragraphs 103 et seq., that

1. Boumba Barou Béri belongs to Niger;
2. Boumba Barou Kaïna belongs to Niger;
3. Kouassi Barou belongs to Niger;
4. Sansan Goungou, also known as Fodofey (or Fandofay) Barou or Koro Kouara Barou, belongs to Niger;
5. Lété Goungou belongs to Niger;
6. Tondi Kwaria Barou, also known as Faran Tounga Barou, belongs to Benin;
7. Monboye Tounga belongs to Niger;
8. Sini Goungou, also known as Tondika Goungou, belongs to Niger;
9. Lama Barou belongs to Niger;
10. Kotcha Barou, also known as Bagou Barou, Gouandi Tounga Barou or Ibrahim Ba Ama Founbou, belongs to Niger;
11. Koki Barou belongs to Benin;
12. Gagno Goungou, also known as Gaya Goungou or Karsangi Goungou, belongs to Benin;
13. Kata Goungou belongs to Benin;
14. Sandi Tounga Barou belongs to Benin;
15. Gandégabi Barou Kaïna belongs to Benin;
16. Gandégabi Barou Béri belongs to Niger;
17. Guirawa Barou, also known as Issa Kaïna, belongs to Niger;
18. Dan Koré Guirawa, also known as Bédari, belongs to Benin;
19. Barou Elhadji Dan Djoda, also known as Sabonbarou or Wéra Barou, belongs to Benin;
20. Koundou Barou belongs to Benin;
21. Elhadji Chaïbou Barou Béri belongs to Niger;
22. Elhadji Chaïbou Barou Kaïna belongs to Niger;
23. Goussou Barou, also known as Gattawani Béri Barou or Dandaniyaye Barou, belongs to Niger;
24. Beyo Barou, also known as Wéra Kaïna Barou, belongs to Niger;
25. Dolé Barou, also known as Barou Béri or Bani Koubaye, belongs to Niger.

These various islands are shown on the illustrative sketch-map referred to in paragraph 115 above.

118. Finally, the Chamber observes that the determination in regard
to the attribution of islands effected above is without prejudice to any private law rights which may be held in respect of those islands.

* * *

119. Niger has also asked the Chamber to determine the frontier on the two bridges between Gaya (Niger) and Malanville (Benin). Benin contends that this issue is not covered by the dispute submitted to the Chamber under the terms of the Special Agreement and that the Chamber therefore has no jurisdiction to comply with Niger’s request.

120. The Chamber notes in this regard that, in the Special Agreement, “[t]he Court is requested to . . . determine the course of the boundary . . . in the River Niger sector”. Since the bridges between Gaya and Malanville are located in that sector, the Chamber considers that it has jurisdiction to determine where the boundary is located on these bridges.

121. Niger contends that the boundary is situated at the middle point of each of the bridges. It observes that the construction and maintenance of these structures has been financed by the Parties on an equal basis and that the bridges are their joint property. According to Niger, it logically follows that the boundary is situated at the middle point of this joint property and does not follow the boundary line in the river itself. Niger further contends that this solution has been adopted in a substantial number of previous and existing agreements.

122. Benin, for its part, submits that the arrangements for the construction and maintenance of the bridges and any provisions on joint ownership bear no relation to the issue of territorial sovereignty. It further contends that a difference between the location of the boundary on the bridges and the course of the boundary in the river beneath would be incoherent and lead to legal inconsistencies.

123. The Chamber initially observes that the two bridges crossing the River Niger between Gaya and Malanville were built in 1958 and 1988-1989 respectively. They are more than 300 m in length and they connect platforms built on each of the banks, which are used for customs and other administrative purposes.

The Chamber further observes that there are a number of arrangements in place which provide that the use and maintenance of these bridges, of which the Parties have joint ownership, is to be financed by them on an equal basis.

It finally observes that these agreements and arrangements do not contain any provisions on territorial issues.

124. The Chamber notes that neither of the Parties has contended that there is a rule of customary international law regarding territorial delimitation in the case of bridges over international watercourses. It further notes that the various precedents cited in the case file are all based on bilateral agreements.

The Chamber observes that, in the absence of an agreement between the Parties, the solution is to extend vertically the line of the boundary on the watercourse. This solution accords with the general theory that a boundary represents the line of separation between areas of State sovereignty, not only on the earth’s surface but also in the subsoil and in the superjacent column of air. Moreover, the solution consisting of the vertical extension of the boundary line on the watercourse avoids the difficulties which could be engendered by having two different boundaries on geometrical planes situated in close proximity to one another.

In light of the foregoing, the Chamber concludes that the boundary on the bridges between Gaya and Malanville follows the course of the boundary in the river. This finding is without prejudice to the arrangements in force between Benin and Niger regarding the use and maintenance of these bridges, which are financed by the two States on an equal basis (see paragraph 123 above). The Chamber observes in particular that the question of the course of the boundary on the bridges is totally independent of that of the ownership of those structures, which belong to the Parties jointly.

* * *

125. The Chamber is further charged under Article 2 (c) of the Special Agreement with “determin[ing] the course of the boundary between the two States in the River Mekrou sector”.

Although Benin contended that this issue was a “quite artificial dispute created by Niger at the time of negotiation of the Special Agreement” for tactical purposes and that until then there had never been any disagreement between the Parties on the matter — an assertion which Niger strongly denied —, there can be no doubt that the Chamber’s task, according to the express terms of the Special Agreement, includes settlement of this aspect of the dispute, without having to speculate on the motives of either Party. Indeed Benin has not sought to argue otherwise.

* * *

126. The dispute between the Parties in regard to this sector of the boundary may be summarized as follows.

According to Benin, the boundary follows the median line of the River Mekrou. That is said to result, on the one hand, from the application of the uti possidetis juris principle, since, at their dates of independence, the territories of Dahomey and Niger were separated by the course of that river pursuant both to the legal titles in force and to the effectivités; on the other hand and in any event, such a boundary is said to have been confirmed by Niger’s formal recognition, at the time of the negotiations between the two Parties in 1973 and 1974 with a view to the construction of the Dyodyonga dam, that the Mekrou did indeed constitute the boundary between their respective territories. In this connection, Benin
relies on a Note Verbale from Niger dated 29 August 1973 and on the
minutes of a meeting held on 8 February 1974 between the experts of the
two Parties (see paragraph 39 above), the River Mekrou being indicated
in both of these documents as constituting the boundary between the two
States.

According to Niger, the boundary in the sector in question follows a
line comprising two parts: the first is a straight line joining the point of
confluence of the River Mekrou with the River Niger to the point where
the Paris meridian meets the Atakora mountain range: the second part
joins this latter point to the point where the former boundary between
the cercles of Say and Fada meets the former boundary between the
cercles of Fada and Atakora. That is claimed to result from the combined
effect of the regulatory instruments which, during the colonial period,
defined the boundary between Dahomey and Niger in the sector in ques-
tion, namely the decree of 2 March 1907 incorporating the cercles of
Fada-N’Gourma and Say into the colony of Haut-Sénégal et Niger (to
which Niger succeeded) and the decrees of 12 August 1909 and 23 April
1913 (see paragraph 39 above) modifying the boundary of the latter
colony with Dahomey. As regards the documents of 1973 and 1974 relied
on by Benin, Niger contends that, even assuming that they can be
regarded as creating a legal obligation, such obligation is vitiated by a
manifest error which would deprive it of any validity according to the
rules of customary law concerning defects in international agreements, as
codified in Article 48, paragraph 1, of the Vienna Convention on the Law
of Treaties.

Sketch-map No. 5, on page 144 below, shows the claims of the Parties
in respect of the boundary in the sector of the River Mekrou.

* * *

127. The Chamber will first ascertain, by application of the principle
of uti possidetis juris, what the course of the intercolonial boundary was
at the critical dates of independence in August 1960. Only then is it
required, if necessary, to consider the documents of 1973 and 1974 relied
on by Benin in order to determine whether they could validly have pro-
duced legal effects capable of affecting the course of the international
boundary as previously defined, that is to say the boundary resulting
from the uti possidetis of 1960.

* * *

128. To determine the course of the intercolonial boundary at the criti-
cal date it is necessary to examine first the legal titles relied on by the
Parties, with any effectivités being considered only on a confirmatory
or subsidiary basis, in accordance with the rules recalled above (see para-
graphs 47 and 77).
Nonetheless, the boundary separating those cercles of Say from Dahomey, was not moved in 1919: nothing in the terms of the decree of 1 March 1919, nor any incompatibility between two successive texts, leads to the conclusion that the boundary clearly and precisely defined in 1907 was modified in 1919. That does not suffice however to refute the Chamber's argument with respect to the course of the boundary in the sector concerned.

The Chamber is bound to note, first of all, that the 1907 decree, neither in its citations nor in any operative definition of the intercolonial boundary, as the earlier decree had done. In reality, the 1919 decree defines the territory of Say, and is, as it were, by this means that it indirectly defines the boundaries between Haute-Volta and Dahomey, the two sections of the circle of Say, which are effective from 1 March 1919, a delimitation not affected by the decree of 1 March 1919 — that is to say, the delimitation of the circle of Say that would then be determined in the disputed sector. However, as recalled above (see paragraphs 30, 47, and 71), the delimitation of the cercles of Fada N'Gourma and Say, until then part of Dahomey, into the neighboring colony, Article 1 of the decree of 2 March 1907, the object of which was to change the course of the boundary between the colony of Haut-Sénégal et Niger and that of Dahomey by incorporating the cercles of Fada N'Gourma and Say, until that date part of Dahomey, into the neighboring colony. Article 1 of that decree provides that the new intercolonial boundary, Article 1 of the 1907 decree, referred to by the Chamber in the course of its arguments, in particular the cercles of Fada N'Gourma and Say, until that time, pursuant to Article 5 of the decree of 18 October 1904, reorganizing the cercles of Say and Fada N'Gourma, expresses the power of the Governor-General to modify the boundary in the future with his normal competence in that regard.

The Chamber notes that the 28 December 1926 decree, defining the intercolonial boundary between the cercles of Say and Haute-Volta, was adopted by the Governor-General following, and as a consequence of, the decree of 2 March 1907. That instrument, in the second paragraph of Article 1, defined the boundary between the cercles of Say and Haute-Volta in the following terms:

"In the South-West by a line starting approximately from the confluence of the River Sirba at the level of the Say parallel, and terminating at the confluence with the Niger."
Thus, by this arrêté of 31 August 1927, the Governor-General clearly fixed the boundary of the cercle of Say, and hence the intercolonial boundary, on the Mekrou.

136. It is true, and Niger has been at pains to point this out, that the arrêté of 31 August 1927 was followed on 15 October by an erratum amending its text retroactively by removing the reference to the course of the Mekrou as the south-eastern boundary between the cercles of Say and Haute-Volta. Article 1 of the arrêté, as amended pursuant to the erratum of 15 October, confines itself to stating that the boundary between Niger and Haute-Volta "follows...the course of the Tapoa... until it meets the former boundary between the cercles of Fada and Say, which it follows as far as its intersection with the course of the Mekrou". However, the erratum would seem in effect to have been motivated not by the fact that the Governor-General did not mean to fix the south-eastern boundary of the cercle of Say along the Mekrou, but rather by a wish not to define the boundary between Dahomey and Niger in an arrêté whose purpose, as was clear from its title, was to fix the boundary between the colonies — at that date the colonies of Dahomey and Niger — which were to be considered as the colonies of the colonial administration, constituted at that date the intercolonial boundary between the two countries.

137. Furthermore, the Chamber must take account of the instruments concerning the creation of game reserves and national parks in the area known as "The Niger W". Both the Governor-General's arrêté of 16 April 1926 and the arrêtés of 30 September 1937 of the Governor of Dahomey and of 13 November of the same year of the Governor of Niger — defining within the territory of each of the two colonies the provisional extent of their nature reserves — use the River Mekrou for purposes of delimitation of the areas in question. If, in the eyes of the administrative authorities competent to promulgate the arrêtés in question, the Mekrou did not represent the intercolonial boundary, it is difficult to see why it should have been chosen as the boundary of those national parks and nature reserves.

138. Finally, the Chamber is bound to note that the cartographic material in the file clearly confirms that, certainly from 1926-1927, the administrative authorities, institutions and charters of the colonial Power, as well as the maps and atlases used by the French courts in this case, fixed the boundaries of the cercles and colonies and, hence, of the colonial administration, according to the Mekrou. Certainly, maps — unless they are annexed to an administrative instrument — do not have the relative force conferred upon them by the AOF Geographical Service (known as the "Blon-del la Rougery map"), to the map entitled "New Boundary of Haute-Volta and Niger (according to the erratum of 5 October 1927 to the arrêté of 31 August 1927)" and to the Dahomey-Togo road map prepared by the AOF Geographical Service in 1938 (see paragraph 42 above).
indicated that boundary, whilst others necessarily implied it, and that this was the state of the law at the dates of independence in August 1960. In these circumstances, it is unnecessary to look for any *effectivités* in order to apply the *uti possidetis* principle, since *effectivités* can only be of interest in a case in order to complete or make good doubtful or absent legal titles, but can never prevail over titles with which they are at variance. The Chamber notes moreover, *ex abundanti*, that the *effectivités* relied on by the Parties in the sector in question are relatively weak.

* * *

142. In the light of the preceding conclusion, the dispute between the Parties regarding the legal effect of Niger's Note Verbale of 29 August 1973 and of the minutes of the meeting of experts of 8 February 1974 becomes moot. It is thus unnecessary to decide whether those documents could have constituted a legally binding obligation for Niger and, if so, whether that obligation could have been vitiated by an error fulfilling the conditions laid down by customary international law.

* * *

143. Lastly, it remains for the Chamber to determine the exact location in the River Mekrou of the boundary between Benin and Niger. In this respect, in its final submissions Benin requested the Chamber to adjudge and declare that, in this sector, the boundary follows “the median line of the River Mekrou”. Niger did not expressly adopt a position on this question, even on an alternative basis; it did, however, contend in its written pleadings that the eastern starting point of the boundary in that sector (corresponding to the western terminal point of the boundary in the River Niger sector) is constituted by the “confluence of the River Niger with the Mekrou”, which it locates at “the intersection of the thalweg of the River Mekrou with the main channel of the River Niger” or at the “point of intersection of the axes of the River Niger and the River Mekrou”.

144. The Chamber would recall that, in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, the Court observed that:

“Treaties or conventions which define boundaries in watercourses nowadays usually refer to the thalweg as the boundary when the watercourse is navigable and to the median line between the two banks when it is not, although it cannot be said that practice has been fully consistent.” (*I.C.J. Reports 1999 (II)*, p. 1062, para. 24.)

In the present case, the Chamber notes that, during a reconnaissance mission carried out in April 1998, the joint technical committee of the Joint Benin-Niger Boundary Delimitation Commission

“plotted the co-ordinates of the point of intersection of the axes of the River Niger and River Mekrou, but was not able to continue its work beyond that point because navigation on the River Mekrou [was] not possible due to the low water level”.

Moreover, the Parties did not provide the Chamber with any documents that would enable the exact course of the thalweg of the Mekrou to be identified. The Chamber notes that in all likelihood there is a negligible difference between the course of the thalweg and the course of the median line of the River Mekrou, but considers that, in view of the circumstances, including the fact that the river is not navigable, a boundary following the median line of the Mekrou would more satisfactorily meet the requirement of legal security inherent in the determination of an international boundary.

145. The Chamber concludes, for the foregoing reasons, that, in the sector of the River Mekrou, the boundary between Benin and Niger is constituted by the median line of that river.

* * *

146. For these reasons,

The Chamber,

(1) By four votes to one,

finds that the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector takes the following course:

— the line of deepest soundings of the main navigable channel of that river, from the intersection of the said line with the median line of the River Mekrou until the point situated at co-ordinates 11° 52' 29" latitude North and 3° 25' 34" longitude East;

— from that point, the line of deepest soundings of the left navigable channel until the point located at co-ordinates 11° 51' 55" latitude North and 3° 27' 41" longitude East, where the boundary deviates from this channel and passes to the left of the island of Kata Goungou, subsequently rejoining the main navigable channel at the point located at co-ordinates 11° 51' 41" latitude North and 3° 28' 53" longitude East;

— from this latter point, the line of deepest soundings of the main navigable channel of the river as far as the boundary of the Parties with Nigeria;

and that the boundary line, proceeding downstream, passes through the points numbered from 1 to 154, the co-ordinates of which are indicated in paragraph 115 of the present Judgment;

In favour: Judge Ranjeva, Vice-President of the Court, President of the Chamber; Judges Kooijmans, Abraham; Judge ad hoc Bedjaoui;

Against: Judge ad hoc Bennouna;
(2) By four votes to one,

_find_ that the islands situated in the River Niger therefore belong to the Republic of Benin or to the Republic of Niger as indicated in paragraph 117 of the present Judgment;

_in favour:_ Judge Ranjeva, Vice-President of the Court, President of the Chamber; Judges Kooijmans, Abraham; Judge ad hoc Bedjaoui;

_against:_ Judge ad hoc Bennouna;

(3) By four votes to one,

_find_ that the boundary between the Republic of Benin and the Republic of Niger on the bridges between Gaya and Malanville follows the course of the boundary in the river;

_in favour:_ Judge Ranjeva, Vice-President of the Court, President of the Chamber; Judges Kooijmans, Abraham; Judge ad hoc Bedjaoui;

_against:_ Judge ad hoc Bennouna;

(4) Unanimously,

_find_ that the boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows the median line of that river, from the intersection of the said line with the line of deepest soundings of the main navigable channel of the River Niger as far as the boundary of the Parties with Burkina Faso.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twelfth day of July, two thousand and five, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Benin and the Government of the Republic of Niger, respectively.

(Signed) Raymond Ranjeva,
President of the Chamber.

(Signed) Philippe Couvreur,
Registrar.

Judge ad hoc Bennouna appends a dissenting opinion to the Judgment of the Chamber.

(Initialled) R.R.

(Initialled) Ph.C.
Armed Activities on the Territory of the Congo (New Application 2002)  
(Democratic Republic of the Congo v. Rwanda), Jurisdiction and  
Admissibility  

Judgment, I.C.J. Reports 2006, pp. 6-54
COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES ACTIVITÉS ARMÉES
SUR LE TERRITOIRE DU CONGO
(NOUVELLE REQUÊTE: 2002)
(RÉPUBLIQUE DÉMOCRATIQUE DU CONGO c. RWANDA)

COMPÉTENCE DE LA COUR
ET RECEVABILITÉ DE LA REQUÊTE

ARRÊT DU 3 FÉVRIER 2006

2006

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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JURISDICTION OF THE COURT
AND ADMISSIBILITY OF THE APPLICATION

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ARRÊT

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(DEMOCRATIC REPUBLIC OF THE CONGO v. RWANDA)

JURISDICTION OF THE COURT
AND ADMISSIBILITY OF THE APPLICATION

Present proceedings confined to the questions of the jurisdiction of the Court and the admissibility of the DRC's Application.

* *

Jurisdiction of the Court — Applicant invoking 11 bases of jurisdiction.

* *

(1) Article 30 of the Convention against Torture of 10 December 1984. Rwanda not party to that Convention — DRC cannot invoke that instrument as a basis of jurisdiction.

(2) Article 9 of the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947. Convention not invoked by the DRC in the final version of its argument — Convention not taken into consideration by the Court in its Judgment.

* *

(3) Forum prorogatum. DRC's contention that Rwanda's agreement to plead amounts to acceptance of the Court's jurisdiction — Express and repeated objection by Rwanda to the Court's jurisdiction at every stage of the proceedings — Whether there has been an unequivocal indication of voluntary and indisputable acceptance of the Court's jurisdiction — Rwanda's attitude cannot be interpreted as consent to the Court's jurisdiction over the merits of the dispute.

(4) Order of 10 July 2002 on the indication of provisional measures. Absence of manifest lack of Court's jurisdiction interpreted by the DRC as acknowledge by the Court of its jurisdiction — Non-removal of DRC's Application from the Court's List — Object of present phase of proceedings is precisely the Court's further examination of the issue of its jurisdiction — Absence of manifest lack of jurisdiction not amounting to acknowledgment by the Court of its jurisdiction.

* *

(5) Article IX of the Genocide Convention of 9 December 1948 — Reservation by Rwanda. Whether Rwanda withdrew its reservation through the adoption of décret-loi No. 014/01 of 15 February 1995 — Question of the validity and effect of the décret-loi in Rwanda's domestic legal order different from that of its effect in the international legal order — Withdrawal by a contracting State of a reservation to a multilateral treaty having effect in relation to other contracting States only when they have received notice thereof — No agreement whereby withdrawal of the reservation could have become operative without notice — No notice by Rwanda of such withdrawal received at international level — Adoption and publication of the décret-loi not entailing, as a matter of international law, Rwanda's withdrawal of its reservation.

DRC's contention that withdrawal of the reservation was corroborated by a statement of 17 March 2005 by Rwanda's Minister of Justice before the United Nations Commission on Human Rights — Claim that this statement constituted a unilateral undertaking having legal effects in regard to withdrawal of the reservation — Capacity of a Minister of Justice to bind the State internationally by statements in respect of matters falling within the Minister's purview cannot be ruled out merely because of the nature of the functions exercised — Examination of the legal effect of the Minister's statement in light of its content and of the circumstances in which it was made — Content of the statement not sufficiently precise — Statement cannot be considered as confirmation by Rwanda of a previous decision to withdraw its reservation or as a unilateral commitment having legal effects in regard to such withdrawal — Statement having nature of a declaration of intent, very general in scope — Whether statement could have effect on the Court's jurisdiction, given that it was made almost three years after the institution of proceedings — Procedural defect which the Applicant could easily remedy: should not be penalized by the Court.

DRC's contention that Rwanda's reservation was invalid because it sought to prevent the Court from safeguarding peremptory norms — Erga omnes nature of the rights and obligations enshrined in the Genocide Convention — Characterization of the prohibition of genocide as a peremptory norm of general international law (jus cogens) — The fact that a norm having such character may be at issue in a dispute cannot in itself provide a basis for the Court's jurisdiction to entertain that dispute — Court's jurisdiction always based on consent of the parties.

DRC's contention that Rwanda's reservation was invalid because incompatible with the object and purpose of the Genocide Convention — Effect of the
fact that Article 120 of the Statute of the International Criminal Court permits no reservations to that Statute — Reservations not prohibited by the Genocide Convention — This legal situation not altered by Article 120 of the Statute of the International Criminal Court — Rwanda’s reservation bearing not on substantive obligations under the Genocide Convention but on the Court’s jurisdiction — Reservation not incompatible with the object and purpose of the Genocide Convention.

DRC’s contention that the reservation conflicts with a peremptory norm of general international law — No such norm requiring a State to consent to the Court’s jurisdiction in order to settle a dispute relating to the Genocide Convention — Article IX of the Genocide Convention cannot constitute a basis for the Court’s jurisdiction.


Whether Rwanda’s reservation withdrawn through the adoption of décret-loi No. 014/01 of 15 February 1995 — DRC’s contention that withdrawal of the reservation was corroborated by a statement of 17 March 2005 by Rwanda’s Minister of Justice before the United Nations Commission on Human Rights — Claim that this statement constituted a unilateral undertaking having legal effects in regard to withdrawal of the reservation — Applicability mutatis mutandis to this issue of the Court’s reasoning and findings regarding the DRC’s claim that Rwanda had withdrawn its reservation to the Genocide Convention — Procedures for withdrawal of a reservation to the Convention on Racial Discrimination expressly provided for in Article 20, paragraph 3, thereof — No notification to United Nations Secretary-General by Rwanda of the withdrawal of its reservation — Rwanda having maintained its reservation.

DRC’s contention that Rwanda’s reservation was invalid because incompatible with the object and purpose of the Convention — Under Article 20, paragraph 2, of the Convention, reservations are to be considered incompatible with the Convention’s object and purpose if at least two-thirds of States parties object — Condition of Article 20, paragraph 2, not satisfied in respect of Rwanda’s reservation to Article 22 — Applicability mutatis mutandis of the Court’s reasoning and conclusions in respect of the DRC’s contention that Rwanda’s reservation to the Genocide Convention was invalid — Reservation to the Convention on Racial Discrimination not incompatible with the object and purpose of that Convention.

DRC’s contention that the reservation conflicts with a peremptory norm of general international law — Court’s reference to its reasons for dismissing the DRC’s argument in respect of Rwanda’s reservation to Article IX of the Genocide Convention — Article 22 of the Convention on Racial Discrimination cannot constitute a basis for the Court’s jurisdiction.

(7) Article 29, paragraph 1, of the Convention on Discrimination against Women of 18 December 1979.

DRC’s contention that an objection based on non-compliance with the pre-conditions provided for in Article 29 is an objection to admissibility of the Application — Examination of the conditions determining the extent of acceptance of the Court’s jurisdiction relates to the issue of its jurisdiction and not to the admissibility of the Application — Conclusion applicable mutatis mutandis to all the other compromissory clauses invoked by DRC — Conditions of Article 29 cumulative — Whether preconditions for seisin of the Court satisfied — DRC not having shown that its attempts to negotiate with Rwanda related to settlement of a dispute concerning the interpretation or application of the Convention — DRC having further not shown that it made a proposal to Rwanda for the organization of arbitration proceedings to which the latter failed to respond — Article 29, paragraph 1, of the Convention on Discrimination against Women cannot serve to found the Court’s jurisdiction.

(8) Article 75 of the WHO Constitution of 22 July 1946.

Whether preconditions for seisin of Court satisfied — DRC not having demonstrated the existence of a question or dispute concerning the interpretation or application of the WHO Constitution — DRC having further not proved that it sought to settle the question or dispute by negotiation or that the World Health Assembly could not have settled it — Article 75 of the WHO Constitution cannot serve to found the Court’s jurisdiction.

(9) Article XIV, paragraph 2, of the Unesco Constitution of 16 November 1945.

Whether preconditions for seisin of Court satisfied — DRC’s claim not involving a question or dispute concerning interpretation of the Constitution — DRC having further not shown that it followed the prior procedure for seisin of the Court pursuant to Article XIV of the Unesco Constitution and Article 38 of the Rules of Procedure of the Unesco General Conference — Article XIV, paragraph 2, of the Unesco Constitution cannot serve to found the Court’s jurisdiction.


Whether preconditions for seisin of Court satisfied — Dispute concerning the interpretation or application of the Convention which could not have been settled by negotiation: DRC not having indicated the specific provisions of the Convention which could apply to its claims on the merits — DRC having further not shown that it made a proposal to Rwanda for the organization of arbitration proceedings to which the latter failed to respond — Article 14,
paragraph 1, of the Montreal Convention cannot serve to found the Court's jurisdiction.


Non-retroactivity of the Vienna Convention (Article 4) — Genocide Convention and Convention on Racial Discrimination concluded before the entry into force between the Parties of the Vienna Convention — Rules in Article 66 of the Vienna Convention not declaratory of customary international law — No agreement between the Parties to apply Article 66 between themselves — Article 66 of the Vienna Convention on the Law of Treaties cannot serve to found the Court's jurisdiction.

Admissibility of the DRC's Application.
No jurisdiction to entertain the Application — Court not required to rule on its admissibility.

Distinction between acceptance by States of the Court's jurisdiction and the conformity of their acts with international law — States remaining responsible for acts attributable to them which are contrary to international law.

JUDGMENT

Present: President SHI; Vice-President RANJEVA; Judges KOROMA, VERESHCHETIN, HIGGINS, PARA-A-RANGUREN, KOUMANS, REZIK, AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, SIMMA, TOMKA, ABRAHAM; Judges ad hoc DUGARD, MAVUNGU; Registrar COUVREUR.

In the case concerning armed activities on the territory of the Congo (new Application: 2002),

between

the Democratic Republic of the Congo,
represented by

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

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

and

the Republic of Rwanda,
represented by

Mr. Martin Ngoga, Deputy Prosecutor General of the Republic of Rwanda, as Agent;

H.E. Mr. Joseph Bonesha, Ambassador of the Republic of Rwanda to the Kingdom of Belgium, as Deputy Agent;

Mr. Christopher Greenwood, C.M.G., Q.C., Professor of International Law at the London School of Economics and Political Science, member of the English Bar, as Counsel;

Ms Jessica Wells, member of the English Bar, as Counsel;

Ms Susan Greenwood, as Secretary,

The Court, composed as above, after deliberation, delivers the following Judgment:

1. On 28 May 2002 the Government of the Democratic Republic of the
Congo (hereinafter "the DRC") filed in the Registry of the Court an Application instituting proceedings against the Republic of Rwanda (hereinafter "Rwanda") in respect of a dispute concerning ... integrity of [the latter], as guaranteed by the Charters of the United Nations and the Organization of African Unity).

In order to found the jurisdiction of the Court, the DRC, referring to Article 36, paragraph 1, of the Statute, invoked in its Application: Article 22 of the International Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereinafter the "Genocide Convention"); Article 75 of the Statute of the International Court of Justice; Article 66 of the Vienna Convention on the Law of Treaties of 23 May 1969 (hereinafter the "Vienna Convention"); and Article 2 of the Statute of the International Court of Justice.

The DRC further contended in its Application that Article 66 of the Vienna Convention established the jurisdiction of the Court to settle disputes arising from the violation of peremptory norms (jus cogens) of international law, as those norms were reflected in a number of international instruments, including the Geneva Conventions of 1949 and the Hague Conventions of 1907.

2. On 28 May 2002, immediately after filing its Application, the DRC also submitted a request for the indication of provisional measures pursuant to Article 41, paragraph 1, of the Statute, and Article 73 and 74 of its Rules. By Order of 18 September 2002, the Court, having taken account of the views of the Parties, decided that the written pleadings would be filed within the time-limits prescribed and of an Counter-Memorial by the DRC. The Memorial and Counter-Memorial were filed within the time-limits so prescribed.

7. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.
9. Public hearings were held between 4 and 8 July 2005, at which the Court heard the oral arguments and replies of:

For Rwanda: Mr. Martin Ngoga, Mr. Christopher Greenwood, Ms Jessica Wells.

For the DRC: H.E. Mr. Jacques Masangu-a-Mwanza, Mr. Akele Adau, Mr. Lwamba Katansi, Mr. Ntumba Luaba Lumu, Mr. Mukadi Bonyi.

10. On the instructions of the Court, on 11 July 2005 the Registrar wrote to the Parties asking them to send him copies of a certain number of documents referred to by them at the hearings. Rwanda furnished the Court with copies of those documents under cover of a letter dated 27 July 2005 received in the Registry on 28 July 2005, to which were appended two notes from, respectively, Rwanda’s Minister of Justice and the President of its Chamber of Deputies. The DRC supplied the Court with copies of the requested documents under cover of two letters dated 29 July and 10 August 2005 and received in the Registry on 1 and 12 August respectively.

11. In its Application the DRC made the following requests:

"Accordingly, while reserving the right to supplement and amplify this claim in the course of the proceedings, the Democratic Republic of the Congo requests the Court to:

Adjudge and declare that:

(a) Rwanda has violated and is violating the United Nations Charter (Article 2, paragraphs 3 and 4) by violating the human rights which are the goal pursued by the United Nations through the maintenance of international peace and security, as well as Articles 3 and 4 of the Charter of the Organization of African Unity;

(b) Rwanda has violated the International Bill of Human Rights, as well as the main instruments protecting human rights, including, inter alia, the Convention on the Elimination of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, the Constitution of the WHO, the Constitution of Unesco;

(c) by shooting down a Boeing 727 owned by Congo Airlines on [10] October 1998 in Kindu, thereby causing the death of 40 civilians, Rwanda also violated the United Nations Charter, the Convention on International Civil Aviation of 7 December 1944 signed at Chicago, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970 and the Montreal Conven-

tion for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971;

(d) by killing, massacring, raping, throat-cutting, and crucifying, Rwanda is guilty of genocide against more than 3,500,000 Congolese, including the victims of the recent massacres in the city of Kisangani, and has violated the sacred right to life provided for in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights, the Convention on the Prevention and Punishment of the Crime of Genocide and other relevant international legal instruments.

In consequence, and in accordance with the international legal obligations referred to above, to adjudge and declare that:

(1) all Rwandan armed forces responsible for the aggression shall forthwith quit the territory of the Democratic Republic of the Congo, so as to enable the Congolese people to enjoy in full their rights to peace, to security, to their resources and to development;

(2) Rwanda is under an obligation to procure the immediate, unconditional withdrawal of its armed and other forces from Congolese territory;

(3) the Democratic Republic of the Congo is entitled to compensation from Rwanda for all acts of looting, destruction, massacre, removal of property and persons and other acts of wrongdoing imputable to Rwanda, in respect of which the Democratic Republic of the Congo reserves the right to establish a precise assessment of injury at a later date, in addition to restitution of the property taken.

It also reserves the right in the course of the proceedings to claim other injury suffered by it and its people."

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

On behalf of the Rwandan Government, in the Memorial:

"Accordingly, Rwanda requests the Court to adjudge and declare that:

The Court lacks jurisdiction to entertain the claims brought by the Democratic Republic of the Congo. In addition, the claims brought by the Democratic Republic of the Congo are inadmissible."

On behalf of the Government of the Democratic Republic of the Congo, in the Counter-Memorial:

"For these reasons, may it please the Court,

To find that the objections to jurisdiction raised by Rwanda are unfounded;

To find that the objections to admissibility raised by Rwanda are unfounded;

And, consequently, to find that the Court has jurisdiction to entertain the case on the merits and that the Application of the Democratic Republic of the Congo is admissible as submitted;

To decide to proceed with the case."
13. At the hearings, the following submissions were presented by the Parties:

*On behalf of the Rwandan Government,*
at the hearing of 6 July 2005:

“For the reasons given in our written preliminary objection and at the oral hearings, the Republic of Rwanda requests the Court to adjudge and declare that:

1. it lacks jurisdiction over the claims brought against the Republic of Rwanda by the Democratic Republic of the Congo; and

2. in the alternative, that the claims brought against the Republic of Rwanda by the Democratic Republic of the Congo are inadmissible.”

*On behalf of the Congolese Government,*
at the hearing of 8 July 2005:

“May it please the Court,

1. to find that the objections to jurisdiction and admissibility raised by Rwanda are unfounded;

2. consequently, to find that the Court has jurisdiction to entertain the case on the merits and that the Application of the Democratic Republic of the Congo is admissible as submitted;

3. to decide to proceed with the case on the merits.”

* * *

14. The Court notes first of all that at the present stage of the proceedings it cannot consider any matter relating to the merits of this dispute between the DRC and Rwanda. In accordance with the decision taken in its Order of 18 September 2002 (see paragraph 6 above), the Court is required to address only the questions of whether it is competent to hear the dispute and whether the DRC’s Application is admissible.

* * *

15. In order to found the jurisdiction of the Court in this case, the DRC relies in its Application on a certain number of compromissory clauses in international conventions, namely: Article 22 of the Convention on Racial Discrimination; Article 29, paragraph 1, of the Convention on Discrimination against Women; Article IX of the Genocide Convention; Article 75 of the WHO Constitution; Article XIV, paragraph 2, of the Unesco Constitution and Article 9 of the Convention on Privileges and Immunities; Article 30, paragraph 1, of the Convention against Torture; and Article 14, paragraph 1, of the Montreal Convention. It further contends that Article 66 of the Vienna Convention on the Law of Treaties establishes the jurisdiction of the Court to settle disputes arising from the violation of peremptory norms (*jus cogens*) in the area of human rights, as those norms are reflected in a number of international instruments (see paragraph 1 above).

For its part Rwanda contends that none of these instruments cited by the DRC “or rules of customary international law can found the jurisdiction of the Court in the present case”. In the alternative, Rwanda argues that, even if one or more of the compromissory clauses invoked by the DRC were to be found by the Court to be titles giving it jurisdiction to entertain the Application, the latter would be “nevertheless inadmissible”.

* * *

16. The Court will begin by recalling that, in its Order of 10 July 2002 (*I.C.J. Reports* 2002, p. 242, para. 61), it noted Rwanda’s statement that it “is not, and never has been, party to the 1984 Convention against Torture”, and found that such was indeed the case. In its Memorial on jurisdiction and admissibility (hereinafter “Memorial”) Rwanda maintained its contention that it was not a party to this Convention and that, accordingly, that Convention manifestly could not provide a basis for the jurisdiction of the Court in these proceedings. The DRC did not raise any argument in response to this contention by Rwanda, either in its Counter-Memorial on jurisdiction and admissibility (hereinafter “Counter-Memorial”) or at the hearings. The Court accordingly concludes that the DRC cannot rely upon the Convention against Torture as a basis of jurisdiction in this case.

17. The Court further recalls that in the above-mentioned Order (*ibid.*, p. 243, para. 62) it also stated that, in the final form of its argument, the DRC did not appear to found the jurisdiction of the Court on the Convention on Privileges and Immunities, and that the Court was accordingly not required to take that instrument into consideration in the context of the request for the indication of provisional measures. Since the DRC has also not sought to invoke that instrument in the present phase of the proceedings, the Court will not take it into consideration in the present Judgment.

* * *

18. The Court notes moreover that, both in its Counter-Memorial and at the hearings, the DRC began by seeking to found the jurisdiction of the Court on two additional bases: respectively, the doctrine of *forum prorogatum* and the Court’s Order of 10 July 2002 on the DRC’s request for the indication of provisional measures. The Court will first examine these two bases of jurisdiction relied on by the DRC before then proceeding to consider the compromissory clauses which the DRC invokes.
In accordance with its established jurisprudence, the Court will examine the issue of the admissibility of the DRC’s Application only should it find that it has jurisdiction to entertain that Application.

* * *

19. The DRC argues, first, that the willingness of a State to submit a dispute to the Court may be apparent not only from an express declaration but also from any conclusive act, in particular from the conduct of the respondent State subsequent to its being notified. In particular it contends that “the Respondent’s agreement to plead implies that it accepts the Court’s jurisdiction”. In this regard the DRC cites the fact that Rwanda has “complied with all the procedural steps prescribed or requested by the Court”, that it has “fully and properly participated in the different procedures in this case, without having itself represented or failing to appear”, and that “it has not refused to appear before the Court or to make submissions”.

20. For its part Rwanda contends that the DRC’s argument is without foundation, since in this case there has been no “voluntary and indisputable acceptance of the Court’s jurisdiction”. Rwanda points out that it has, on the contrary, consistently asserted that the Court has no jurisdiction and that it has appeared solely for the purpose of challenging that jurisdiction. Rwanda further observes that “if [the DRC’s] argument is right, then there is no way that a State can challenge the jurisdiction of [the] Court without conceding that the Court has jurisdiction”, and that therefore “[t]he only safe course . . . is for a respondent State not to appear before the Court at all”. It contends that this argument by the DRC flies in the face of the Statute of the Court, its Rules and its jurisprudence.

* * *

21. The Court recalls its jurisprudence, as well as that of its predecessor, the Permanent Court of International Justice, regarding the forms which the parties’ expression of their consent to its jurisdiction may take. According to that jurisprudence, neither the Statute nor the Rules require that this consent should be expressed in any particular form, and “there is nothing to prevent the acceptance of jurisdiction . . . from being effected by two separate and successive acts, instead of jointly and beforehand by a special agreement” (Corfu Channel (United Kingdom v. Albania), Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948, p. 27; see also Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15, p. 23). The attitude of the respondent State must, however, be capable of being regarded as “an unequivocal indication” of the desire of that State to accept the Court’s jurisdiction in a “voluntary and indisputable” manner

22. In the present case the Court will confine itself to noting that Rwanda has expressly and repeatedly objected to its jurisdiction at every stage of the proceedings (see Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002, pp. 234, 238). Rwanda’s attitude therefore cannot be regarded as “an unequivocal indication” of its desire to accept the jurisdiction of the Court in a “voluntary and indisputable” manner. The fact, as the DRC has pointed out, that Rwanda has “fully and properly participated in the different procedures in this case, without having itself represented or failing to appear”, and that “it has not refused to appear before the Court or to make submissions”, cannot be interpreted as consent to the Court’s jurisdiction over the merits, inasmuch as the very purpose of this participation was to challenge that jurisdiction (Anglo-Iranian Oil Co. (United Kingdom v. Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952, pp. 113-114).

* * *

23. To found the jurisdiction of the Court in this case, the DRC also relies on one of the Court’s findings in its Order of 10 July 2002, whereby it stated that, “in the absence of a manifest lack of jurisdiction, the Court cannot grant Rwanda’s request that the case be removed from the List”. In the DRC’s view, this finding of an “absence of a manifest lack of jurisdiction” could be interpreted as an acknowledgment by the Court that it has jurisdiction. Thus the DRC has expressed its belief that, “in rejecting Rwanda’s request for the removal from the List of the application on the merits, the Court could only have intended that crimes such as those committed by the Respondent must not remain unpunished”.

24. On this point, for its part Rwanda recalls that in this same Order the Court clearly stated that the findings reached by it at that stage in the proceedings in no way prejudged the question of its jurisdiction to deal with the merits of the case. Rwanda observes in this regard that a finding by the Court in an Order of this kind that there is no manifest lack of jurisdiction, coupled, moreover, with a finding that there is no prima facie basis for jurisdiction, cannot afford any support to the argument of a State seeking to establish the Court’s jurisdiction. Rwanda points out that “[t]he Court does not possess jurisdiction simply because there is an
absence of a manifest lack of jurisdiction; it possesses jurisdiction only if there is a positive presence of jurisdiction”.


The fact that in its Order of 10 July 2002 the Court did not conclude that it manifestly lacked jurisdiction cannot therefore amount to an acknowledgment that it has jurisdiction. On the contrary, from the outset the Court had serious doubts regarding its jurisdiction to entertain the DRC’s Application, for in that same Order it justified its refusal to indicate provisional measures by the lack of prima facie jurisdiction. In declining Rwanda’s request to remove the case from the List, the Court simply reserved the right fully to examine further the issue of its jurisdic-

26. Having concluded that the two additional bases of jurisdiction invoked by the DRC cannot be accepted, the Court must now consider the compromissory clauses referred to in the Application, with the exception of those contained in the Convention against Torture and the Convention on Privileges and Immunities (see paragraphs 16 and 17 above).

27. The Court will examine in the following order the compromissory clauses invoked by the DRC: Article IX of the Genocide Convention; Article 22 of the Convention on Racial Discrimination; Article 29, paragraph 1, of the Convention on Discrimination against Women; Article 75 of the WHO Constitution; Article XIV, paragraph 2, of the Unesco Constitution; Article 14, paragraph 1, of the Montreal Convention; Article 66 of the Vienna Convention on the Law of Treaties.

28. In its Application the DRC contends that Rwanda has violated Articles II and III of the Genocide Convention. Article II of that Convention prohibits:

   “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
   
   (a) Killing members of the group;
   (b) Causing serious bodily or mental harm to members of the group;
   (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   (d) Imposing measures intended to prevent births within the group;
   (e) Forcibly transferring children of the group to another group.”

Article III provides:

   “The following acts shall be punishable:
   
   (a) Genocide;
   (b) Conspiracy to commit genocide;
   (c) Direct and public incitement to commit genocide;
   (d) Attempt to commit genocide;
   (e) Complicity in genocide.”

In order to found the jurisdiction of the Court to entertain its claim, the DRC invokes Article IX of the Convention, which reads as follows:
“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

29. Rwanda argued in its Memorial that the jurisdiction of the Court under the Genocide Convention was excluded by its reservation to the entirety of Article IX. In its Counter-Memorial the DRC disputed the validity of that reservation. At the hearings it further contended that Rwanda had withdrawn its reservation; to that end it cited a Rwandan décret-loi of 15 February 1995 and a statement of 17 March 2005 by Rwanda’s Minister of Justice at the Sixty-first Session of the United Nations Commission on Human Rights. Rwanda has denied the DRC’s contention that it has withdrawn its reservation to Article IX of the Genocide Convention. The Court will therefore begin by examining whether Rwanda has in fact withdrawn its reservation. Only if it finds that Rwanda has maintained its reservation will the Court need to address the DRC’s arguments concerning the reservation’s validity.

* * *

30. As just stated, the DRC claimed at the hearings that Rwanda had withdrawn its reservation to Article IX of the Genocide Convention. Thus the DRC argued that, in Article 15 of the Protocol of Agreement on Miscellaneous Issues and Final Provisions signed between the Government of Rwanda and the Rwandan Patriotic Front at Arusha on 3 August 1993, Rwanda undertook to withdraw all reservations made by it when it became party to treaty instruments “on human rights”. The DRC contends that Rwanda implemented that undertaking by adopting décret-loi No. 014/01 of 15 February 1995, whereby the Broad-Based Transitional Government allegedly withdrew all reservations made by Rwanda at the accession, approval and ratification of international instruments relating to human rights.

31. In this regard the DRC observed that the Arusha Peace Agreement concluded on 4 August 1993 between the Government of Rwanda and the Rwandan Patriotic Front, of which the above-mentioned Protocol forms an integral part, was not a mere internal political agreement, as Rwanda contended, but a text which under Rwandan law, namely Article 1 of the Fundamental Law of the Rwandese Republic adopted by the Transitional National Assembly on 26 May 1995, formed part of the “constitutional ensemble”. The DRC argued, furthermore, that Rwanda’s contention that décret-loi No. 014/01 had fallen into desuetude or lapsed because it was not confirmed by the new parliament was unfounded. According to the DRC, “[i]f the Rwandan parliament did not confirm the Order in Council, without, however leaving any trace of this volte-face, that is neither more nor less than . . . a ‘wrongful act’; and it was a universal principle of law that ‘no one may profit by his own wrongdoing’”. The DRC maintained moreover that the décret-loi was not subject to the procedure of approval by parliament, since, under Congolese and Rwandan law, both of which had been influenced by Belgian law, a décret-loi was a measure enacted by the executive branch in cases of emergency when parliament is in recess; if these conditions were satisfied, parliamentary approval was not necessary, save in the case of a constitutional décret-loi, which was not the case for décret-loi No. 014/01.

32. The DRC further argued that the fact that withdrawal of the reservation was not notified to the United Nations Secretary-General could not be relied on against third States, since Rwanda expressed its intention to withdraw the reservation in a legislative text, namely the décret-loi of 15 February 1995. According to the DRC, the failure to notify that décret-loi to the United Nations Secretary-General has no relevance in this case, since it is not the act of notification to an international organization which gives validity “to a domestic administrative enactment, but rather its promulgation and/or publication by the competent national authority”.

33. Finally, the DRC contended that Rwanda’s withdrawal of its reservation to Article IX of the Genocide Convention was corroborated by a statement by the latter’s Minister of Justice on 17 March 2005 at the Sixty-first Session of the United Nations Commission on Human Rights. The Minister there announced that “the few [human rights] instruments not yet ratified” at that date by Rwanda, as well as reservations “not yet withdrawn”, would “shortly be ratified . . . [or] withdrawn”. In the DRC’s view, this statement meant that there were reservations, including that made by Rwanda in respect of Article IX of the Genocide Convention, which had already been withdrawn by that State in 1995. The DRC added that the statement by the Rwandan Minister of Justice “gave material form at international level to the . . . decision taken by the Rwandan Government [in February 1995] to withdraw all reservations to human rights treaties”, and that this statement, “made within one of the most representative forums of the international community, the United Nations Commission on Human Rights, . . . [did] indeed bind the Rwandan State”.

34. For its part, Rwanda contended at the hearings that it had never taken any measure to withdraw its reservation to Article IX of the Genocide Convention.

As regards the Arusha Peace Agreement of 4 August 1993, Rwanda considered that this was not an international instrument but a series of agreements concluded between the Government of Rwanda and the Rwandan Patriotic Front, that is to say an internal agreement which did not create any obligation on Rwanda’s part to another State or to the international community as a whole.

Rwanda further observed that Article 15 of the Protocol of Agreement
on Miscellaneous Issues and Final Provisions of 3 August 1993 made no express reference to the Genocide Convention and did not specify whether the reservations referred to comprised both those concerning procedural provisions, including provisions relating to the jurisdiction of the Court, and those concerning substantive provisions.

35. In regard to décret-loi No. 014/01 of 15 February 1995, Rwanda pointed out that this text, like Article 15 of the Protocol of Agreement, was drawn in very general terms, since it “authorized the withdrawal of all reservations entered into by Rwanda to all international agreements”. Rwanda further stated that, “under the constitutional instruments then in force in Rwanda, a decree of this kind had to be approved by Parliament — at that time called the Transitional National Assembly — at its session immediately following the adoption of the decree”. Rwanda points out that, at the session immediately following the adoption of décret-loi No. 014/01, which took place between 12 April and 11 July 1995, the Order was not approved, and therefore lapsed.

36. Rwanda further observed that it had never notified withdrawal of its reservation to Article IX of the Genocide Convention to the United Nations Secretary-General, or taken any measure to withdraw it, and that only such formal action on the international plane could constitute the definitive position of a State in regard to its treaty obligations.

37. Regarding the statement made on 17 March 2005 at the Sixty-first Session of the United Nations Commission on Human Rights by its Minister of Justice, Rwanda contends that in her speech the Minister simply restated Rwanda’s intention to lift “unspecified” reservations to “unspecified” human rights treaties “at some time in the future”. Rwanda notes that the statement was inconsistent with the argument of the DRC that it had already withdrawn those same reservations in 1995. It further observes that the statement could not bind it or oblige it to withdraw “a particular reservation”, since it was made by a Minister of Justice and not by a Foreign Minister or Head of Government, “with automatic authority to bind the State in matters of international relations”. Finally, Rwanda asserts that a statement given in a forum such as the United Nations Commission on Human Rights, almost three years after the institution of the present proceedings before the Court, cannot have any effect on the issue of jurisdiction, which “has to be judged by reference to the situation as it existed at the date the Application was filed”.

38. The Court notes that both the DRC and Rwanda are parties to the Genocide Convention, the DRC having acceded on 31 May 1962 and Rwanda on 16 April 1975. The Court observes, however, that Rwanda’s instrument of accession to the Convention, as deposited with the Secretary-General of the United Nations, contains a reservation worded as follows: “The Rwandese Republic does not consider itself as bound by Article IX of the Convention.”

39. The Court also notes that the Parties take opposing views, first on whether, in adopting décret-loi No. 014/01 of 15 February 1995, Rwanda effectively withdrew its reservation to Article IX of the Genocide Convention and, secondly, on the question of the legal effect of the statement by Rwanda’s Minister of Justice at the Sixty-first Session of the United Nations Commission on Human Rights. The Court will accordingly address in turn each of these two questions.

40. In regard to the first question, the Court notes that an instrument entitled “Décret-loi No. 014/01 of 15 February 1995 withdrawing all reservations entered by the Rwandese Republic at the accession, approval and ratification of international instruments” was adopted on 15 February 1995 by the President of the Rwandese Republic following an Opinion of the Council of Ministers and was countersigned by the Prime Minister and Minister of Justice of the Rwandese Republic. Article 1 of this décret-loi, which contains three articles, provides that “[a]ll reservations entered by the Rwandese Republic in respect of the accession, approval and ratification of international instruments are withdrawn”; Article 2 states that “[a]ll prior provisions contrary to the present décret-loi are abrogated”; while Article 3 provides that “[t]his décret-loi shall enter into force on the day of its publication in the Official Journal of the Rwandese Republic”. The décret-loi was published in the Official Journal of the Rwandese Republic, on a date of which the Court has not been apprised, and entered into force.

41. The validity of this décret-loi under Rwandan domestic law has been denied by Rwanda. However, in the Court’s view the question of the validity and effect of the décret-loi within the domestic legal order of Rwanda is different from that of its effect within the international legal order. Thus a clear distinction has to be drawn between a decision to withdraw a reservation to a treaty taken within a State’s domestic legal order and the implementation of that decision by the competent national authorities within the international legal order, which can be effected only by notification of withdrawal of the reservation to the other States parties to the treaty in question. It is a rule of international law, deriving from the principle of legal security and well established in practice, that, subject to agreement to the contrary, the withdrawal by a contracting State of a reservation to a multilateral treaty takes effect in relation to the other contracting States only when they have received notification thereof. This rule is expressed in Article 22, paragraph 3 (a), of the Vienna Convention on the Law of Treaties, which provides as follows: “3. Unless the Treaty otherwise provides, or it is otherwise agreed: (a) the withdrawal of a reservation becomes operative in relation to another Contracting State only when
Rwanda is one of the countries that has ratified the greatest number of international human rights instruments. In 2004 alone, our Government ratified ten of them, including those concerning the rights of women, the prevention and repression of corruption, the prohibition of weapons of mass destruction, and the environment. The few instruments not yet ratified will shortly be withdrawn.

42. The Court observes that in this case it has not been shown that Rwanda notified the withdrawal of its reservations to the other States parties to the “international instruments” referred to in Article 1 of décret-loi No. 014/01 of 15 February 1995, and in particular to the States parties to the Genocide Convention. Nor has it been shown that there was any agreement whereby such withdrawal could have become operative without notification. In the Court’s view, the adoption of that décret-loi and its publication in the Official Journal of the Rwandese Republic cannot in themselves amount to such notification. In order to have effect in international law, the withdrawal would have had to be the subject of a notice received at the international level.

43. The Court notes that, as regards the Genocide Convention, the Government of Rwanda has taken no action at international level on the basis of the décret-loi. It observes that this Convention is a multilateral treaty whose depositary is the Secretary-General of the United Nations, and it considers that it was normally through the United Nations that States parties to the Convention submitted their reservations and any withdrawal. In this case, there is no evidence that Rwanda notified the Secretary-General of the withdrawal of its reservation to Article IX of the Genocide Convention.

44. In light of the foregoing, the Court finds that the adoption and publication of décret-loi No. 014/01 of 15 February 1995 by Rwanda did not, as a matter of international law, effect a withdrawal by that State of its reservation to Article IX of the Genocide Convention.

45. The Court will now turn to the second question, that of the legal effect of the statement made on 17 March 2005 by Ms Mukabagwiza, Minister of Justice of Rwanda, at the Sixtieth Session of the United Nations Commission on Human Rights: “Rwanda is one of the countries that has ratified the greatest number of international human rights instruments. In 2004 alone, our Government ratified ten of them, including those concerning the rights of women, the prevention and repression of corruption, the prohibition of weapons of mass destruction, and the environment. The few instruments not yet ratified will shortly be withdrawn.”

46. The Court will begin by examining Rwanda’s argument that it cannot be legally bound by the statement in question, since such a statement made by a Minister of Justice cannot be considered as a State’s submission of a written reservation or objection to a reservation. In its view, the Court observes that, in accordance with the consistent jurisprudence of the Court (see Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, pp. 269-270, paras. 49-51; Application of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 622, para. 44; Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002, pp. 21-22, para. 53; see also Legal Status of Eastern Greenland (Denmark v. Norway), Judgment, 1933, P.C.I.J. Series A/B No. 53, p. 71), it is well-established that, in the matter of the conclusion of treaties, the rule of customary law finds expression in Article 7, paragraph 2, of the Vienna Convention on the Law of Treaties, which provides that the following are considered as representing their State for the purpose of performing all acts relating to the conclusion of treaties:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of treaties.
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49. In order to determine the legal effect of that statement, the Court must, however, examine its actual content as well as the circumstances in which it was made. The Court observes that the United Nations Commission on Human Rights had made its statement before the United Nations Commission on Human Rights.

50. On the first point, the Court recalls that a statement of this kind can create legal obligations only if it is made in clear and specific terms (see *Nuclear Tests (Australia v. France)*, I.C.J. Reports 1974, pp. 269-270, para. 51; *Nuclear Tests (New Zealand v. France)*, I.C.J. Report 1985, pp. 472-473, para. 46).

51. The Court further observes that the statement made by the Minister of Justice of Rwanda was not made in sufficiently specific terms in relation to the particular question of the withdrawal of reservations. Given the general nature of its wording, the statement of reservations cannot therefore be considered as confirmation by Rwanda of a previous decision to withdraw its reservation to Article IX of the Genocide Convention, or as any sort of unilateral commitment on its part having legal effects in regard to such withdrawal at least, it can be interpreted as a declaration of intent.

52. In this connection, the Court notes that it was in the context of a presentation of general policy on the protection of human rights that the Minister of Justice of Rwanda made her statement before the United Nations Commission on Human Rights. The Court further notes that the questions relating to the protection of human rights which were the subject of that statement were not at issue in the case. In this context, the statement made by the Minister of Justice of Rwanda was not made in the context of a presentation of general policy on the protection of human rights, or as any sort of unilateral commitment on the part of Rwanda having legal effects in regard to such withdrawal at least, it can be interpreted as a declaration of intent.

53. This conclusion is corroborated by an examination of the circumstances in which the statement was made. Thus the Court notes that it was made after the general discussion on the protection of human rights, and in the context of a presentation of general policy on the protection of human rights. In this respect, the Court observes that the statement was made in the context of a presentation of general policy on the protection of human rights, and in the context of a presentation of general policy on the protection of human rights. In this respect, the Court observes that the statement was made in the context of a presentation of general policy on the protection of human rights, and in the context of a presentation of general policy on the protection of human rights.

54. Finally, the Court will address Rwanda's argument that the statement made by the Minister of Justice of Rwanda was not made in the context of a presentation of general policy on the protection of human rights.

55. In order to show that Rwanda's reservation is invalid, the DRC maintains that the Genocide Convention has the force of general law in accordance with the principle of *jus cogens*. The DRC further states at the hearings that, in the present case, if the Rwandan Minister's statement had somehow entailed the withdrawal of Rwanda's reservation to Article IX of the Genocide Convention in the course of the proceedings, the DRC could have made it on its own initiative by filing a new Application. This argument by Rwanda must accordingly be rejected.

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**55.** Having concluded that the DRC's contention that Rwanda has withdrawn its reservation to Article IX of the Genocide Convention is unfounded, the Court must now turn to the DRC's argument that this reservation is invalid.

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in keeping with the spirit of Article 53 of the Vienna Convention", Rwanda's reservation to Article IX of the Genocide Convention is null and void, because it seeks to "prevent the . . . Court from fulfilling its noble mission of safeguarding peremptory norms". Hence the fact that the DRC had not objected to that reservation was of no consequence in the present proceedings.

57. The DRC also contends that Rwanda's reservation is incompatible with the object and purpose of the Convention, since

"its effect is to exclude Rwanda from any mechanism for the monitoring and prosecution of genocide, whereas the object and purpose of the Convention are precisely the elimination of impunity for this serious violation of international law".

58. The DRC further argues that Rwanda's reservation is irrelevant in the light of the evolution of the international law relating to genocide since 1948, which testifies to a "will" in the international community "to see full effectiveness given to the . . . Convention" and which is reflected in Article 120 of the Statute of the International Criminal Court, which prohibits reservations, and in the recognition of the *jus cogens* nature of the prohibition of genocide established by recent doctrine and jurisprudence.

59. The DRC argues finally that, even if the Court were to reject its argument based on the peremptory character of the norms contained in the Genocide Convention, it cannot permit Rwanda to behave in a contradictory fashion, that is to say, to call on the United Nations Security Council to set up an international criminal tribunal to try the authors of the genocide committed against the Rwandan people, while at the same time refusing to allow those guilty of genocide to be tried when they are Rwandan nationals or the victims of the genocide are not Rwandans.

60. With respect to its reservation to Article IX of the Genocide Convention, Rwanda first observes that, although, as the DRC contends, the norms codified in the substantive provisions of the Genocide Convention have the status of *jus cogens* and create rights and obligations *erga omnes*, that does not in itself suffice to "confer jurisdiction on the Court with respect to a dispute concerning the application of those rights and obligations", as, according to Rwanda, the Court had held in the case concerning *East Timor* and in its Order of 10 July 2002 in the present case.

61. Secondly, Rwanda argues that its reservation to Article IX is not incompatible with the object and purpose of the Genocide Convention, inasmuch as the reservation relates not "to the substantive obligations of the parties to the Convention but to a procedural provision". It claims in this connection that 14 other States maintain similar reservations, and that the majority of the 133 States parties to the Convention have raised no objection to those reservations; the DRC itself did not object to Rwanda's reservation prior to the hearings of June 2002. Rwanda further observes that, at the provisional measures stage in the cases concerning *Legality of Use of Force*, the Court, in light of the reservations to Article IX of the Genocide Convention by Spain and the United States — which are in similar terms to Rwanda's reservation — decided to remove the cases concerning those two States from its List, on the ground of its manifest lack of jurisdiction; it necessarily followed that the Court considered that there was no room for doubt as to the validity and effect of those reservations. The fact that the Court, in its Order of 10 July 2002, did not find that there was a manifest lack of jurisdiction did not in any way support the DRC's argument, inasmuch as this conclusion was addressed to the totality of the DRC's alleged bases of jurisdiction; it could be explained only by reference to the other treaties invoked by the DRC, and not to the Genocide Convention.

62. Rwanda observes thirdly that the fact that Article 120 of the Statute of the International Criminal Court — to which Rwanda is not a party and which it has not even signed — prohibits reservations has no bearing whatever on this issue. Thus, according to Rwanda, the fact that the States which drew up the Statute of the International Criminal Court "chose to prohibit all reservations to that treaty in no way affects the right of States to make reservations to other treaties which, like the Genocide Convention, do not contain such a prohibition".

63. Rwanda contends fourthly that its request to the United Nations Security Council to establish an international criminal tribunal to try individuals accused of participation in the genocide perpetrated on Rwandan territory in 1994 is "an entirely separate matter from the jurisdiction of [the] Court to hear disputes between States". There can be no question, according to Rwanda, of "an otherwise valid reservation to Article IX being rendered 'inoperative', because the reserving State supported the creation by the Security Council of a criminal tribunal with jurisdiction over individuals".

64. The Court will begin by reaffirming that "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" and that a consequence of that conception is "the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)' (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23). It follows that "the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*" (Application of the Convention on the Prevention and Punishment of the
The Court observes, however, as it has already had occasion to emphasize, that “the erga omnes character of a norm and the rule of consent to jurisdiction are two different things” (East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 102, para. 29), and that the mere fact that rights and obligations erga omnes may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute.

The same applies to the relationship between peremptory norms of general international law (jus cogens) and the establishment of the Court’s jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court’s Statute that jurisdiction is always based on the consent of the parties.

65. As it recalled in its Order of 10 July 2002, the Court has jurisdiction in respect of States only to the extent that they have consented thereto (Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002, p. 241, para. 57). When a compromissory clause in a treaty provides for the Court’s jurisdiction, that jurisdiction exists only in respect of the parties to the treaty who are bound by that clause and within the limits set out therein (ibid., p. 245, para. 71).

66. The Court notes, however, that it has already found that reservations are not prohibited under the Genocide Convention (Advisory Opinion in the case concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951, pp. 22 et seq.). This legal situation is not altered by the fact that the Statute of the International Criminal Court, in its Article 120, does not permit reservations to that Statute, including provisions relating to the jurisdiction of the International Criminal Court on the crime of genocide. Thus, in the view of the Court, a reservation under the Genocide Convention would be permissible to the extent that such reservation is not incompatible with the object and purpose of the Convention.

67. Rwanda’s reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.

68. In fact, the Court has already had occasion in the past to give effect to such reservations to Article IX of the Convention (see Legality of Use of Force (Yugoslavia v. Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II), p. 772, paras. 32-33; Legality of Use of Force (Yugoslavia v. United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II), p. 924, paras. 24-25). The Court further notes that, as a matter of the law of treaties, when Rwanda acceded to the Genocide Convention and made the reservation in question, the DRC made no objection to it.

69. In so far as the DRC contended further that Rwanda’s reservation is in conflict with a peremptory norm of general international law, it suffices for the Court to note that no such norm presently exists requiring a State to consent to the jurisdiction of the Court in order to settle a dispute relating to the Genocide Convention. Rwanda’s reservation cannot therefore, on such grounds, be regarded as lacking legal effect.

70. The Court concludes from the foregoing that, having regard to Rwanda’s reservation to Article IX of the Genocide Convention, this Article cannot constitute the basis for the jurisdiction of the Court in the present case.

71. The DRC also seeks to found the jurisdiction of the Court on Article 22 of the Convention on Racial Discrimination, which states:

“Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.”

In its Application the DRC alleges that Rwanda has committed numerous acts of racial discrimination within the meaning of Article 1 of that Convention, which provides inter alia:

“the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

72. Rwanda claims that the jurisdiction of the Court under the Convention on Racial Discrimination is precluded by its reservation to the entire Article 22. It contends that, as the Court observed in its Order of 10 July 2002, the said reservation did not attract objections from two-thirds of the States parties and should therefore be regarded as compatible with the object and purpose of the Convention pursuant to
Article 20, paragraph 2, thereof. Rwanda also points out that the DRC itself did not raise any objection to that reservation or to any similar reservations made by other States.

73. For its part, the DRC argues that Rwanda’s reservation to Article 22 of the Convention on Racial Discrimination is unacceptable on the ground of its incompatibility with the object and purpose of the treaty, “because it would amount to granting Rwanda the right to commit acts prohibited by the Convention with complete impunity”. The DRC further contended at the hearings that the prohibition on racial discrimination was a peremptory norm and that, “in keeping with the spirit of Article 53 of the Vienna Convention” on the Law of Treaties, Rwanda’s reservation to Article 22 of the Convention on Racial Discrimination should “be considered as contrary to jure cogens and without effect”. Hence the fact that the DRC had not objected to that reservation was of no consequence in the present proceedings. In addition, the DRC maintained, as it did in respect of the reservation to Article IX of the Genocide Convention (see paragraph 30 above), that the reservation entered by Rwanda to Article 22 of the Convention on Racial Discrimination has “lapsed or fallen into desuetude as a result of the undertaking, enshrined in the Rwandan Fundamental Law, to ‘withdraw all reservations entered by Rwanda when it adhered to . . . international instruments’” relating to human rights.

74. The Court notes that both the DRC and Rwanda are parties to the Convention on Racial Discrimination, the DRC having acceded thereto on 21 April 1976 and Rwanda on 16 April 1975. Rwanda’s instrument of accession to the Convention, as deposited with the United Nations Secretary-General, does however include a reservation reading as follows: “The Rwandese Republic does not consider itself as bound by article 22 of the Convention.”

75. The Court will first address the DRC’s argument that the reservation has “lapsed or fallen into desuetude as a result of the undertaking, enshrined in the Rwandan Fundamental Law, to ‘withdraw all reservations entered by Rwanda when it adhered to . . . international instruments’” relating to human rights. Without prejudice to the applicability mutatis mutandis to Rwanda’s reservation to Article 22 of the Convention on Racial Discrimination of the Court’s reasoning and conclusions in respect of Rwanda’s reservation to Article IX of the Genocide Convention (see paragraphs 64-68 above), the Court observes, moreover, that the DRC itself raised no objection to the reservation when it acceded to the Convention.

76. The Court must therefore now consider the DRC’s argument that the reservation is invalid.

77. The Court notes that the Convention on Racial Discrimination prohibits reservations incompatible with its object and purpose. The Court observes in this connection that, under Article 20, paragraph 2, of the Convention, “[a] reservation shall be considered incompatible . . . if at least two-thirds of the States Parties to [the] Convention object to it”. The Court notes, however, that such has not been the case as regards Rwanda’s reservation in respect of the Court’s jurisdiction. Without prejudice to the applicability mutatis mutandis to Rwanda’s reservation to Article 22 of the Convention on Racial Discrimination of the Court’s reasoning and conclusions in respect of Rwanda’s reservation to Article IX of the Genocide Convention (see paragraphs 64-68 above), the Court is of the view that Rwanda’s reservation to Article 22 cannot therefore be regarded as incompatible with that Convention’s object and purpose. The Court observes, moreover, that the DRC itself raised no objection to the reservation when it acceded to the Convention.

78. In relation to the DRC’s argument that the reservation in question is without legal effect because, on the one hand, the prohibition on racial discrimination is a peremptory norm of general international law and, on the other, such a reservation is in conflict with a peremptory norm, the Court refers to its reasoning when dismissing the DRC’s similar argument in regard to Rwanda’s reservation to Article IX of the Genocide Convention (see paragraphs 64-69 above): the fact that a dispute concerns non-compliance with a peremptory norm of general international law cannot suffice to found the Court’s jurisdiction to entertain such a dispute, and there exists no peremptory norm requiring States to consent to such jurisdiction in order to settle disputes relating to the Convention on Racial Discrimination.

79. The Court concludes from the foregoing that, having regard to Rwanda’s reservation to Article 22 of the Convention on Racial Discrimination, this Article cannot constitute the basis for the jurisdiction of the Court in the present case.

80. The DRC further claims to found the jurisdiction of the Court on Article 29, paragraph 1, of the Convention on Discrimination against Women, which provides:

“Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not
settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.”

The DRC maintains that Rwanda has violated its obligations under Article 1 of the Convention, which reads as follows:

“For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

81. Rwanda contends that the Court cannot assume jurisdiction on the basis of Article 29 of the Convention on Discrimination against Women, on the ground that in the present case the preconditions required by that provision for referral to the Court have not been fulfilled. Those preconditions are cumulative according to Rwanda and are as follows: there must be a dispute between the parties concerning the interpretation or application of the Convention; it must have proved impossible to settle that dispute by negotiation; one of the parties must have requested that the dispute be submitted to arbitration, but the parties have been unable to agree on the organization thereof; and, lastly, six months must have elapsed between the request for arbitration and seisin of the Court.

Rwanda further argues that the objections which it has raised in these proceedings bear on the jurisdiction of the Court and not on the admissibility of the Application, as the DRC contends. It states in this connection that the Court’s jurisdiction is based on the consent of the parties and that they are free to attach substantive or procedural conditions to that consent; as those conditions circumscribe the recognition of the Court’s jurisdiction, a contention that they have not been complied with is not an objection as to admissibility but indeed an objection to the jurisdiction of the Court, as, according to Rwanda, the Court made clear in the case concerning the Aerial Incident at Lockerbie.

82. In respect of the first of the four conditions laid down by Article 29, that is to say the existence of a dispute concerning the Convention, Rwanda asserts that “there has been no claim by the Congo, prior to its filing of the Application[,]” and that “[a]t no time did the Congo advance any claim that Rwanda was in breach of the Convention or suggest that there was a dispute regarding the interpretation of any provision of the Convention”. It argues in this connection that the practice of human rights tribunals, cited by the DRC, under which an individual is not required first to identify the precise provision of the treaty relied on, does not relieve the DRC of the duty to specify the nature of the dispute. Rwanda observes that the present proceedings do not involve a claim brought by an individual against a State, but are between two equal States and that in this phase of the case it is no longer just a matter of determining whether the Court has prima facie jurisdiction to indicate provisional measures, but of ascertaining whether the preconditions for the seisin of the Court have been satisfied.

83. In respect of the condition of prior negotiation, Rwanda maintains that “the Congo has at no time even raised the question of this Convention with Rwanda in any of the numerous meetings which have taken place between representatives of the two governments over the last few years”; the series of meetings between the two States referred to by the DRC having involved general negotiations to settle the armed conflict, not a dispute concerning the said Convention. The only attempt to negotiate which would be relevant to satisfying the conditions of Article 29 would be one concerning a specific dispute over the interpretation or application of the Convention on Discrimination against Women. Rwanda points out in particular that the Court, in its Order of 10 July 2002, decided that the DRC had not shown that its attempts to enter into negotiations or undertake arbitration proceedings concerned the application of the Convention. In response to the DRC’s argument that the war between the two Parties rendered negotiations impossible over a specific dispute under the Convention, Rwanda has cited a letter of 14 January 2002 from the Minister of Telecommunications of the DRC to the Secretary-General of the International Telecommunication Union concerning a question of telephone prefixes; in Rwanda’s view, this letter shows that, if the DRC was able in the middle of an armed conflict to raise a technical issue of this kind, it would certainly have been capable of entering into negotiations dealing with a dispute over specific provisions of the Convention.

84. Lastly, concerning the arbitration requirement, Rwanda contends that there has been no attempt by the DRC to take any of the steps required to organize arbitration proceedings, despite the holding of “regular and frequent meetings between representatives of the two countries at all levels as part of the Lusaka peace process”; according to Rwanda, the DRC has not offered any evidence in this connection. Rwanda adds that the lack of diplomatic relations between the Parties at the time is beside the point; it notes moreover that in its 2002 Order the Court considered this argument to be insufficient.

85. For its part, the DRC maintains, first, that “the purported objection to jurisdiction on grounds of failure to satisfy the preconditions” provided for in Article 29 of the Convention in reality constitutes an objection to the admissibility of the Application.
Secondly, the DRC denies that the compromissory clause in question contains four preconditions. According to the DRC, the clause contains only two conditions, namely that the dispute must involve the application or interpretation of the Convention and that it must have proved impossible to organize arbitration proceedings, it being understood that such a failure “will not become apparent until six months have elapsed from the request for arbitration”.

86. Concerning the fulfilment of those conditions, the DRC asserts that international law does not prescribe any set form for the filing of complaints by States; negotiation may be bilateral, but it may also be conducted within the framework of an international organization, as the Court stated in the South West Africa cases in 1962. The DRC points out that it lodged numerous claims against Rwanda in the form of protests made to the authorities of that State through the intermediary of international institutions or organizations and through individual contacts between the respective authorities of the two States. The DRC further asserts that the protests made through international organizations “were brought to the attention of Rwanda by the United Nations bodies” and that, “since the private meetings between the Congolese and Rwandan Presidents took place mainly under the auspices either of other Heads of States or of international institutions, the official summit proceedings relating thereto are in the public domain”. As instances of negotiations conducted within the framework of international organizations, the DRC cites the complaint referred on 24 February 1999 to the African Commission on Human and Peoples’ Rights, a body which, according to the DRC, plays “a veritable role of arbitrator” between African States in respect of violations of human rights guaranteed not only by the African Charter on Human and Peoples’ Rights but also by other international instruments; in the view of the DRC, the Commission could have ruled on violations of conventions such as the Convention on Discrimination against Women if Rwanda had not obstructed the proceedings by various delaying tactics. The DRC also refers to its complaints to the United Nations Security Council following various human rights violations committed by Rwanda and to the adoption by that body of resolutions, including resolutions 1304 of 16 June 2000 and 1417 of 14 June 2002, in which, according to the DRC, the Council “progressed from mere requests to actual demands”. The DRC contends that there were therefore indeed attempts on its part to negotiate, but no headway could ever have been made owing to Rwanda’s bad faith; the DRC further contends that “the impossibility of opening or progressing in negotiations with Rwanda” precluded contemplating “the possibility of moving from negotiations to arbitration”.

87. The Court notes that both the DRC and Rwanda are parties to the Convention on Discrimination against Women, the DRC having ratified it on 17 October 1986 and Rwanda on 2 March 1981. It also notes that Article 29 of this Convention gives the Court jurisdiction in respect of any dispute between States parties concerning its interpretation or application, on condition that: it has not been possible to settle the dispute by negotiation; that, following the failure of negotiations, the dispute has, at the request of one such State, been submitted to arbitration; and that, if the parties have been unable to agree on the organization of the arbitration, a period of six months has elapsed from the date of the request for arbitration.

In the view of the Court, it is apparent from the language of Article 29 of the Convention that these conditions are cumulative. The Court must therefore consider whether the preconditions on its seisin set out in the said Article 29 have been satisfied in this case.

88. The Court will however first address the DRC’s argument that the objection based on non-fulfilment of the preconditions set out in the compromissory clauses, and in particular in Article 29 of the Convention, is an objection to the admissibility of its Application rather than to the jurisdiction of the Court. The Court recalls in this regard that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them (see paragraph 65 above). When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application (see Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, pp. 11-15; Interpretation of the Statute of the Memel Territory, Merits, Judgment, 1932, P.C.I.J., Series AIB, No. 49, pp. 327-328; Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series AIB, No. 77, pp. 78-80; South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, pp. 344-346; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 427-429, paras. 81-83; Border and Trans-border Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, pp. 88-90, paras. 42-48; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 16, paras. 16-19; p. 24, paras. 39-40; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 121-122, paras. 15-19; p. 129, paras. 38-39). It follows that in the present case the conditions for seisin of the Court set out in Article 29 of the Convention on Discrimination against Women must be examined in...
89. The Court will now examine the conditions laid down by Article 29 of the Convention on Discrimination against Women. It will begin by considering whether in this case there exists a dispute of an international nature which could not have been settled by negotiation or arbitration. The DRC has alleged that Rwanda is in breach of the Convention. The Court will examine whether this allegation can be substantiated.

90. The Court recalls that a dispute is an agreement on a point of law or fact, a conflict of legal views or interests (Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11). For its part, the present Court has had occasion to state the following: "In order to establish the existence of a dispute, it must be shown that the claim of one party is positively opposed by the other (South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 38); and further, whether there exists an international dispute is a matter of objective determination (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1949, p. 100, para. 22, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 122, para. 20). In the present case, the Court has found nothing in the file which would enable it to conclude that the DRC made a proposal to Rwanda that arbitration proceedings should be organized, and that the latter failed to respond thereto."

91. The Court notes that in the present case the DRC has alleged that Rwanda is in breach of the Convention. The Court will examine whether this allegation can be substantiated.

92. The Court further notes that the DRC has also failed to prove the existence of a dispute by the application of the Convention to the facts of the case. The Court has found nothing in the file which would enable it to conclude that the DRC made a proposal to Rwanda that arbitration proceedings should be organized, and that the latter failed to respond thereto.

93. It follows from the foregoing that Article 29, paragraph 1, of the Convention on Discrimination against Women cannot serve to found the jurisdiction of the Court in the present case.

94. The DRC further seeks to found the jurisdiction of the Court on Article 75 of the WHO Constitution, which provides: "Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or mediation shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement."

The DRC contends that Rwanda has breached the provisions of Articles 1 and 2 of the Constitution, which respectively concern the Organization's objectives and functions.

95. Rwanda maintains that Article 75 of the WHO Constitution cannot found the Court's jurisdiction in this case. In this regard, it begins by stating that the provisions of Article 29 of the Convention on Discrimination against Women cannot serve to found the jurisdiction of the Court in the present case.

96. The Court notes that the evidence has not satisfied the Court that the DRC has proved the existence of a dispute by the application of the Convention to the facts of the case. The Court has found nothing in the file which would enable it to conclude that the DRC made a proposal to Rwanda that arbitration proceedings should be organized, and that the latter failed to respond thereto.
arguing that the WHO Constitution is inapplicable for two reasons. First, it claims that the DRC has failed to specify which particular obligation laid down by that instrument has allegedly been breached by Rwanda, the only provision to which it ever made reference having been Article 2; that Article does not impose any direct obligation on the Member States themselves, as the Court moreover pointed out in paragraph 82 of its Order of 10 July 2002. Secondly, Rwanda contends that the DRC’s allegations “do not appear to give rise to a dispute concerning the interpretation or application of the Constitution”, as “[i]t is clear from the Application that the Congo considers this dispute to be founded on the alleged acts of aggression of Rwanda”.

96. Rwanda further argues that, in addition to requiring the existence of a dispute concerning the interpretation or application of the Constitution, Article 75 imposes two further preconditions on the seizure of the Court: namely, settlement of the dispute by negotiation must have proved impossible and settlement by the World Health Assembly must also have proved impossible. According to Rwanda, the two requirements of negotiation and recourse to the World Health Assembly are cumulative not alternative, as claimed by the DRC, and they have not been satisfied in the present case. Rwanda adds that, even if the two requirements were not cumulative, the DRC would still be unable to rely on Article 75, because it has not proved that it has satisfied the negotiation requirement. It is not sufficient, in Rwanda’s view, for the DRC to argue that Rwanda’s refusal to participate rendered negotiation impossible; Rwanda considers that the DRC must show “that it . . . attempted, in good faith, to negotiate a solution to this particular dispute”.

97. In reply, the DRC disputes Rwanda’s assertion that the obligations set out in the WHO Constitution are binding only on the Organization itself; in the DRC’s view, it would be difficult “to accept that Member States, including Rwanda, are not under an obligation to contribute to the accomplishment by the World Health Organization of [its] functions” or, at the very least, to refrain from hindering the fulfilment of its objective and those functions, as they are defined in Articles 1 and 2 of the Constitution. The DRC asserts that the principle that Member States must fulfil in good faith the obligations they have assumed is “a general principle the basis of which is to be found in international customary law and which is confirmed by other constituent instruments of international organizations”; it specifically cites the example of Article 2, paragraph 2, of the United Nations Charter. The DRC alleges that Rwanda, in resorting to the spreading of AIDS as an instrument of war and in engaging in large-scale killings on Congolese territory, has not “in good faith carried out the Constitution of the WHO, which aims at fostering the highest possible level of health for all peoples of the world”; the DRC further claims to have made an ample showing that a number of international organizations, both governmental and other, “have published detailed reports on the serious deterioration of the health situation in the DRC as a consequence of the war of aggression” waged by Rwanda.

98. The DRC further contends that Article 75 of the WHO Constitution leaves it open to the parties to choose between negotiations and recourse to the World Health Assembly procedure to settle their disputes; according to the DRC, these two conditions are not cumulative, as is shown by “the use of the word ‘or’”. Members of the World Health Organization are accordingly under no obligation to look first to one and then the other of these modes of settlement before bringing proceedings before the Court. In the present case, the DRC opted for negotiations, but these failed “through the fault of Rwanda”.

99. The Court observes that the DRC has been a party to the WHO Constitution since 24 February 1961 and Rwanda since 7 November 1962 and that both are thus members of that Organization. The Court further notes that Article 75 of the WHO Constitution provides for the Court’s jurisdiction, under the conditions laid down therein, over “any question or dispute concerning the interpretation or application” of that instrument. The Article requires that a question or dispute must specifically concern the interpretation or application of the Constitution. In the opinion of the Court, the DRC has not shown that there was a question concerning the interpretation or application of the WHO Constitution on which itself and Rwanda had opposing views, or that it had a dispute with that State in regard to this matter.

100. The Court further notes that, even if the DRC had demonstrated the existence of a question or dispute falling within the scope of Article 75 of the WHO Constitution, it has in any event not proved that the other preconditions for seizure of the Court established by that provision have been satisfied, namely that it attempted to settle the question or dispute by negotiation with Rwanda or that the World Health Assembly had been unable to settle it.

101. The Court concludes from the foregoing that Article 75 of the WHO Constitution cannot serve to found its jurisdiction in the present case.

* * *

102. The DRC further seeks to found the jurisdiction of the Court on Article XIV, paragraph 2, of the Unesco Constitution, which reads as follows:

“Any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International
In its Application the DRC invokes Article I of the Constitution, which concerns the Organization’s purposes and functions, and maintains that the “jurisdiction” of the Court is not limited to matters of interpretation of the instrument. In its response to the pleadings, the DRC argues that Article XIV of the Unesco Constitution does not confine the Court’s jurisdiction solely to matters of interpretation of the instrument, but extends to “questions concerning the interpretation of the Organization’s Constitution”.

Rwanda argues that the Court is precluded from finding that it has jurisdiction on the basis of Article XIV of the Unesco Constitution. It first points out that “the decisions of the Court are final and binding upon the parties” and that the Court does not have jurisdiction to resolve disputes between States that are not members of the Organization. It further argues that the Court’s jurisdiction is limited to matters of interpretation of the instrument, and that the DRC has failed to establish that the dispute concerns a question of interpretation.

The Court notes that both the DRC and Rwanda are parties to the Unesco Constitution and have been members since 1964 and 1962 respectively. The Court further considers that the existence of a question of interpretation is demonstrated by the fact that the DRC and Rwanda have failed to resolve their dispute through the procedures provided for in the Constitution.

The Court further considers that the DRC’s Application, which seeks to have the Court interpret the provisions of the Constitution, does not provide a sufficient basis for the Court’s jurisdiction.

In conclusion, the Court finds that the DRC has failed to establish the necessary elements of its Application and that the Court does not have jurisdiction over the dispute. The Court, therefore, dismisses the Application and orders the parties to comply with the provisions of the Constitution and the Rules of Procedure.
Article 38 of the Rules of Procedure of the UNESCO General Conference was followed.

The Court concludes from the foregoing, and in particular from Article XIV, paragraph 2, of the UNESCO Constitution, that Article XIV, paragraph 2, of the UNESCO Constitution cannot serve to found the jurisdiction of the Court in the present case.

The DRC further claims to found the jurisdiction of the Court on Article 14, paragraph 1, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, which provides as follows:

"Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to the International Court of Justice, in accordance with its Statute, or to the Permanent Court of Arbitration, if the parties agree to that method of settlement."

In its Application, the DRC made the following submission:

"By shooting down a Boeing 727 owned by Congo Airlines on 10 October 1998, the DRC thereby caused the death of 11 persons, including five French nationals. The incident occurred in the context of the armed conflict that has been taking place in the Congo since 1996. The DRC asserts that the incident is covered by Article 14, paragraph 1, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971, as the DRC is a Contracting State to that Convention."

Rwanda asserts that Article 14, paragraph 1, of the Montreal Convention lays down a series of requirements, each of which must be satisfied before that provision can confer jurisdiction on the Court.

Rwanda maintains that the DRC has failed to establish that any such dispute could not be settled by negotiation and that the DRC has therefore failed to satisfy another essential requirement imposed by Article 14, paragraph 1, of the Montreal Convention.

In response, the DRC contends that the purported objection is without merit and that the Court has jurisdiction over the dispute.

It is therefore unnecessary to consider whether the DRC has established the existence of a dispute between the Parties falling within the scope of the Convention.
tion to jurisdiction” on grounds of failure to satisfy the preconditions laid down in Article 14 of the Montreal Convention in reality constitutes an objection to the admissibility of the Application (see paragraphs 85 and 88 above).

The DRC next asserts that only two preconditions are laid down by that Article, namely: the dispute must concern the application or interpretation of the Convention in question; and it must have proved impossible to organize an arbitration, it being understood that the failure of an attempt to do so “will not become apparent until six months have elapsed from the request for arbitration”.

Finally, the DRC maintains that these two preconditions for the seisin of the Court have been satisfied in the present case.

115. As regards the existence of a dispute within the meaning of Article 14 of the Montreal Convention, the DRC observes that Rwanda itself has acknowledged that the only dispute in respect of which that Convention might furnish a basis for the Court’s jurisdiction is the one relating to the incident of 10 October 1998 involving the Congo Airlines aircraft above Kindu.

116. In respect of the requirement of negotiations, the DRC contends that the Rwandan authorities adopted the “empty chair” policy whenever the DRC offered to discuss an issue such as the application of the Montreal Convention to the incident of 10 October 1998. It cites in particular the Syrte (Libya) Summit, “devoted to the settlement of various disputes between the Parties”, to which Rwanda had been invited but which it did not attend, and the Blantyre (Malawi) Summit in 2002, in which Rwanda did not take part either and where, according to the United Nations Secretary-General, “no substantive issues were discussed” because of Rwanda’s absence. At the hearings, the DRC further stated that a Security Council Group of Experts described itself in its report of 25 January 2005 as “gravely concerned about the lack of co-operation received from Rwanda on civil aviation matters”. The DRC also argued

“that negotiation between two States has been initiated either once the dispute has been the subject of an exchange of views, or indeed where it has been raised in a specific forum to which both States are party (this was the case for the ICAO, the United Nations Security Council, and various multilateral or sub-regional conferences), where the Congo consistently evoked Rwanda’s violations of certain international instruments”.

The DRC further contended that “the impossibility of opening or progressing in negotiations with Rwanda” precluded contemplating “the possibility of moving from negotiations to arbitration”.

117. The Court notes that both the DRC and Rwanda are parties to the Montreal Convention and have been since 6 July 1977 in the case of the DRC and 3 November 1987 in the case of Rwanda, that both are Members of the ICAO, and that the Montreal Convention was already in force between them at the time when the Congo Airlines aircraft was stated to have been destroyed above Kindu, on 10 October 1998, and when the Application was filed, on 28 May 2002. The Court also notes that Article 14, paragraph 1, of the Montreal Convention gives the Court jurisdiction in respect of any dispute between contracting States concerning the interpretation or application of the Convention, on condition that; it has not been possible to settle the dispute by negotiation; that, following the failure of negotiations, the dispute has, at the request of one such State, been submitted to arbitration; and that, if the parties have been unable to agree on the organization of the arbitration, a period of six months has elapsed from the date of the request for arbitration. In order to determine whether it has jurisdiction under this provision, the Court will therefore first have to ascertain whether there is a dispute between the Parties relating to the interpretation or application of the Montreal Convention which could not have been settled by negotiation.

118. The Court observes in this regard that the DRC has not indicated to it which are the specific provisions of the Montreal Convention which could apply to its claims on the merits. In its Application the DRC confined itself to invoking that Convention in connection with the destruction on 10 October 1998, shortly after take-off from Kindu Airport, of a civil aircraft belonging to Congo Airlines. Even if it could be established that the facts cited by the DRC might, if proved, fall within the terms of the Convention and gave rise to a dispute between the Parties concerning its interpretation or application, and even if it could be considered that the discussions within the Council of the ICAO amounted to negotiations, the Court finds that, in any event, the DRC has failed to show that it satisfied the conditions required by Article 14, paragraph 1, of the Montreal Convention concerning recourse to arbitration: in particular, it has not shown that it made a proposal to Rwanda that arbitration proceedings should be organized, and that the latter failed to respond thereto (cf. paragraph 92 above).

119. The Court considers that Article 14, paragraph 1, of the Montreal Convention cannot therefore serve to found its jurisdiction in the present case.

* * *

120. To found the jurisdiction of the Court in the present case, the DRC relies finally on Article 66 of the Vienna Convention on the Law of Treaties, which provides inter alia that “[a]ny one of the parties to a dispute concerning the application or the interpretation of article 53 or 64”, relating to conflicts between treaties and peremptory norms of general
international law, “may, by a written application, submit it to the Inter-
national Court of Justice for a decision unless the parties by common
consent agree to submit the dispute to arbitration”.

121. In its Counter-Memorial the DRC noted that Rwanda’s Mem-
orial invoked inter alia “the alleged irrelevance of the Congo’s reference to
the Vienna Convention on the Law of Treaties”, and the DRC referred the
Court in this regard to the arguments which it had ... is a party, allows the Court to rule on any dispute concerning” the validity of a treaty which is contrary to a norm of
jus cogens”. In this regard the DRC argued that reservations to a treaty form an integral part thereof, and that they must accordingly “avoid either being in direct
contradiction with a norm of jus cogens, or preventing the implementa-
tion of that norm”. According to the DRC, Rwanda’s reservation to
Article IX of the Genocide Convention, as well as to “other similar pro-
visions and compromissory clauses, seeks to prevent the...Court from
fulfilling its noble mission of safeguarding peremptory norms, including
the prohibition of genocide”, and must therefore be regarded as “null
and void”.

122. In reply to Rwanda’s reliance at the hearings on Article 4 of the
Vienna Convention, which provides that the Convention applies only
to treaties, which the DRC explained that Article 66 of the Vienna Convention, to which the DRC referred in this regard, allows the Court to rule on any dispute concerning the invalidity of a treaty which is contrary to a norm of
jus cogens. In this regard the DRC argued that reservations to a treaty must accordingly “avoid either being in direct
contradiction with a norm of jus cogens, or preventing the implementa-
tion of that norm”. In this connection, the DRC cited the Judgments of 27 June 1986 in the case concerning
Military and Paramilitary Activities in and against Nicaragua, where the
Court held that there was an obligation on the United States to respect the four Geneva Conventions “in all circumstances”, but from such an obligation, the Court derived the “moral and humanitarian principles” to which the
Court had referred in its Advisory Opinion on Reservations to
the Geneva Conventions, and it asked the Court to “safeguard [those principles] by finding that it has jurisdiction”.

123. For its part, Rwanda contended in its Memorial that the DRC’s
argument that the norms of jus cogens are capable of conferring jurisdic-
tion on the Court is without foundation, since that norm is always
dependent on the consent of the parties, even when the norm that a State
is accused of violating is a jus cogens norm. Rwanda added that the same

124. At the hearings, and in response to the DRC’s argument that
Rwanda’s reservations to Article IX of the Genocide Convention, and to
Article 66 of the Vienna Convention, were void because they contravened with a specific kind of dispute regarding the interpretation of
the Convention’s temporal law to which the Court “can rule on that question...as a part of
its task of determining whether the Genocide Convention affords a basis
of jurisdiction”.

125. The Court recalls that Article 4 of the Vienna Convention on the
Law of Treaties provides for the non-retroactivity of that Convention in
the following terms:

“Without prejudice to the application of any rules set forth in
the Memorandum of Judgment.”
the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."

In this connection, the Court notes first that the Genocide Convention was adopted on 9 December 1948, the DRC and Rwanda having acceded to it on 31 May 1962 and 16 April 1975 respectively (see paragraph 38 above); and that the Convention on Racial Discrimination was adopted on 21 December 1965, the DRC and Rwanda having acceded on 21 April 1976 and 16 April 1975 respectively (see paragraph 74 above). The Court notes secondly that the Vienna Convention on the Law of Treaties entered into force between the DRC and Rwanda only on 3 February 1980, pursuant to Article 84, paragraph 2, thereof. The Conventions on Genocide and Racial Discrimination were concluded before the latter date. Thus in the present case the rules contained in the Vienna Convention are not applicable, save in so far as they are declaratory of customary international law. The Court considers that the rules contained in Article 66 of the Vienna Convention are not of this character. Nor have the two Parties otherwise agreed to apply Article 66 between themselves.

Finally, the Court deems it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties (see paragraph 64 above).

126. The Court concludes from all of the foregoing considerations that it cannot accept any of the bases of jurisdiction put forward by the DRC in the present case. Since it has no jurisdiction to entertain the Application, the Court is not required to rule on its admissibility.

127. While the Court has come to the conclusion that it cannot accept any of the grounds put forward by the DRC to establish its jurisdiction in the present case, and cannot therefore entertain the latter’s Application, it stresses that it has reached this conclusion solely in the context of the preliminary question of whether it has jurisdiction in this case — the issue to be determined at this stage of the proceedings (see paragraph 14 above). The Court is precluded by its Statute from taking any position on the merits of the claims made by the DRC. However, as the Court has stated on numerous previous occasions, there is a fundamental distinction between the question of the acceptance by States of the Court’s jurisdic-

diction and the conformity of their acts with international law. Whether or not States have accepted the jurisdiction of the Court, they are required to fulfil their obligations under the United Nations Charter and the other rules of international law, including international humanitarian and human rights law, and they remain responsible for acts attributable to them which are contrary to international law.

* * *

128. For these reasons,

The Court,

By fifteen votes to two,

Finds that it has no jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 28 May 2002.

In favour: President Shi; Vice-President Ranjeva; Judges Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; Judge ad hoc Dugard;

Against: Judge Koroma; Judge ad hoc Mavungu.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this third day of February, two thousand and six, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Democratic Republic of the Congo and the Government of the Republic of Rwanda, respectively.

(Signed) Shi Jiuyong,

President.

(Signed) Philippe COUVREUR,

Registrar.

Judge Koroma appends a dissenting opinion to the Judgment of the Court; Judges Higgins, Kooijmans, Elaraby, Owada and Simma append a joint separate opinion to the Judgment of the Court; Judge Kooijmans appends a declaration to the Judgment of the Court; Judge Al-Khasawneh appends a separate opinion to the Judgment of the Court; Judge Elaraby appends a declaration to the Judgment of the Court;
Judge *ad hoc* DUGARD appends a separate opinion to the Judgment of the Court; Judge *ad hoc* MAVUNGU appends a dissenting opinion to the Judgment of the Court.

_(Initialled) J.Y.S._

_(Initialled) Ph.C._
Maritime delimitation in the Indian Ocean (Somalia v. Kenya)

Application instituting proceedings, 28 August 2014
APPLICATION INSTITUTING PROCEEDINGS

To the Registrar,
International Court of Justice

The undersigned, being duly authorized by the Government of the Federal Republic of Somalia (“Somalia”), states as follows:

1. In accordance with Article 36, paragraphs 1 and 2, and Article 40 of the Statute of the Court, as well as Article 38 of the Rules, I have the honour to submit this Application instituting proceedings in the name of Somalia against the Republic of Kenya (“Kenya”).

2. This case concerns the establishment of the single maritime boundary between Somalia and Kenya in the Indian Ocean delimiting the territorial sea, exclusive economic zone (“EEZ”) and continental shelf, including the continental shelf beyond 200 nautical miles (“M’”).

3. The law applicable to this dispute is the 1982 United Nations Convention on the Law of the Sea (“UNCLOS” or the “Convention”), which Somalia and Kenya ratified in July and March 1989, respectively, and customary international law.

I. The Jurisdiction of the Court

4. Somalia submitted a declaration recognizing as compulsory ipso facto, on the basis of reciprocity, the jurisdiction of the Court on 11 April 1963. Kenya did the same on 19 April 1965. No condition or reservation to either declaration applies. The Court therefore has jurisdiction over this dispute pursuant to Article 36, paragraph 2, of its Statute.

5. The jurisdiction of the Court under Article 36, paragraph 2, of its Statute is underscored by Article 282 of UNCLOS, which provides:
If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part [XV of UNCLOS], unless the parties to the dispute agree otherwise.

II. Background

6. Somalia and Kenya share a land boundary in East Africa that meets the Indian Ocean at a point located at approximately 1°39'43" S - 41°33'34" E. The coasts of the Parties in this area face generally south-southeast.

7. In anticipation of its July 1989 ratification of UNCLOS, the President of Somalia issued Law No. 5 dated 26 January 1989 approving the Somali Maritime Law of 1988. Among other things, the 1988 Somali Maritime Law provided that the breadth of the territorial sea would be 12 M, claimed a 200 M EEZ and stated that the continental shelf of Somalia extends throughout the natural prolongation of its land territory to the outer edge of the continental margin. Law No. 5 further repealed any prior laws inconsistent with the Somali Maritime Law of 1988.

8. On 9 February 1989, Somalia further enacted Law No. 11 adopting UNCLOS and incorporating the Convention’s provisions into internal law. The same date, Presidential Decree No. 14 was promulgated, entering Law No. 11 into effect.

9. On 30 June 2014, in conformity with UNCLOS, the President of Somalia issued a Proclamation claiming an EEZ extending to 200 M measured from normal baselines. The same day, Somalia deposited with the United Nations Division of Ocean Affairs and the Law of the Sea a list of coordinates defining the outer limit of its EEZ.

10. Acting in accordance with Article 4 of Annex II of the Convention, Somalia submitted preliminary information indicative of the outer limits of the continental shelf beyond 200 M to the Commission on the Limits of the Continental Shelf (“CLCS”) on 14 April 2009.

11. Somalia made its full Submission concerning the outer limits of its continental shelf beyond 200 M to the CLCS on 21 July 2014. As detailed therein, the outer limits of the continental shelf of Somalia extend well beyond 200 M across the entirety of Somalia’s Indian Ocean coast. In some places, the outer limit extends fully to 350 M. Somalia made its Submission without prejudice to the question of maritime delimitation with neighbouring States, including Kenya.

12. For its part, Kenya claims a 12 M territorial sea pursuant to its 1972 Territorial Waters Act, as revised. Under its 1989 Maritime Zones Act and a Presidential Proclamation dated 9 June 2005, Kenya also claims a 200 M EEZ.

13. Kenya measures the breadth of its territorial sea and EEZ from a series of straight baselines covering the full length of its coast. These baselines were first declared in the 1972 Territorial Waters Act and have been amended from time to time. Somalia considers that Kenya’s straight baselines do not conform to the requirements of UNCLOS Article 7.

14. Kenya does not, to the knowledge of the Government of Somalia, currently have any legislation in force with respect to its continental shelf. Nevertheless, on 6 May 2009, Kenya made a Submission on the continental shelf beyond 200 M to the CLCS. At paragraph 1-4 of the Executive Summary to its Submission, Kenya states: “The Government of Kenya intends to proclaim the outer limits of the continental shelf following the making of recommendations by the Commission pursuant to paragraph 8 of Article 76. The proclaimed outer limits will be established on the basis of those recommendations.”

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1 As supplemented by the decisions of the Eleventh (SPLOS/72) and Eighteenth (SPLOS/183) Meetings of the States Parties to the Convention regarding the ten-year period established by Article 4 of Annex II.


15. Kenya's Submission to the CLCS claims that the outer limit of its continental shelf lies fully 350 M from its coast.

III. The Dispute

16. As adjacent coastal States facing generally south-southeast onto the Indian Ocean, the potential maritime entitlements of Somalia and Kenya overlap, including in the area beyond 200 M.

17. The Parties disagree about the location of the maritime boundary in the area where their maritime entitlements overlap. Diplomatic negotiations, in which their respective views have been fully exchanged, have failed to resolve this disagreement.

18. It is Somalia's position that the maritime boundary between the Parties in the territorial sea, EEZ and continental shelf should be determined in accordance with UNCLOS Articles 15, 74 and 83, respectively. In the territorial sea, the boundary should be a median line, as specified by Article 15, since there are no special circumstances that would justify departure from such a line. In the EEZ and continental shelf, the boundary should be established according to the three-step process that the Court has consistently employed in its application of Articles 74 and 83.

19. Kenya's current position on the maritime boundary is that it should be a straight line emanating from the Parties' land boundary terminus, and extending due east along the parallel of latitude on which the land boundary terminus sits, through the full extent of the territorial sea, EEZ and continental shelf, including the continental shelf beyond 200 M. This was not always Kenya's position. In its 1972 Territorial Waters Act, as revised, Kenya claimed as the territorial sea boundary with Somalia "a median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial waters" are measured.

20. Kenya's 1989 Maritime Zones Act reiterated the position stated in the 1972 Territorial Waters Act and provided that the territorial sea boundary shall be defined by means of an equidistant line. Specifically, paragraph 3(4) of the 1989 Maritime Zones Act stated that Kenya's territorial waters "extend to every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial waters of each of respective states is measured."

21. With respect to the maritime boundary in the EEZ, paragraph 4(4) of Kenya's 1989 Maritime Zones Act provided that the "northern boundary of the exclusive economic zone with Somalia shall be delimited by notice in the Gazette by the Minister pursuant to an agreement between Kenya and Somalia on the basis of international law."

22. In 2005, by means of a Presidential Proclamation, Kenya changed tack and claimed a maritime boundary emanating from the land boundary terminus and following a parallel of latitude due east out to the limit of the EEZ. In particular, paragraph (1b) of the 2005 Proclamation provided that "the Exclusive Economic Zone of Kenya shall: ... [i]n respect of its northern territorial waters boundary with Somali Republic be on eastern latitude South of Diu Damasciaca Island being latitude 1°39'34" degrees south."

23. Kenya's 2005 boundary claim is reflected in its 2009 submission to the CLCS. As depicted in the sketch maps included in the Executive Summary thereto, and indicated by the coordinates submitted therewith, Kenya claims an area of continental shelf beyond 200 M defined in the north by the same 1°39'34" parallel of latitude claimed in the 2005 Presidential Proclamation. A copy of the map appearing on page 9 of the Executive Summary to Kenya's Submission is attached hereto as Sketch Map No. 1.

24. The parallel boundary Kenya claims with Somalia departs substantially from a provisional equidistance line in both the territorial sea and the areas beyond 12 M. Whereas a provisional equidistance line broadly reflects the south-southeast facing orientation of the coasts in this area, Kenya's claim line cuts severely across the coastal projection of the southern Somali coast. A comparison of Kenya's current claim line and a provisional equidistance line is reflected in Sketch Map No. 2.
25. Kenya has acted unilaterally on the basis of its purported parallel boundary with Somalia, including in the territorial sea, to exploit both the living and non-living resources on Somalia’s side of a provisionally drawn equidistant line. It has, for example, offered a number of petroleum exploration blocks that extend up to the northern limit of the parallel boundary it claims.

26. Relevant Kenyan petroleum blocks include Blocks L-5, L-21, L-22, L-23, L-24 and L-25 as depicted in Sketch Map No. 3, attached to this Application. According to publicly available information, Kenya awarded Block L-5 to the American company Anadarko Petroleum Corp. in 2010 (though subsequent reports appear to indicate that Anadarko gave up its interest in late 2012 or early 2013). Blocks L-21, L-23 and L-24—which lie entirely (in the case of L-21 and L-23) or predominantly (in the case of L-24) on the Somali side of a provisional equidistance line—were awarded to the Italian company Eni S.p.A. in 2012. Block L-22 was awarded to the French company Total S.A. the same year. (Based on the information currently available to the Government of Somalia, Block L-25 remains under negotiation.)

27. Notwithstanding the difficult state of its domestic affairs, Somalia has repeatedly protested Kenya’s excessive and unjustifiable maritime claims. By means of a diplomatic note addressed to the Secretary General of the United Nations dated 4 February 2014, for example, Somalia objected to the CLCS’s consideration of Kenya’s Submission. In its note, the Government of Somalia stated, inter alia: “Based on the exaggerated nature of Kenya’s claim, its lack of legal foundation, and its severe prejudice to Somalia both within and beyond 200 M, Somalia formally objects to consideration of Kenya’s submission by the Commission on the Limits of the Continental Shelf.”

28. The CLCS took note of Somalia’s objection in the Statement by the Chair reporting on the progress of work at the 34th session of the CLCS (CLCS/83). Acting in accordance with paragraph 5(a) of Annex I to its Rules of Procedure, which precludes the Commission from considering submissions when a maritime dispute exists, the CLCS determined that it “was not in a position to proceed with the establishment of a subcommission [to consider Kenya’s Submission] at that time.”

29. The Parties have met on numerous occasions to exchange views on the settlement of their dispute over the delimitation of their maritime boundary. None of these negotiation sessions have yielded agreement. Indeed, no meaningful progress toward an agreement has been achieved at any of them.

30. The most recent rounds of negotiations were held in Nairobi in March and July 2014. At these meetings, the two States presented very different proposals for the single maritime boundary to divide the maritime areas appertaining to each in the Indian Ocean. Kenya insisted on its claim that the maritime boundary should run due east along the parallel of latitude emanating from the Parties’ land boundary terminus. Somalia, on the other hand, stated its view that the maritime boundary should instead follow an azimuth of approximately N131.5°E from the land boundary terminus out to the outer limit of the two States’ maritime entitlements. In Somalia’s view, the N131.5°E line reflects the dominant geographic realities prevailing between the Parties and constitutes an equitable solution.

31. At the end of the negotiations in July 2014, Kenya proposed to Somalia that the Parties meet one more time in an attempt to resolve their differences over the maritime boundary. It was agreed that these meetings would be held in Mogadishu on 25 and 26 August 2014. Although the Somali delegation was ready to meet on those dates, the Kenyan delegation, without providing either advance notification or subsequent explanation, failed to arrive and, as a consequence, the additional round of meetings that Kenya had requested were not held.

32. The inability of the Parties to narrow the differences between them, and the failure of the Kenyan delegation to attend the final meeting, have made manifest the need for judicial resolution of this dispute.

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4 Commission on the Limits of the Continental Shelf, Thirty-Fourth session, “Progress of work in the Commission on the Limits of the Continental Shelf: Statement by the Chair,” UN Doc. No. CLCS/83 (31 March 2014), para. 18.
IV. The Grounds upon which Somalia Bases Its Claim

33. Somalia bases its claim on UNCLOS; specifically, Articles 15, 74 and 83, governing the delimitation of the territorial sea, continental shelf and EEZ. Also applicable is customary international law, as well as the general international law of maritime delimitation as applied by this Court and other international tribunals. This includes the now-standard three-step methodology pursuant to which courts and tribunals will (1) draw a provisional equidistance line; (2) determine whether there are “relevant circumstances” that render the provisionally-drawn equidistance line inequitable; and (3) test the proposed delimitation line to determine whether it results in any gross disproportion. Other rules of international law not incompatible with UNCLOS may also be pertinent.

34. In Somalia’s view, the coasts relevant to the delimitation between Somalia and Kenya are generally unremarkable. There are therefore no special or relevant circumstances that could justify Kenya’s claim line, or indeed any departure from equidistance in favour of Kenya.

35. To the contrary, the fact that the relevant coast of Somalia is disproportionately longer than that of Kenya renders a strict equidistance solution inequitable to Somalia. Any provisional delimitation line based on equidistance should therefore be adjusted in favour of Somalia.

V. Decision Requested

36. The Court is asked to determine, on the basis of international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including in the continental shelf beyond 200 M.

37. Somalia further requests the Court to determine the precise geographical co-ordinates of the single maritime boundary in the Indian Ocean.

VI. Reservation of Rights

38. Somalia reserves its rights to supplement or amend the present Application.

* * *

The Government of Somalia has appointed the Minister of Foreign Affairs and Investment Promotion, H.E. Dr. Abdirahman Dualeh Beileh as Agent for these proceedings. The Ambassador and Permanent Representative of Somalia to the United Nations, H.E. Dr. Elmi Ahmed Duale, has been appointed as Deputy Agent.

It is requested that all communications be notified to the Agent at the following address:

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