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INTRODUCTION TO INTERNATIONAL LAW PROFESSOR GEORG NOLTE

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INTRODUCTION TO INTERNATIONAL LAW
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REQUIRED READINGS (*printed format*)

Legal instruments and documents

1. Charter of the United Nations, 1945
For text, see *Charter of the United Nations and Statute of the International Court of Justice*
2. Universal Declaration of Human Rights, 1948
For text, see *The Core International Human Rights Treaties*, 2014, United Nations Publication, p. 3
3. Vienna Convention on the Law of Treaties, 1969
For text, see *The Work of the International Law Commission*, 8th ed., vol. II, United Nations Publication, p. 116
4. Articles on the responsibility of States for internationally wrongful acts (United Nations General Assembly resolution 56/83 of 12 December 2001, annex)
For text, see *The Work of the International Law Commission*, 8th ed., vol. II, p. 401

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

Case Law

5. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, pp. 92-112, paras. 172-214
6. *Separate Opinion of Judge Simma, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, pp. 334-350

B. Sources and subjects

Case law

7. *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, *I.C.J. Reports 1969*, pp. 37-45, paras. 60-81
8. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, *I.C.J. Reports 2010*, pp. 423-453, paras 49-123

C. Treaty law

Legal instruments and documents

Reservations

9. Selection of Guidelines from the Guide to Practice on Reservations to Treaties, 2011 (Report of the International Law Commission, Sixty-third session (26 April-3 June and 4 July-12 August 2011), A/66/10, p. 19)

Case law

Interpretation

10. *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, *I.C.J. Reports 2009*, pp. 213-248, paras. 1-84

Invalidity, termination and suspension

11. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, pp. 17-24, 38-69, paras. 15-20, 46-115

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

Case law

State immunity

12. *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, *I.C.J. Reports 2012*, p. 99

Jurisdiction and immunity of State officials

13. *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

RECOMMENDED READINGS (electronic format)

Legal instruments and documents

1. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (United Nations General Assembly resolution 2625 (XXV) of 24 October 1970, annex)

2. Definition of Aggression (United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974)
3. The crime of aggression (Assembly of States Parties to the Rome Statute of the International Criminal Court, Kampala, Resolution RC/Res.6 of 11 June 2010)

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

Legal instruments and documents

4. 2005 World Summit Outcome (United Nations General Assembly resolution 60/1 of 16 September 2005)

Case law

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

B. Sources and subjects

Legal instruments and documents

6. *Situation in Palestine*, Office of the Prosecutor, International Criminal Court, 3 April 2012
7. Status of Palestine in the United Nations (United Nations General Assembly resolution 67/19 of 29 November 2012)

Case law

8. *Dissenting Opinion of Judge Koroma, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, pp. 467-477
9. *Separate Opinion of Judge Yusuf, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, pp. 618-626

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

The effect of Security Council resolutions

10. *Nada v. Switzerland*, No. 10593/08, European Court of Human Rights, 12 September 2012

Jurisdiction and immunity of State officials

11. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3*
12. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*
13. *Separate Opinion of Judge Abraham, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*

International Court of Justice

**Military and Paramilitary Activities in and against Nicaragua
(Nicaragua v. United States of America)
Merits, Judgment**

I.C.J. Reports 1986, pp. 92-112, paras. 172-214

“supports the Nicaraguan democratic resistance in its efforts to peacefully resolve the Nicaraguan conflict and to achieve the fulfillment of the Government of Nicaragua’s solemn commitments to the Nicaraguan people, the United States, and the Organization of American States”.

From the transcripts of speeches and press conferences supplied to the Court by Nicaragua, it is clear that the resolution of Congress expresses a view shared by the President of the United States, who is constitutionally responsible for the foreign policy of the United States.

171. The question whether the alleged violations by the Nicaraguan Government of the 1979 Resolution of the Organization of American States Meeting of Consultation, listed in paragraph 169, are relied on by the United States Government as legal justifications of its conduct towards Nicaragua, or merely as political arguments, will be examined later in the present Judgment. It may however be observed that the resolution clearly links United States support for the *contras* to the breaches of what the United States regards as the “solemn commitments” of the Government of Nicaragua.

* * * * *

172. The Court has now to turn its attention to the question of the law applicable to the present dispute. In formulating its view on the significance of the United States multilateral treaty reservation, the Court has reached the conclusion that it must refrain from applying the multilateral treaties invoked by Nicaragua in support of its claims, without prejudice either to other treaties or to the other sources of law enumerated in Article 38 of the Statute. The first stage in its determination of the law actually to be applied to this dispute is to ascertain the consequences of the exclusion of the applicability of the multilateral treaties for the definition of the content of the customary international law which remains applicable.

173. According to the United States, these consequences are extremely wide-ranging. The United States has argued that :

“Just as Nicaragua’s claims allegedly based on ‘customary and general international law’ cannot be determined without recourse to the United Nations Charter as the principal source of that law, they also cannot be determined without reference to the ‘particular international law’ established by multilateral conventions in force among the parties.”

The United States contends that the only general and customary international law on which Nicaragua can base its claims is that of the Charter : in particular, the Court could not, it is said, consider the lawfulness of an alleged use of armed force without referring to the “principal source of the

relevant international law”, namely, Article 2, paragraph 4, of the United Nations Charter. In brief, in a more general sense “the provisions of the United Nations Charter relevant here subsume and supervise related principles of customary and general international law”. The United States concludes that “since the multilateral treaty reservation bars adjudication of claims based on those treaties, it bars all of Nicaragua’s claims”. Thus the effect of the reservation in question is not, it is said, merely to prevent the Court from deciding upon Nicaragua’s claims by applying the multilateral treaties in question ; it further prevents it from applying in its decision any rule of customary international law the content of which is also the subject of a provision in those multilateral treaties.

174. In its Judgment of 26 November 1984, the Court has already commented briefly on this line of argument. Contrary to the views advanced by the United States, it affirmed that it

“cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.” (*I.C.J. Reports 1984*, p. 424, para. 73.)

Now that the Court has reached the stage of a decision on the merits, it must develop and refine upon these initial remarks. The Court would observe that, according to the United States argument, it should refrain from applying the rules of customary international law because they have been “subsumed” and “supervened” by those of international treaty law, and especially those of the United Nations Charter. Thus the United States apparently takes the view that the existence of principles in the United Nations Charter precludes the possibility that similar rules might exist independently in customary international law, either because existing customary rules had been incorporated into the Charter, or because the Charter influenced the later adoption of customary rules with a corresponding content.

175. The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in

the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective.

176. As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" (in the French text the "droit naturel") of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content. This could also be demonstrated for other subjects, in particular for the principle of non-intervention.

177. But as observed above (paragraph 175), even if the customary norm and the treaty norm were to have exactly the same content, this

would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the *North Sea Continental Shelf* cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to "crystallize", or because it had influenced its subsequent adoption. The Court found that this identity of content in treaty law and in customary international law did not exist in the case of the rule invoked, which appeared in one article of the treaty, but did not suggest that such identity was debarred as a matter of principle: on the contrary, it considered it to be clear that certain other articles of the treaty in question "were . . . regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law" (*I.C.J. Reports 1969*, p. 39, para. 63). More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that the customary international law has no further existence of its own.

178. There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence. This is so from the standpoint of their applicability. In a legal dispute affecting two States, one of them may argue that the applicability of a treaty rule to its own conduct depends on the other State's conduct in respect of the application of other rules, on other subjects, also included in the same treaty. For example, if a State exercises its right to terminate or suspend the operation of a treaty on the ground of the violation by the other party of a "provision essential to the accomplishment of the object or purpose of the treaty" (in the words of Art. 60, para. 3 (b), of the Vienna Convention on the Law of Treaties), it is exempted, *vis-à-vis* the other State, from a rule of treaty-law because of the breach by that other State of a different rule of treaty-law. But if the two rules in question also exist as rules of customary international law, the failure of the one State to apply the one rule does not justify the other State in declining to apply the other rule. Rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application. A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule. Thus, if that rule parallels a rule of customary international law, two rules of the same content are subject to separate treatment as regards the organs competent to verify their implementation, depending on whether they are

customary rules or treaty rules. The present dispute illustrates this point.

179. It will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content. Consequently, in ascertaining the content of the customary international law applicable to the present dispute, the Court must satisfy itself that the Parties are bound by the customary rules in question; but the Court is in no way bound to uphold these rules only in so far as they differ from the treaty rules which it is prevented by the United States reservation from applying in the present dispute.

180. The United States however presented a further argument, during the proceedings devoted to the question of jurisdiction and admissibility, in support of its contention that the multilateral treaty reservation debars the Court from considering the Nicaraguan claims based on customary international law. The United States observed that the multilateral treaties in question contain legal standards specifically agreed between the Parties to govern their mutual rights and obligations, and that the conduct of the Parties will continue to be governed by these treaties, irrespective of what the Court may decide on the customary law issue, because of the principle of *pacta sunt servanda*. Accordingly, in the contention of the United States, the Court cannot properly adjudicate the mutual rights and obligations of the two States when reference to their treaty rights and obligations is barred; the Court would be adjudicating those rights and obligations by standards other than those to which the Parties have agreed to conduct themselves in their actual international relations.

181. The question raised by this argument is whether the provisions of the multilateral treaties in question, particularly the United Nations Charter, diverge from the relevant rules of customary international law to such an extent that a judgment of the Court as to the rights and obligations of the parties under customary law, disregarding the content of the multilateral treaties binding on the parties, would be a wholly academic exercise, and not "susceptible of any compliance or execution whatever" (*Northern Cameroons, I.C.J. Reports 1963*, p. 37). The Court does not consider that this is the case. As already noted, on the question of the use of force, the United States itself argues for a complete identity of the relevant rules of customary international law with the provisions of the Charter. The Court has not accepted this extreme contention, having found that on a number of points the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content (paragraph 174 above). However, so far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter,

to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. The differences which may exist between the specific content of each are not, in the Court's view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate, or a judgment not susceptible of compliance or execution.

182. The Court concludes that it should exercise the jurisdiction conferred upon it by the United States declaration of acceptance under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law notwithstanding the exclusion from its jurisdiction of disputes "arising under" the United Nations and Organization of American States Charters.

* * *

183. In view of this conclusion, the Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States; as the Court recently observed,

"It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them." (*Continental Shelf (Libyan Arab Jamahiriya/ Malta), I.C.J. Reports 1985*, pp. 29-30, para. 27.)

In this respect the Court must not lose sight of the Charter of the United Nations and that of the Organization of American States, notwithstanding the operation of the multilateral treaty reservation. Although the Court has no jurisdiction to determine whether the conduct of the United States constitutes a breach of those conventions, it can and must take them into account in ascertaining the content of the customary international law which the United States is also alleged to have infringed.

184. The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia*,

international custom "as evidence of a general practice accepted as law", the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.

185. In the present dispute, the Court, while exercising its jurisdiction only in respect of the application of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary international law. Furthermore, in the present case, apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. It is therefore in the light of this "subjective element" — the expression used by the Court in its 1969 Judgment in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 44) — that the Court has to appraise the relevant practice.

186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

* *

187. The Court must therefore determine, first, the substance of the customary rules relating to the use of force in international relations, applicable to the dispute submitted to it. The United States has argued that, on this crucial question of the lawfulness of the use of force in inter-State relations, the rules of general and customary international law, and those of the United Nations Charter, are in fact identical. In its view this identity is so complete that, as explained above (paragraph 173), it constitutes an argument to prevent the Court from applying this customary law, because it is indistinguishable from the multilateral treaty law which it may not apply. In its Counter-Memorial on jurisdiction and

admissibility the United States asserts that "Article 2 (4) of the Charter is customary and general international law". It quotes with approval an observation by the International Law Commission to the effect that

"the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force" (*ILC Yearbook*, 1966, Vol. II, p. 247).

The United States points out that Nicaragua has endorsed this view, since one of its counsel asserted that "indeed it is generally considered by publicists that Article 2, paragraph 4, of the United Nations Charter is in this respect an embodiment of existing general principles of international law". And the United States concludes:

"In sum, the provisions of Article 2 (4) with respect to the lawfulness of the use of force are 'modern customary law' (International Law Commission, *loc. cit.*) and the 'embodiment of general principles of international law' (counsel for Nicaragua, Hearing of 25 April 1984, morning, *loc. cit.*). There is no other 'customary and general international law' on which Nicaragua can rest its claims."

"It is, in short, inconceivable that this Court could consider the lawfulness of an alleged use of armed force without referring to the principal source of the relevant international law — Article 2 (4) of the United Nations Charter."

As for Nicaragua, the only noteworthy shade of difference in its view lies in Nicaragua's belief that

"in certain cases the rule of customary law will not necessarily be identical in content and mode of application to the conventional rule".

188. The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced

from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

189. As regards the United States in particular, the weight of an expression of *opinio juris* can similarly be attached to its support of the resolution of the Sixth International Conference of American States condemning aggression (18 February 1928) and ratification of the Montevideo Convention on Rights and Duties of States (26 December 1933), Article 11 of which imposes the obligation not to recognize territorial acquisitions or special advantages which have been obtained by force. Also significant is United States acceptance of the principle of the prohibition of the use of force which is contained in the declaration on principles governing the mutual relations of States participating in the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), whereby the participating States undertake to "refrain in their mutual relations, as well as in their international relations in general," (emphasis added) from the threat or use of force. Acceptance of a text in these terms confirms the existence of an *opinio juris* of the participating States prohibiting the use of force in international relations.

190. A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *ius cogens*" (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, *ILC Yearbook*, 1966-II, p. 247). Nicaragua in its

Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations "has come to be recognized as *ius cogens*". The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a "universal norm", a "universal international law", a "universally recognized principle of international law", and a "principle of *ius cogens*".

191. As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), referred to above). As already observed, the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question. Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force. In particular, according to this resolution :

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

States have a duty to refrain from acts of reprisal involving the use of force.

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of that right to self-determination and freedom and independence.

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

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

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

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

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

“*The General Assembly Resolves* :

1. To reiterate solemnly the need for the member states of the Organization to observe strictly the principles of nonintervention and self-determination of peoples as a means of ensuring peaceful coexistence among them and to refrain from committing any direct or indirect act that might constitute a violation of those principles.
2. To reaffirm the obligation of those states to refrain from applying economic, political, or any other type of measures to coerce another state and obtain from it advantages of any kind.
3. Similarly, to reaffirm the obligation of these states to refrain from organizing, supporting, promoting, financing, instigating, or tolerating subversive, terrorist, or armed activities against another state and from intervening in a civil war in another state or in its internal struggles.”

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

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

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

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

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

195. In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” (*inter alia*) an actual armed attack conducted by regular forces, “or its substantial involvement therein”. This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the

Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.

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

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

197. Furthermore, by Article 3, paragraph 1, of the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro on 2 September 1947, the High-Contracting Parties

"agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations" ;

and under paragraph 2 of that Article,

"On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate

measures which it may individually take in fulfilment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity."

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

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

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

200. At this point, the Court may consider whether in customary international law there is any requirement corresponding to that found in the treaty law of the United Nations Charter, by which the State claiming to use the right of individual or collective self-defence must report to an international body, empowered to determine the conformity with international law of the measures which the State is seeking to justify on that basis. Thus Article 51 of the United Nations Charter requires that measures taken by States in exercise of this right of self-defence must be "immediately reported" to the Security Council. As the Court has observed above (paragraphs 178 and 188), a principle enshrined in a treaty, if reflected in customary international law, may well be so unencumbered with the conditions and modalities surrounding it in the treaty. Whatever influence the Charter may have had on customary international law in these matters, it is clear that in customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed. On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.

201. To justify certain activities involving the use of force, the United States has relied solely on the exercise of its right of collective self-defence. However the Court, having regard particularly to the non-participation of the United States in the merits phase, considers that it should enquire whether customary international law, applicable to the present dispute, may contain other rules which may exclude the unlawfulness of such activities. It does not, however, see any need to reopen the question of the conditions governing the exercise of the right of individual self-defence, which have already been examined in connection with collective self-defence. On the other hand, the Court must enquire whether there is any justification for the activities in question, to be found not in the right of collective self-defence against an armed attack, but in the right to take counter-measures in response to conduct of Nicaragua which is not alleged to constitute an armed attack. It will examine this point in connection with an analysis of the principle of non-intervention in customary international law.

* * *

202. The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference ; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed : "Between independent States, respect for territorial sovereignty is an essential foundation of international relations" (*I.C.J. Reports 1949*, p. 35), and international law requires political integrity also to be respected. Expressions of an *opinio juris* regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find. Of course, statements whereby States avow their recognition of the principles of international law set forth in the United Nations Charter cannot strictly be interpreted as applying to the principle of non-intervention by States in the internal and external affairs of other States, since this principle is not, as such, spelt out in the Charter. But it was never intended that the Charter should embody written confirmation of every essential principle of international law in force. The existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States. A particular instance of this is General Assembly resolution 2625 (XXV), the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States. In the *Corfu Channel* case, when a State claimed a right of intervention in order to secure evidence in the territory of another State for submission to an international tribunal (*I.C.J. Reports 1949*, p. 34), the Court observed that :

"the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here ; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself." (*I.C.J. Reports 1949*, p. 35.)

203. The principle has since been reflected in numerous declarations adopted by international organizations and conferences in which the United States and Nicaragua have participated, e.g., General Assembly resolution 2131 (XX), the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. It is true that the United States, while it voted in favour of General Assembly resolution 2131 (XX), also declared at the time of its adoption in the First Committee that it considered the declaration in that resolution to be "only a statement of political intention and not a formulation of law" (*Official Records of the General Assembly, Twentieth Session, First Committee, A/C.1/SR.1423*, p. 436). However, the essentials of resolution 2131 (XX) are repeated in the Declaration approved by resolution 2625 (XXV), which set out principles which the General Assembly declared to be "basic principles" of international law, and on the adoption of which no analogous statement was made by the United States representative.

204. As regards inter-American relations, attention may be drawn to, for example, the United States reservation to the Montevideo Convention on Rights and Duties of States (26 December 1933), declaring the opposition of the United States Government to "interference with the freedom, the sovereignty or other internal affairs, or processes of the Governments of other nations" ; or the ratification by the United States of the Additional Protocol relative to Non-Intervention (23 December 1936). Among more recent texts, mention may be made of resolutions AG/RES.78 and AG/RES.128 of the General Assembly of the Organization of American States. In a different context, the United States expressly accepted the principles set forth in the declaration, to which reference has already been made, appearing in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), including an elaborate statement of the principle of non-intervention ; while these principles were presented as applying to the mutual relations among the participating States, it can be inferred that the text testifies to the existence, and the acceptance by the United States, of a customary principle which has universal application.

205. Notwithstanding the multiplicity of declarations by States accepting the principle of non-intervention, there remain two questions : first,

what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law? As regards the first problem – that of the content of the principle of non-intervention – the Court will define only those aspects of the principle which appear to be relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. As noted above (paragraph 191), General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting State when the acts committed in another State “involve a threat or use of force”. These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention. In view of the nature of Nicaragua’s complaints against the United States, and those expressed by the United States in regard to Nicaragua’s conduct towards El Salvador, it is primarily acts of intervention of this kind with which the Court is concerned in the present case.

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

207. In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned “amount to a settled practice”, but they must be accompanied

by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is

“evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.” (*I.C.J. Reports 1969*, p. 44, para. 77.)

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

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

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

directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.

* *

210. When dealing with the rule of the prohibition of the use of force, the Court considered the exception to it constituted by the exercise of the right of collective self-defence in the event of armed attack. Similarly, it must now consider the following question : if one State acts towards another State in breach of the principle of non-intervention, may a third State lawfully take such action by way of counter-measures against the first State as would otherwise constitute an intervention in its internal affairs ? A right to act in this way in the case of intervention would be analogous to the right of collective self-defence in the case of an armed attack, but both the act which gives rise to the reaction, and that reaction itself, would in principle be less grave. Since the Court is here dealing with a dispute in which a wrongful use of force is alleged, it has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force. The question is itself undeniably relevant from the theoretical viewpoint. However, since the Court is bound to confine its decision to those points of law which are essential to the settlement of the dispute before it, it is not for the Court here to determine what direct reactions are lawfully open to a State which considers itself the victim of another State's acts of intervention, possibly involving the use of force. Hence it has not to determine whether, in the event of Nicaragua's having committed any such acts against El Salvador, the latter was lawfully entitled to take any particular counter-measure. It might however be suggested that, in such a situation, the United States might have been permitted to intervene in Nicaragua in the exercise of some right analogous to the right of collective self-defence, one which might be resorted to in a case of intervention short of armed attack.

211. The Court has recalled above (paragraphs 193 to 195) that for one State to use force against another, on the ground that that State has committed a wrongful act of force against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack. In the view of the Court, under international law in force today – whether customary international law or that of the United Nations system – States do not have a right of “collective” armed response to acts which do not constitute an “armed attack”. Furthermore, the Court has to recall that the United States itself is relying on the “inherent right of self-defence” (paragraph 126 above), but apparently does not claim that any such right exists

as would, in respect of intervention, operate in the same way as the right of collective self-defence in respect of an armed attack. In the discharge of its duty under Article 53 of the Statute, the Court has nevertheless had to consider whether such a right might exist ; but in doing so it may take note of the absence of any such claim by the United States as an indication of *opinio juris*.

* *

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

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

214. On the other hand, it is true that in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters ; Article 18, paragraph 1 (b), of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones which may exist beyond territorial waters (Art. 58 of the Convention), and secondly, beyond territorial waters and on the high seas (Art. 87), it follows that any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for

maritime navigation. It may therefore be said that, if this right of access to the port is hindered by the laying of mines by another State, what is infringed is the freedom of communications and of maritime commerce. At all events, it is certain that interference with navigation in these areas prejudices both the sovereignty of the coastal State over its internal waters, and the right of free access enjoyed by foreign ships.

* *

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

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

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

"certain general and well recognized principles, namely : elementary considerations of humanity, even more exacting in peace than in war" (*I.C.J. Reports 1949*, p. 22).

* *

216. This last consideration leads the Court on to examination of the international humanitarian law applicable to the dispute. Clearly, use of force may in some circumstances raise questions of such law. Nicaragua has in the present proceedings not expressly invoked the provisions of international humanitarian law as such, even though, as noted above (paragraph 113), it has complained of acts committed on its territory which

would appear to be breaches of the provisions of such law. In the submissions in its Application it has expressly charged

"That the United States, in breach of its obligation under general and customary international law, has killed, wounded and kidnapped and is killing, wounding and kidnapping citizens of Nicaragua." (Application, 26 (f).)

The Court has already indicated (paragraph 115) that the evidence available is insufficient for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua ; accordingly, this submission has to be rejected. The question however remains of the law applicable to the acts of the United States in relation to the activities of the *contras*, in particular the production and dissemination of the manual on psychological operations described in paragraphs 117 to 122 above ; as already explained (paragraph 116), this is a different question from that of the violations of humanitarian law of which the *contras* may or may not have been guilty.

217. The Court observes that Nicaragua, which has invoked a number of multilateral treaties, has refrained from making reference to the four Geneva Conventions of 12 August 1949, to which both Nicaragua and the United States are parties. Thus at the time when the Court was seized of the dispute, that dispute could be considered not to "arise", to use the wording of the United States multilateral treaty reservation, under any of these Geneva Conventions. The Court did not therefore have to consider whether that reservation might be a bar to the Court treating the relevant provisions of these Conventions as applicable. However, if the Court were on its own initiative to find it appropriate to apply these Conventions, as such, for the settlement of the dispute, it could be argued that the Court would be treating it as a dispute "arising" under them ; on that basis, it would have to consider whether any State party to those Conventions would be "affected" by the decision, for the purposes of the United States multilateral treaty reservation.

218. The Court however sees no need to take a position on that matter, since in its view the conduct of the United States may be judged according to the fundamental general principles of humanitarian law ; in its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles. It is significant in this respect that, according to the terms of the Conventions, the denunciation of one of them

"shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the

International Court of Justice

**Separate Opinion of Judge Simma,
Armed Activities on the Territory of the Congo
(Democratic Republic of the Congo v. Uganda)
Judgment**

I.C.J. Reports 2005, pp. 334-350

SEPARATE OPINION OF JUDGE SIMMA

The Court should have called the Ugandan invasion of a large part of the DRC's territory an act of aggression — The Court should not have avoided attacks by non-State actors but rather it should have taken the opportunity to clarify a matter to the confused state of which it has itself contributed — Against the background of current attempts to deprive certain persons of the protection due to them under international humanitarian and human rights law, the Court should have found that the private persons maltreated at Kinshasa Airport in August 1998 did enjoy such protection, and that Uganda would have had standing to raise a claim in their regard irrespective of their nationality.

1. Let me emphasize at the outset that I agree with everything the Court is saying in its Judgment. Rather, what I am concerned about are certain issues on which the Court decided to say nothing. The first two matters in this regard fall within the ambit of the use of force in the context of the claims of the Democratic Republic of the Congo; the third issue concerns the applicability of international humanitarian and human rights law to a certain part of Uganda's second counter-claim.

1. THE USE OF FORCE BY UGANDA AS AN ACT OF AGGRESSION

2. One deliberate omission characterizing the Judgment will strike any politically alert reader: it is the way in which the Court has avoided dealing with the explicit request of the DRC to find that Uganda, by its massive use of force against the Applicant has committed an act of aggression. In this regard I associate myself with the criticism expressed in the separate opinion of Judge Elaraby. After all, Uganda invaded a part of the territory of the DRC of the size of Germany and kept it under its own control, or that of the various Congolese warlords it befriended, for several years, helping itself to the immense natural riches of these tormented regions. In its Judgment the Court cannot but acknowledge of course that by engaging in these "military activities" Uganda "violated the principle of non-use of force in international relations and the principle of non-intervention" (Judgment, para. 345 (1)). The Judgment gets toughest in paragraph 165 of its reasoning where it states that "[t]he unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter". So, why not

call a spade a spade? If there ever was a military activity before the Court that deserves to be qualified as an act of aggression, it is the Ugandan invasion of the DRC. Compared to its scale and impact, the military adventures the Court had to deal with in earlier cases, as in *Corfu Channel*, *Military and Paramilitary Activities in and against Nicaragua* or *Oil Platforms*, border on the insignificant.

3. It is true that the United Nations Security Council, despite adopting a whole series of resolutions on the situation in the Great Lakes region (cf. paragraph 150 of the Judgment) has never gone as far as expressly qualifying the Ugandan invasion as an act of aggression, even though it must appear as a textbook example of the first one of the definitions of "this most serious and dangerous form of the illegal use of force" laid down in General Assembly resolution 3314 (XXIX). The Council will have had its own — political — reasons for refraining from such a determination. But the Court, as the principal *judicial* organ of the United Nations, does not have to follow that course. Its very raison d'être is to arrive at decisions based on law and nothing but the law, keeping the political context of the cases before it in mind, of course, but not desisting from stating what is manifest out of regard for such non-legal considerations. This is the division of labour between the Court and the political organs of the United Nations envisaged by the Charter!

2. SELF-DEFENCE AGAINST LARGE-SCALE ARMED ATTACKS BY NON-STATE ACTORS

4. I am in agreement with the Court's finding in paragraph 146 of the Judgment that the "armed attacks" to which Uganda referred when claiming to have acted in self-defence against the DRC were perpetrated not by the Congolese armed forces but rather by the Allied Democratic Forces (ADF), that is, from a rebel group operating against Uganda from Congolese territory. The Court stated that Uganda could provide no satisfactory proof that would have sustained its allegation that these attacks emanated from armed bands or regulars sent by or on behalf of the DRC. Thus these attacks are not attributable to the DRC.

5. The Court, however, then finds, that for these reasons the legal and factual circumstances for the exercise of a right to self-defence by Uganda against the DRC were not present (Judgment, para. 147). Accordingly, the Court continues, it has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary interna-

tional law provides for a right of self-defence against large-scale attacks by irregular forces (Judgment, para. 147).

6. Thus, the reasoning on which the Judgment relies in its findings on the first submission by the DRC appears to be as follows:

- since the submission of the DRC requests the Court (only) to find that it was Uganda's use of force against the DRC which constituted an act of aggression, and
- since the Court does not consider that the military activities carried out from Congolese territory onto the territory of the Respondent by anti-Ugandan rebel forces are attributable to the DRC,
- and since therefore Uganda's claim that its use of force against the DRC was justified as an exercise of self-defence, cannot be upheld,

it suffices for the Court to find Uganda in breach of the prohibition of the use of force enshrined in the United Nations Charter and in general international law. The Applicant, the Court appears to say, has not asked for anything beyond that. Therefore, it is not necessary for the Court to deal with the legal qualification of either the cross-boundary military activities of the anti-Ugandan groups as such, or of the Ugandan countermeasures against these hostile acts.

7. What thus remains unanswered by the Court is the question whether, even if not attributable to the DRC, such activities could have been repelled by Uganda through engaging these groups also on Congolese territory, if necessary, provided that the rebel attacks were of a scale sufficient to reach the threshold of an "armed attack" within the meaning of Article 51 of the United Nations Charter.

8. Like Judge Kooijmans in paragraphs 25 ff. of his separate opinion, I submit that the Court should have taken the opportunity presented by the present case to clarify the state of the law on a highly controversial matter which is marked by great controversy and confusion — not the least because it was the Court itself that has substantially contributed to this confusion by its *Nicaragua* Judgment of two decades ago. With Judge Kooijmans, I regret that the Court "thus has missed a chance to fine-tune the position it took 20 years ago in spite of the explicit invitation by one of the Parties to do so" (separate opinion of Judge Kooijmans, para. 25).

9. From the *Nicaragua* case onwards the Court has made several pronouncements on questions of use of force and self-defence which are problematic less for the things they say than for the questions they leave open, prominently among them the issue of self-defence against armed attacks by non-State actors.

10. The most recent — and most pertinent — statement in this context is to be found in the (extremely succinct) discussion by the Court in its *Wall* Opinion of the Israeli argument that the separation barrier under

construction was a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 194, para. 138). To this argument the Court replied that Article 51 recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another. Since Israel did not claim that the attacks against it were imputable to a foreign State, however, Article 51 of the Charter had no relevance in the case of the wall (*ibid.*, para. 139).

11. Such a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently to be reconsidered, also by the Court. As is well known, these developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter provisions, particularly the "Bush doctrine" justifying the pre-emptive use of force¹. Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as "armed attacks" within the meaning of Article 51.

12. In his separate opinion, Judge Kooijmans points to the fact that the almost complete absence of governmental authority in the whole or part of the territory of certain States has unfortunately become a phenomenon as familiar as international terrorism (separate opinion of Judge Kooijmans, para. 30). I fully agree with his conclusions that, if armed attacks are carried out by irregular forces from such territory against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State, and, further, that it "would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not so require" (*ibid.*)².

13. I also subscribe to Judge Kooijmans's opinion that the lawfulness

¹ Th. Bruha and Ch. Tams, "Self-Defence against Terrorist Attacks. Considerations in the Light of the ICJ's 'Israeli Wall' Opinion", in K. Dicke *et al* (eds.), *Weltinnenrecht. Liber Amicorum Jost Delbrück*, 2005, pp. 84-112, at p. 97.

² Referring to Y. Dinstein, *War, Aggression, and Self-Defence*, 3rd ed., 2001, p. 216.

of the conduct of the attacked State in the face of such an armed attack by a non-State group must be put to the same test as that applied in the case of a claim of self-defence against a State, namely, does the scale of the armed action by the irregulars amount to an armed attack and, if so, is the defensive action by the attacked State in conformity with the requirements of necessity and proportionality? (Separate opinion of Judge Kooijmans, para. 31.)

14. In applying this test to the military activities of Uganda on Congolese territory from August 1998 onwards, Judge Kooijmans concludes — and I agree — that, while the activities that Uganda conducted in August in an area contiguous to the border may still be regarded as keeping within these limits, the stepping up of Ugandan military operations starting with the occupation of the Kisangani airport and continuing thereafter, leading the Ugandan forces far into the interior of the DRC, assumed a magnitude and duration that could not possibly be justified any longer by reliance on any right of self-defence. Thus, at this point, our view meets with, and shares, the Court's final conclusion that Uganda's military intervention constitutes "a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter" (Judgment, para. 165).

15. What I wanted to demonstrate with the preceding reasoning is that the Court could well have afforded to approach the question of the use of armed force on a large scale by non-State actors in a realistic vein, instead of avoiding it altogether by a sleight of hand, and still arrive at the same convincing result. By the unnecessarily cautious way in which it handles this matter, as well as by dodging the issue of "aggression", the Court creates the impression that it somehow feels uncomfortable being confronted with certain questions of utmost importance in contemporary international relations.

3. THE MALTREATMENT OF PERSONS AT NDIJILI INTERNATIONAL AIRPORT AND INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW

16. My third observation relates to the maltreatment inflicted on certain persons by Congolese soldiers at Ndjili International Airport in Kinshasa in August 1998.

In its second counter-claim, Uganda alleged, *inter alia*, that by maltreating certain individuals other than Ugandan diplomats when they attempted to leave the country following the outbreak of the armed conflict, the DRC violated its obligations under the "international minimal standard relating to the treatment of foreign nationals lawfully on State territory", as well as "universally recognized standards of human rights concerning the security of the human person" (Counter-Memorial of Uganda (CMU), paras. 405-407). The Court concluded in paragraph 333 of its Judgment that in presenting this part of the counter-claim Uganda

was attempting to exercise its right to diplomatic protection with regard to its nationals. It followed that Uganda would need to meet the conditions necessary for the exercise of diplomatic protection as recognized in general international law, that is, the requirement of Ugandan nationality of the individuals concerned and the prior exhaustion of local remedies. The Court observed that no specific documentation could be found in the case file identifying the persons as Ugandan nationals. The Court thus decided that, this condition not being met, the part of Uganda's counter-claim under consideration here was inadmissible. It thus upheld the objection of the DRC to this effect (Judgment, para. 345 (11)).

17. My vote in favour of this part of the Judgment only extends to the inadmissibility of Uganda's claim to diplomatic protection, since I agree with the Court's finding that the preconditions for a claim of diplomatic protection by Uganda were not met. I am of the view, however, that the Court's reasoning should not have finished at this point. Rather, the Court should have recognized that the victims of the attacks at the Ndjili International Airport remained legally protected against such maltreatment irrespective of their nationality, by other branches of international law, namely international human rights and, particularly, international humanitarian law. In its Judgment the Court has made a laudable effort to apply the rules developed in these fields to the situation of persons of varying nationality and status finding themselves in the war zones, in as comprehensive a manner as possible. The only group of people that remains unprotected by the legal shield thus devised by the Court are the 17 unfortunate individuals encountering the fury of the Congolese soldiers at the airport in Kinshasa.

18. I have to admit that the way in which Uganda presented and argued the part of its second counter-claim devoted to this group struck me as somewhat careless, both with regard to the evidence that Uganda mustered and to the quality of its legal reasoning. Such superficiality might stem from the attempts of more or less desperate counsel to find issues out of which they think they could construe what to them might look like a professionally acceptable counter-claim³, instead of genuine concern for the fate of the persons concerned.

³ This is not the first case giving me this impression; cf. my separate opinion in the case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, pp. 342-343, para. 36.

19. Be this as it may, I will take the opportunity of Uganda's claim concerning the events at the airport further to develop the thesis presented at the outset, namely that it would have been possible for the Court in its Judgment to embrace the situation in which these individuals found themselves, on the basis of international humanitarian and human rights law, and that no legal void existed in their regard. The reader might ask himself why I should give so much attention to an incident which happened more than seven years ago, whose gravity must certainly pale beside the unspeakable atrocities committed in the war in the Congo. I will be very clear: I consider that legal arguments clarifying that in situations like the one before us no gaps exist in the law that would deprive the affected persons of any legal protection, have, unfortunately, never been as important as at present, in the face of certain recent deplorable developments.

20. Let me, first, turn to the relevance of international humanitarian law to the incident at Ndjili International Airport.

To begin with, the fact that the airport was not a site of major hostilities in the armed conflict between the DRC and Uganda does not present a barrier to the application of international humanitarian law to the events which happened there. There are two reasons for this.

21. First, the key issue in finding whether international humanitarian law should apply also in peaceful areas of the territory of a belligerent State is whether those areas are somehow connected to the conflict. This was indeed the case with Ndjili International Airport because the individuals maltreated there found themselves in a situation of evacuation from armed conflict. The Note of Protest sent by the Embassy of Uganda to the Ministry of Foreign Affairs of the DRC on 21 August 1998 — which the Court considers reliable evidence in paragraph 339 of its Judgment — states that individuals and Ugandan diplomats were at Ndjili International Airport in the context of an evacuation (CMU, Ann. 23). This evacuation was necessary due to the armed conflict taking place in the DRC. Therefore, the events at the airport were factually connected to the armed conflict. The airport was not a random peaceful location completely unconnected to that conflict. Quite the contrary, it was the point of departure for an evacuation rendered necessary precisely by the armed conflict. During that evacuation, the airport became the scene of violence by Congolese forces against the evacuees.

22. Article 80 (1) of the Rules of Court states that: "A counter-claim may be presented provided that it is *directly connected* with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court." (Emphasis added.) In its Order of 29 November 2001, the Court found the second counter-claim admissible under the

Article 80 "direct connection" test, stating that "each Party holds the other responsible for various acts of oppression allegedly *accompanying an illegal use of force*; . . . these are facts of the same nature, and . . . the Parties' claims form part of the same factual complex" (para. 40; emphasis added). Therefore the Court had already determined, in its Order under Article 80, that the events at the airport formed part of the "same factual complex" as the armed conflict which constitutes the basis of the main claim. Hence, international humanitarian law should apply to the counter-claim as it does to the main claim.

23. Second, the application of international humanitarian law to the events at the airport would be consistent with the understanding of the scope of international humanitarian law developed by the ICTY Appeals Chamber. In *Prosecutor v. Tadić*, the Appeals Chamber stated:

"Armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between . . . such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal armed conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law *continues to apply in the whole territory of the warring States* or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there." (No. IT-94-I, Decision of the Appeals Chamber on the defence motion for interlocutory appeal on jurisdiction, para. 70 (2 October 1995); emphasis added.)

The Appeals Chamber also noted that "the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities" (*ibid.*, para. 67). Later in the same case, a Trial Chamber analysed the phrase "when committed in armed conflict", which qualifies the unlawful acts set out in Article 5 of the Statute of the ICTY, and concluded that "it is not necessary that the acts occur in the heat of battle" (*Prosecutor v. Duško Tadić*, No. IT-94-I-T, Trial Chamber, Opinion and Judgment, para. 632 (7 May 1997)). Similarly, a Trial Chamber of the ICTY has stated that "there does not have to be actual combat activities in a particular location for the norms of international humanitarian law to be applicable" (*Prosecutor v. Delalić, Mucić, Delić, & Landžo*, No. IT-96-21-T, Trial Chamber Judgment, para. 185 (16 November 1998)).

24. I turn, next, to the substantive rules of international humanitarian

law applicable to the persons in question. The provision which first comes to mind is Article 4 of the Fourth Geneva Convention of 1949. According to Article 4, persons who “at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals” are considered “protected persons” under the Convention. If the individuals maltreated by the DRC at Ndjili International Airport were considered protected persons under Article 4 of the Fourth Geneva Convention, the behaviour of the Congolese soldiers would have violated several provisions of that Convention, including Article 27 (requiring that protected persons “shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity”), Article 32 (prohibiting the infliction of physical suffering on protected persons), Article 33 (prohibiting reprisals against protected persons and their property), and Article 36 (requiring that evacuations of protected persons be carried out safely).

25. However, the qualification of the 17 individuals at the airport as “protected persons” within the meaning of Article 4 meets with great difficulties. As I stated above, Uganda was not able to prove that these persons were its own nationals; in fact we have no information whatsoever as to their nationality. In this regard, Article 4 of the Fourth Geneva Convention states that:

“Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”

The individuals under consideration might have been nationals of a neutral State or those of a co-belligerent (like Rwanda), and we do not know whether their home State maintained normal diplomatic relations with the DRC at the time of the incident. Against this factual background — or rather, the lack thereof — it would not have been possible for the Court to regard them as “protected persons”.

26. But this is not the end of the matter. The gap thus left by Geneva Convention Article 4 has in the meantime been — deliberately — closed by Article 75 of Protocol I Additional to the Geneva Conventions of 1949. This provision enshrines the fundamental guarantees of international humanitarian law and reads in pertinent part as follows:

“1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party

to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

- (a) violence to the life, health, or physical or mental well-being of persons, in particular:
- (iii) corporal punishment;
- (b) outrages upon personal dignity, in particular humiliating and degrading treatment,”

The Commentary of the International Committee of the Red Cross to Article 75 specifically notes that this provision was meant to provide protection to individuals who, by virtue of the exceptions listed in Article 4 of the Fourth Geneva Convention, did not qualify as “protected persons”. Thus, the Commentary makes clear that Article 75 provides protection to both nationals of States not parties to the conflict and nationals of allied States, even if their home State happened to have normal diplomatic representation in the State in whose hands they find themselves⁴. The Commentary emphasizes that “[i]f . . . there were . . . cases in which the status of . . . protected person were denied to certain individuals, the protection of Article 75 must be applied to them as a minimum”⁵.

27. The conclusion just arrived at has been confirmed recently in an Opinion of the European Commission for Democracy through Law (Venice Commission) established by the Council of Europe⁶. This Opinion was prepared to answer the question whether the new challenges posed by international terrorism, and the claims made by the United States in the wake of September 11 to the effect that the United States could deny certain persons the protection of the Geneva Conventions because they were “enemy unlawful combatants”, rendered necessary a further development of international humanitarian law. According to the Venice Commission, Article 75 of Protocol I Additional to the Geneva Conventions, as well as common Article 3 to the Geneva Conventions (on which *infra*)

“are based on the assumption that nationals of States which are not

⁴ *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. Sandoz, Ch. Swinarski, B. Zimmermann (eds.), 1987, p. 869.
⁵ *Ibid.*, p. 867.

⁶ Adopted by the Venice Commission at its 57th Plenary Session, Venice, 12-13 December 2003, Opinion No. 245/2003, doc. No. CDL-AD (2003)018, paras. 34 ff.

Parties to the conflict or nationals of co-belligerent States do not need the full protection of GC IV since they are normally even better protected by the rules on diplomatic protection. Should, however, diplomatic protection not be (properly) exercised on behalf of such third party nationals, International Humanitarian Law provides for protection under Article 75 P I and common Article 3 so that such persons do not remain without certain minimum rights.⁷

Thus, also according to the Venice Commission, there is “in respect of these matters . . . no legal void in international law”⁸.

28. Further, it can safely be concluded that the fundamental guarantees enshrined in Article 75 of Additional Protocol I are also embodied in customary international law⁹.

29. Attention must also be drawn to Article 3 common to all four Geneva Conventions, which defines certain rules to be applied in armed conflicts of a non-international character. As the Court stated in the *Nicaragua* case:

“There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’ (*Corfu Channel, Merits, I.C.J. Reports 1949*, p. 22 . . .).” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 114, para. 218.)

As such, the Court in *Nicaragua* found these rules applicable to the international dispute before it. The same is valid in the present case. In this regard, the decision of the *Tadić* Appeals Chamber discussed above is also of note. In relation to common Article 3, it stated that “the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations” (*Prosecutor v. Tadić, Decision of the Appeals Chamber on the defence motion for interlocutory appeal on jurisdiction*, para. 69; see *supra*, para. 23).

30. In addition to constituting breaches of international humanitarian

⁷ *Op. cit.* footnote 6, para. 38.

⁸ *Ibid.*, para. 85.

⁹ For a highly relevant reference in this regard (cf. *supra*, para. 19), United States Army, *Operational Law Handbook* (2002), International and Operational Law Department, The Judge Advocate General’s School, United States Army, Charlottesville, Virginia, issued 15 June 2001, Chap. 2, p. 5. See also, more generally, A. Roberts, “The Laws of War in the War on Terror”, *Israel Yearbook on Human Rights*, Vol. 32 (2002), pp. 192-245.

law, the maltreatment of the persons in question at Ndjili International Airport was also in violation of international human rights law. In paragraph 216 of its Judgment, the Court recalls its finding in the Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, according to which “the protection offered by human rights conventions does not cease in case of armed conflict . . .” (*I.C.J. Reports 2004*, p. 178, para. 106). In its Advisory Opinion, the Court continued:

“As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.” (*Ibid.*)

In my view, the maltreatment of the individuals at the airport falls under the third category of the situations mentioned: it is a matter of both international humanitarian and international human rights law.

31. Applying international human rights law to the individuals maltreated by the DRC at Ndjili International Airport, the conduct of the DRC would violate provisions of the International Covenant on Civil and Political Rights of 19 December 1966, the African Charter on Human and Peoples’ Rights of 27 June 1981, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, to all of which both the DRC and Uganda are parties. Specifically, under the International Covenant on Civil and Political Rights, the conduct of the DRC would violate Article 7 (“No one shall be subjected to . . . cruel, inhuman or degrading treatment or punishment”), Article 9, paragraph 1 (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”), Article 10, paragraph 1 (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”), and Article 12, paragraphs 1 and 2 (“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement . . . 2. Everyone shall be free to leave any country, including his own”).

Under the African Charter, the conduct of the DRC would violate Article 4 (“Human beings are inviolable. Every human being shall be entitled to respect for . . . the integrity of his person. No one may be arbitrarily deprived of this right”), Article 5 (“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly . . . cruel, inhuman or degrading punishment and

treatment shall be prohibited”), Article 6 (“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”), as well as Article 12, paragraphs 1 and 2 (“1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law. 2. Every individual shall have the right to leave any country including his own, and to return to his country . . .”). Finally, although the conduct of the DRC at Ndjili International Airport did not rise to the level of torture, it was nevertheless in violation of Article 16, paragraph 1, of the Convention against Torture which reads as follows:

“Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

32. The jurisdiction of the Court being firmly established, there remains the issue of standing to raise violations of international humanitarian and human rights law in the case of persons who may not have the nationality of the claimant State. In the present case, regarding Uganda’s counterclaim, the issue does not present itself in a technical sense because Uganda has not actually pleaded a violation of either of these branches of international law in relation to the persons in question. But if Uganda had chosen to raise these violations before the Court, it would undoubtedly have had standing to bring such claims.

33. As to international humanitarian law, Uganda would have had standing because, as the Court emphasized in its Advisory Opinion on the *Wall*:

“Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.’ It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.” (*I.C.J. Reports 2004*, pp. 199–200, para. 158.)

The Court concluded that given the character and the importance of the rights and obligations involved, there is an obligation on all States parties to the Convention to respect and ensure respect for violations of the international humanitarian law codified in the Convention (*ibid.*, p. 200, paras. 158–159). The same reasoning is applicable in the instant case.

There cannot be any doubt that the obligation (not only to respect but also) to ensure respect for international humanitarian law applies to the obligations enshrined both in common Article 3 and in Protocol I Additional to the Geneva Conventions.

34. The ICRC Commentary to common Article 1 of the Conventions arrives at the same result in its analysis of the obligation to respect and to ensure respect, where it is stated that:

“in the event of a Power failing to fulfil its obligations [under the Convention], the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.”¹⁰

Thus, regardless of whether the maltreated individuals were Ugandans or not, Uganda had the right — indeed the duty — to raise the violations of international humanitarian law committed against the private persons at the airport. The implementation of a State party’s international legal duty to ensure respect by another State party for the obligations arising under humanitarian treaties by way of raising it before the International Court of Justice is certainly one of the most constructive avenues in this regard.

35. As to the question of standing of a claimant State for violations of human rights committed against persons which might or might not possess the nationality of that State, the jurisdiction of the Court not being at issue, the contemporary law of State responsibility provides a positive answer as well. The International Law Commission’s 2001 draft on Responsibility of States for Internationally Wrongful Acts provides not only for the invocation of responsibility by an injured State (which quality Uganda would possess if it had been able to establish the Ugandan nationality of the individuals at the airport) but also for the possibility that such responsibility can be invoked by a State other than an injured State. In this regard, Article 48 of the draft reads as follows:

“Article 48

Invocation of Responsibility by a State Other than an Injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

¹⁰ *Commentary to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, J. S. Pictet (ed.), 1958, p. 16.

- (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- (b) The obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
- (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
- (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.¹¹

The obligations deriving from the human rights treaties cited above and breached by the DRC are instances *par excellence* of obligations that are owed to a group of States including Uganda, and are established for the protection of a collective interest of the States parties to the Covenant.

36. With regard to the customary requirement of the exhaustion of local remedies, this condition only applies if effective remedies are available in the first place (cf. ILC Article 44 (b) and the commentary thereto). In view of the circumstances of the airport incident and, more generally, of the political situation prevailing in the DRC at the time of the Ugandan invasion, I tend to agree with the Ugandan argument that attempts by the victims of that incident to seek justice in the Congolese courts would have remained futile (cf. paragraph 317 of the Judgment). Hence, no obstacle would have stood in the way for Uganda to raise the violation of human rights of the persons maltreated at Ndjili International Airport, even if these individuals did not possess its nationality.

37. In summary of this issue, Uganda would have had standing to bring, and the Court would have had jurisdiction to decide upon a claim both under international humanitarian law and international human rights law for the maltreatment of the individuals at the airport, irrespective of the nationality of these individuals. The specific construction of the rights and obligations under the Fourth Geneva Convention as well

¹¹ Report of the ILC on the Work of its Fifty-third Session, *Official Records of the General Assembly, Fifty-sixth Session, Suppl. No. 10 (A/56/10)*, p. 56.

as the relevant provisions of Protocol I Additional to this Convention not only entitles every State party to raise these violations but even creates an obligation to ensure respect for the humanitarian law in question. The rules of the international law of State responsibility lead to an analogous result as concerns the violations of human rights of the persons concerned by the Congolese soldiers. Uganda chose the avenue of diplomatic protection and failed. A reminder by the Court of the applicability of international humanitarian and human rights law standards and of Uganda's standing to raise violations of the obligations deriving from these standards by the DRC would, in my view, not have gone *ultra petita partium*.

38. Let me conclude with a more general observation on the community interest underlying international humanitarian and human rights law. I feel compelled to do so because of the notable hesitation and weakness with which such community interest is currently manifesting itself vis-à-vis the ongoing attempts to dismantle important elements of these branches of international law in the proclaimed "war" on international terrorism.

39. As against such undue restraint it is to be remembered that at least the core of the obligations deriving from the rules of international humanitarian and human rights law are valid *erga omnes*. According to the Commentary of the ICRC to Article 4 of the Fourth Geneva Convention, "[t]he spirit which inspires the Geneva Conventions naturally makes it desirable that they should be applicable 'erga omnes', since they may be regarded as the codification of accepted principles"¹². In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* the Court stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . . , that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*J.C.J. Reports 1996 (I)*, p. 257, para. 79). Similarly, in the *Wall* Advisory Opinion, the Court affirmed that the rules of international humanitarian law "incorporate obligations which are essentially of an *erga omnes* character" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 199, para. 157).

40. As the Court indicated in the *Barcelona Traction* case, obligations *erga omnes* are by their very nature "the concern of all States" and, "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection" (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). In the same vein, the International Law Commission has

¹² *Op. cit.* footnote 10, p. 48.

stated in the Commentaries to its Articles on the Responsibility of States for Internationally Wrongful Acts that there are certain rights in the protection of which, by reason of their importance, “all States have a legal interest . . .” (A/56/10 at p. 278)¹³.

41. If the international community allowed such interest to erode in the face not only of violations of obligations *erga omnes* but of outright attempts to do away with these fundamental duties, and in their place to open black holes in the law in which human beings may be “disappeared” and deprived of any legal protection whatsoever for indefinite periods of time, then international law, for me, would become much less worthwhile.

(Signed) Bruno SIMMA.

¹³ Concerning the specific question of standing in case of breaches of obligations *erga omnes* the Institute of International Law, in a resolution on the topic of obligations of this nature adopted at its Krakow Session of 2005, accepted the following provisions:

“Article 3

In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes* and a State to which the obligation is owed, the latter State has standing to bring a claim to the International Court of Justice or other international judicial institution in relation to a dispute concerning compliance with that obligation.

Article 4

The International Court of Justice or other international judicial institution should give a State to which an obligation *erga omnes* is owed the possibility to participate in proceedings pending before the Court or that institution and relating to that obligation. Specific rules should govern this participation.”

International Court of Justice

**North Sea Continental Shelf
(Federal Republic of Germany/Denmark; Federal Republic of
Germany/Netherlands)
Judgment**

I.C.J. Reports 1969, pp. 37-45, paras. 60-81

ference of language to be observed in the two paragraphs of Article 6 of the Geneva Convention (reproduced in paragraph 26 above) as respects recourse in the one case to median lines and in the other to lateral equidistance lines, in the event of absence of agreement.

58. If on the other hand, contrary to the view expressed in the preceding paragraph, it were correct to say that there is no essential difference in the process of delimiting the continental shelf areas between opposite States and that of delimitations between adjacent States, then the results ought in principle to be the same or at least comparable. But in fact, whereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other.

59. Equally distinct in the opinion of the Court is the case of the lateral boundary between adjacent territorial waters to be drawn on an equidistance basis. As was convincingly demonstrated in the maps and diagrams furnished by the Parties, and as has been noted in paragraph 8, the distorting effects of lateral equidistance lines under certain conditions of coastal configuration are nevertheless comparatively small within the limits of territorial waters, but produce their maximum effect in the localities where the main continental shelf areas lie further out. There is also a direct correlation between the notion of closest proximity to the coast and the sovereign jurisdiction which the coastal State is entitled to exercise and must exercise, not only over the seabed underneath the territorial waters but over the waters themselves, which does not exist in respect of continental shelf areas where there is no jurisdiction over the superjacent waters, and over the seabed only for purposes of exploration and exploitation.

* * *

60. The conclusions so far reached leave open, and still to be considered, the question whether on some basis other than that of an *a priori* logical necessity, i.e., through positive law processes, the equidistance principle has come to be regarded as a rule of customary international law, so that it would be obligatory for the Federal Republic in that way, even though Article 6 of the Geneva Convention is not, as such, opposable to it. For this purpose it is necessary to examine the status of the principle as it stood when the Convention was drawn up, as it resulted from the effect of the Convention, and in the light of State practice subsequent to the Convention; but it should be clearly understood that in the pronouncements the Court makes on these matters it has in view solely the delimitation provisions (Article 6) of the Convention, not other parts of it, nor the Convention as such.

61. The first of these questions can conveniently be considered in the form suggested on behalf of Denmark and the Netherlands themselves in the course of the oral hearing, when it was stated that they had not in fact contended that the delimitation article (Article 6) of the Convention "embodied already received rules of customary law in the sense that the Convention was merely declaratory of existing rules". Their contention was, rather, that although prior to the Conference, continental shelf law was only in the formative stage, and State practice lacked uniformity, yet "the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference"; and this emerging customary law became "crystallized in the adoption of the Continental Shelf Convention by the Conference".

62. Whatever validity this contention may have in respect of at least certain parts of the Convention, the Court cannot accept it as regards the delimitation provision (Article 6), the relevant parts of which were adopted almost unchanged from the draft of the International Law Commission that formed the basis of discussion at the Conference. The status of the rule in the Convention therefore depends mainly on the processes that led the Commission to propose it. These processes have already been reviewed in connection with the Danish-Netherlands contention of an *a priori* necessity for equidistance, and the Court considers this review sufficient for present purposes also, in order to show that the principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule.

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63. The foregoing conclusion receives significant confirmation from the fact that Article 6 is one of those in respect of which, under the reservations article of the Convention (Article 12) reservations may be made by any State on signing, ratifying or acceding,—for, speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;—whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own

favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded. This expectation is, in principle, fulfilled by Article 12 of the Geneva Continental Shelf Convention, which permits reservations to be made to all the articles of the Convention "other than to Articles 1 to 3 inclusive"—these three Articles being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf; the juridical character of the coastal State's entitlement; the nature of the rights exercisable; the kind of natural resources to which these relate; and the preservation intact of the legal status as high seas of the waters over the shelf, and the legal status of the superjacent air-space.

64. The normal inference would therefore be that any articles that do not figure among those excluded from the faculty of reservation under Article 12, were not regarded as declaratory of previously existing or emergent rules of law; and this is the inference the Court in fact draws in respect of Article 6 (delimitation), having regard also to the attitude of the International Law Commission to this provision, as already described in general terms. Naturally this would not of itself prevent this provision from eventually passing into the general *corpus* of customary international law by one of the processes considered in paragraphs 70-81 below. But that is not here the issue. What is now under consideration is whether it originally figured in the Convention as such a rule.

65. It has however been suggested that the inference drawn at the beginning of the preceding paragraph is not necessarily warranted, seeing that there are certain other provisions of the Convention, also not excluded from the faculty of reservation, but which do undoubtedly in principle relate to matters that lie within the field of received customary law, such as the obligation not to impede the laying or maintenance of submarine cables or pipelines on the continental shelf seabed (Article 4), and the general obligation not unjustifiably to interfere with freedom of navigation, fishing, and so on (Article 5, paragraphs 1 and 6). These matters however, all relate to or are consequential upon principles or rules of general maritime law, very considerably ante-dating the Convention, and not directly connected with but only incidental to continental shelf rights as such. They were mentioned in the Convention, not in order to declare or confirm their existence, which was not necessary, but simply to ensure that they were not prejudiced by the exercise of continental shelf rights as provided for in the Convention. Another method of

drafting might have clarified the point, but this cannot alter the fact that no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention, and especially obligations formalized in Article 2 of the contemporaneous Convention on the High Seas, expressed by its preamble to be declaratory of established principles of international law.

66. Article 6 (delimitation) appears to the Court to be in a different position. It does directly relate to continental shelf rights as such, rather than to matters incidental to these; and since it was not, as were Articles 1 to 3, excluded from the faculty of reservation, it is a legitimate inference that it was considered to have a different and less fundamental status and not, like those Articles, to reflect pre-existing or emergent customary law. It was however contended on behalf of Denmark and the Netherlands that the right of reservation given in respect of Article 6 was not intended to be an unfettered right, and that in particular it does not extend to effecting a total exclusion of the equidistance principle of delimitation,—for, so it was claimed, delimitation on the basis of that principle is implicit in Articles 1 and 2 of the Convention, in respect of which no reservations are permitted. Hence the right of reservation under Article 6 could only be exercised in a manner consistent with the preservation of at least the basic principle of equidistance. In this connection it was pointed out that, of the no more than four reservations so far entered in respect of Article 6, one at least of which was somewhat far-reaching, none has purported to effect such a total exclusion or denial.

67. The Court finds this argument unconvincing for a number of reasons. In the first place, Articles 1 and 2 of the Geneva Convention do not appear to have any direct connection with inter-State delimitation as such. Article 1 is concerned only with the outer, seaward, limit of the shelf generally, not with boundaries between the shelf areas of opposite or adjacent States. Article 2 is equally not concerned with such boundaries. The suggestion seems to be that the notion of equidistance is implicit in the reference in paragraph 2 of Article 2 to the rights of the coastal State over its continental shelf being "exclusive". So far as actual language is concerned this interpretation is clearly incorrect. The true sense of the passage is that in whatever areas of the continental shelf a coastal State has rights, those rights are exclusive rights, not exercisable by any other State. But this says nothing as to what in fact are the precise areas in respect of which each coastal State possesses these exclusive rights. This question, which can arise only as regards the fringes of a coastal State's shelf area is, as explained at the end of paragraph 20 above, exactly what falls to be settled through the process of delimitation, and this is the sphere of Article 6, not Article 2.

68. Secondly, it must be observed that no valid conclusions can be drawn from the fact that the faculty of entering reservations to Article 6 has been exercised only sparingly and within certain limits. This is the affair exclusively of those States which have not wished to exercise the faculty, or which have been content to do so only to a limited extent. Their action or inaction cannot affect the right of other States to enter reservations to whatever is the legitimate extent of the right.

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69. In the light of these various considerations, the Court reaches the conclusion that the Geneva Convention did not embody or crystallize any pre-existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance-special circumstances basis. A rule was of course embodied in Article 6 of the Convention, but as a purely conventional rule. Whether it has since acquired a broader basis remains to be seen: *quia* conventional rule however, as has already been concluded, it is not opposable to the Federal Republic.

* * *

70. The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice,—and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

71. In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

72. It would in the first place be necessary that the provision con-

cerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law. Considered *in abstracto* the equidistance principle might be said to fulfil this requirement. Yet in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties,—but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention. Secondly the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm-creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, and is not the subject of any revision brought about in consequence of a request made under Article 13 of the Convention—of which there is at present no official indication—it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess.

73. With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. In the present case however, the Court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient. That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain.

74. As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964, and that when the present proceedings were brought it was less than three years, while less than one had elapsed at the time when the respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked:— and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

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75. The Court must now consider whether State practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement. Leaving aside cases which, for various reasons, the Court does not consider to be reliable guides as precedents, such as delimitations effected between the present Parties themselves, or not relating to international boundaries, some fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the 1958 Geneva Convention, in which continental shelf boundaries have been delimited according to the equidistance principle—in the majority of the cases by agreement, in a few others unilaterally—or else the delimitation was foreshadowed but has not yet been carried out. Amongst these fifteen are the four North Sea delimitations United Kingdom/Norway-Denmark-Netherlands, and Norway/Denmark already mentioned in paragraph 4 of this Judgment. But even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it necessary to enumerate or evaluate them separately, since there are, *a priori*, several grounds which deprive them of weight as precedents in the present context.

76. To begin with, over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle. As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of

their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and, as has been seen (paragraphs 22 and 23), there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.

77. The essential point in this connection—and it seems necessary to stress it—is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*;—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

78. In this respect the Court follows the view adopted by the Permanent Court of International Justice in the *Lotus* case, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, *mutatis mutandis*, to the present case (*P.C.I.J., Series A, No. 10, 1927, at p. 28*):

“Even if the rarity of the judicial decisions to be found . . . were sufficient to prove . . . the circumstance alleged . . . , it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty: on the other hand, . . . there are other circumstances calculated to show that the contrary is true.”

Applying this dictum to the present case, the position is simply that in certain cases—not a great number—the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt

necessity deriving from the fundamental theory of the continental shelf, leads to the final conclusion on this part of the case that the use of the equidistance method is not obligatory for the delimitation of the areas concerned in the present proceedings. In these circumstances, it becomes unnecessary for the Court to determine whether or not the configuration of the German North Sea coast constitutes a "special circumstance" for the purposes either of Article 6 of the Geneva Convention or of any rule of customary international law,—since once the use of the equidistance method of delimitation is determined not to be obligatory in any event, it ceases to be legally necessary to prove the existence of special circumstances in order to justify not using that method.

* * * * *

83. The legal situation therefore is that the Parties are under no obligation to apply either the 1958 Convention, which is not opposable to the Federal Republic, or the equidistance method as a mandatory rule of customary law, which it is not. But as between States faced with an issue concerning the lateral delimitation of adjacent continental shelves, there are still rules and principles of law to be applied; and in the present case it is not the fact either that rules are lacking, or that the situation is one for the unfettered appreciation of the Parties. Equally, it is not the case that if the equidistance principle is not a rule of law, there has to be as an alternative some other single equivalent rule.

84. As already indicated, the Court is not called upon itself to delimit the areas of continental shelf appertaining respectively to each Party, and in consequence is not bound to prescribe the methods to be employed for the purposes of such a delimitation. The Court has to indicate to the Parties the principles and rules of law in the light of which the methods for eventually effecting the delimitation will have to be chosen. The Court will discharge this task in such a way as to provide the Parties with the requisite directions, without substituting itself for them by means of a detailed indication of the methods to be followed and the factors to be taken into account for the purposes of a delimitation the carrying out of which the Parties have expressly reserved to themselves.

85. It emerges from the history of the development of the legal régime of the continental shelf, which has been reviewed earlier, that the essential reason why the equidistance method is not to be regarded as a rule of law is that, if it were to be compulsorily applied in all situations, this would not be consonant with certain basic legal notions which, as has been observed in paragraphs 48 and 55, have from the beginning reflected the *opinio juris* in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles. On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the

legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so—especially considering that they might have been motivated by other obvious factors.

79. Finally, it appears that in almost all of the cases cited, the delimitations concerned were median-line delimitations between opposite States, not lateral delimitations between adjacent States. For reasons which have already been given (paragraph 57) the Court regards the case of median-line delimitations between opposite States as different in various respects, and as being sufficiently distinct not to constitute a precedent for the delimitation of lateral boundaries. In only one situation discussed by the Parties does there appear to have been a geographical configuration which to some extent resembles the present one, in the sense that a number of States on the same coastline are grouped around a sharp curve or bend of it. No complete delimitation in this area has however yet been carried out. But the Court is not concerned to deny to this case, or any other of those cited, all evidential value in favour of the thesis of Denmark and the Netherlands. It simply considers that they are inconclusive, and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifested in such circumstances, as would justify the inference that delimitation according to the principle of equidistance amounts to a mandatory rule of customary international law,—more particularly where lateral delimitations are concerned.

80. There are of course plenty of cases (and a considerable number were cited) of delimitations of waters, as opposed to seabed, being carried out on the basis of equidistance—mostly of internal waters (lakes, rivers, etc.), and mostly median-line cases. The nearest analogy is that of adjacent territorial waters, but as already explained (paragraph 59) the Court does not consider this case to be analogous to that of the continental shelf.

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81. The Court accordingly concludes that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent States, neither has its subsequent effect been constitutive of such a rule; and that State practice up-to-date has equally been insufficient for the purpose.

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82. The immediately foregoing conclusion, coupled with that reached earlier (paragraph 56) to the effect that the equidistance principle could not be regarded as being a rule of law on any *a priori* basis of logical

International Court of Justice

**Accordance with International Law of the Unilateral
Declaration of Independence in Respect of Kosovo
Advisory Opinion**

I.C.J. Reports 2010, pp. 423-453, paras. 49-123

22 JULY 2010

ADVISORY OPINION

TABLE OF CONTENTS

	<i>Paragraphs</i>
CHRONOLOGY OF THE PROCEDURE	1-16
I. JURISDICTION AND DISCRETION	17-48
A. Jurisdiction	18-28
B. Discretion	29-48
II. SCOPE AND MEANING OF THE QUESTION	49-56
III. FACTUAL BACKGROUND	57-77
A. Security Council resolution 1244 (1999) and the relevant UNMIK regulations	58-63
B. The relevant events in the final status process prior to 17 February 2008	64-73
C. The events of 17 February 2008 and thereafter	74-77
IV. THE QUESTION WHETHER THE DECLARATION OF INDEPENDENCE IS IN ACCORDANCE WITH INTERNATIONAL LAW	78-121
A. General international law	79-84
B. Security Council resolution 1244 (1999) and the UNMIK Constitutional Framework created thereunder	85-121
1. Interpretation of Security Council resolution 1244 (1999)	94-100
2. The question whether the declaration of independence is in accordance with Security Council resolution 1244 (1999) and the measures adopted thereunder	101-121
(a) The identity of the authors of the declaration of independence	102-109
(b) The question whether the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999) or the measures adopted thereunder	110-121
V. GENERAL CONCLUSION	122
OPERATIVE CLAUSE	123

ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO	

CONFORMITÉ AU DROIT INTERNATIONAL DE LA DÉCLARATION UNILATÉRALE D'INDEPENDANCE RELATIVE AU KOSOVO	

22 JUILLET 2010

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Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (I.C.J. Reports 1947-1948, pp. 61-62), it responded to a request from the General Assembly even though that request referred to statements made in a meeting of the Security Council and it had been submitted that the Court should therefore exercise its discretion to decline to reply (*I.C.J. Pleadings, Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, p. 90). Where, as here, the General Assembly has a legitimate interest in the answer to a question, the fact that that answer may turn, in part, on a decision of the Security Council is not sufficient to justify the Court in declining to give its opinion to the General Assembly.

48. Accordingly, the Court considers that there are no compelling reasons for it to decline to exercise its jurisdiction in respect of the present request.

II. SCOPE AND MEANING OF THE QUESTION

49. The Court will now turn to the scope and meaning of the question on which the General Assembly has requested that it give its opinion. The General Assembly has formulated that question in the following terms:

“Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”

50. The Court recalls that in some previous cases it has departed from the language of the question put to it where the question was not adequately formulated (see for example, in *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)*, *Advisory Opinion, 1928, P.C.I.J., Series B, No. 16*) or where the Court determined, on the basis of its examination of the background to the request, that the request did not reflect the “legal questions really in issue” (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 89, para. 35*). Similarly, where the question asked was unclear or vague, the Court has clarified the question before giving its opinion (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, p. 348, para. 46*).

51. In the present case, the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court’s opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State. The Court notes that, in past requests

for advisory opinions, the General Assembly and the Security Council, when they have wanted the Court’s opinion on the legal consequences of an action, have framed the question in such a way that this aspect is expressly stated (see, for example, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971, p. 16* and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 136*). Accordingly, the Court does not consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly. The Court accordingly sees no reason to reformulate the scope of the question.

52. There are, however, two aspects of the question which require comment. First, the question refers to “the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo” (General Assembly resolution 63/3 of 8 October 2008, single operative paragraph; emphasis added). In addition, the third preambular paragraph of the General Assembly resolution “[r]ecall[s] that on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia”. Whether it was indeed the Provisional Institutions of Self-Government of Kosovo which promulgated the declaration of independence was contested by a number of those participating in the present proceedings. The identity of the authors of the declaration of independence, as is demonstrated below (paragraphs 102 to 109), is a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law. It would be incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly.

53. Nor does the Court consider that the General Assembly intended to restrict the Court’s freedom to determine this issue for itself. The Court notes that the agenda item under which what became resolution 63/3 was discussed did not refer to the identity of the authors of the declaration and was entitled simply “Request for an advisory opinion of the International Court of Justice on whether the declaration of independence of Kosovo is in accordance with international law” (General Assembly resolution 63/3 of 8 October 2008; emphasis added). The wording of this agenda item had been proposed by the Republic of Serbia, the sole sponsor of resolution 63/3, when it requested the inclusion of a supplementary item on the agenda of the 63rd session of the General Assembly (Letter of the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General, 22 August 2008, A/63/195). That agenda item then became the title of the draft resolution and, in turn, of resolution 63/3. The common element in the agenda item and the

title of the resolution itself is whether the declaration of independence is in accordance with international law. Moreover, there was no discussion of the identity of the authors of the declaration, or of the difference in wording between the title of the resolution and the question which it posed to the Court during the debate on the draft resolution (A/63/PV.22).

54. As the Court has stated in a different context:

“It is not to be assumed that the General Assembly would . . . seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion.” (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion*, I.C.J. Reports 1962, p. 157.)

This consideration is applicable in the present case. In assessing whether or not the declaration of independence is in accordance with international law, the Court must be free to examine the entire record and decide for itself whether that declaration was promulgated by the Provisional Institutions of Self-Government or some other entity.

55. While many of those participating in the present proceedings made reference to the opinion of the Supreme Court of Canada in *Reference by the Governor in Council concerning Certain Questions relating to the Secession of Quebec from Canada* ([1998] 2 *Supreme Court Reporter (SCR)* 217; 161 *Dominion Law Reports (DLR)* (4th) 385; 115 *International Law Reports (ILR)* 536), the Court observes that the question in the present case is markedly different from that posed to the Supreme Court of Canada.

The relevant question in that case was:

“Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?”

56. The question put to the Supreme Court of Canada inquired whether there was a right to “effect secession”, and whether there was a rule of international law which conferred a positive entitlement on any of the organs named. By contrast, the General Assembly has asked whether the declaration of independence was “in accordance with” international law. The answer to that question turns on whether or not the applicable international law prohibited the declaration of independence. If the Court concludes that it did, then it must answer the question put by saying that the declaration of independence was not in accordance with international law. It follows that the task which the Court is called upon to perform is

to determine whether or not the declaration of independence was adopted in violation of international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act — such as a unilateral declaration of independence — not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.

III. FACTUAL BACKGROUND

57. The declaration of independence of 17 February 2008 must be considered within the factual context which led to its adoption. The Court therefore will briefly describe the relevant characteristics of the framework put in place by the Security Council to ensure the interim administration of Kosovo, namely, Security Council resolution 1244 (1999) and the regulations promulgated thereunder by the United Nations Mission in Kosovo. The Court will then proceed with a brief description of the developments relating to the so-called “final status process” in the years preceding the adoption of the declaration of independence, before turning to the events of 17 February 2008.

A. Security Council Resolution 1244 (1999) and the Relevant UNMIK Regulations

58. Resolution 1244 (1999) was adopted by the Security Council, acting under Chapter VII of the United Nations Charter, on 10 June 1999. In this resolution, the Security Council, “determined to resolve the grave humanitarian situation” which it had identified (see the fourth preambular paragraph) and to put an end to the armed conflict in Kosovo, authorized the United Nations Secretary-General to establish an international civil presence in Kosovo in order to provide “an interim administration for Kosovo . . . which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions” (para. 10). Paragraph 3 demanded

“in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable”.

Pursuant to paragraph 5 of the resolution, the Security Council decided

on the deployment in Kosovo, under the auspices of the United Nations, of international civil and security presences and welcomed the agreement of the Federal Republic of Yugoslavia to such presences. The powers and responsibilities of the security presence were further clarified in paragraphs 7 and 9. Paragraph 15 of resolution 1244 (1999) demanded that the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization. Immediately preceding the adoption of Security Council resolution 1244 (1999), various implementing steps had already been taken through a series of measures, including, *inter alia*, those stipulated in the Military Technical Agreement of 9 June 1999, whose Article I.2 provided for the deployment of KFOR, permitting these to

“operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission”.

The Military Technical Agreement also provided for the withdrawal of FRY ground and air forces, save for “an agreed number of Yugoslav and Serb military and police personnel” as foreseen in paragraph 4 of resolution 1244 (1999).

59. Paragraph 11 of the resolution described the principal responsibilities of the international civil presence in Kosovo as follows:

- “(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);
- (b) Performing basic civilian administrative functions where and as long as required;
- (c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;
- (d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo’s local provisional institutions and other peace-building activities;
- (e) Facilitating a political process designed to determine Kosovo’s future status, taking into account the Rambouillet accords (S/1999/648);

(f) In a final stage, overseeing the transfer of authority from Kosovo’s provisional institutions to institutions established under a political settlement . . .”.

60. On 12 June 1999, the Secretary-General presented to the Security Council “a preliminary operational concept for the overall organization of the civil presence, which will be known as the United Nations Interim Administration Mission in Kosovo (UNMIK)”, pursuant to paragraph 10 of resolution 1244 (1999), according to which UNMIK would be headed by a Special Representative of the Secretary-General, to be appointed by the Secretary-General in consultation with the Security Council (Report of the Secretary-General of 12 June 1999 (United Nations doc. S/1999/672, 12 June 1999)). The Report of the Secretary-General provided that there would be four Deputy Special Representatives working within UNMIK, each responsible for one of four major components (the so-called “four pillars”) of the UNMIK régime (para. 5): (a) interim civil administration (with a lead role assigned to the United Nations); (b) humanitarian affairs (with a lead role assigned to the Office of the United Nations High Commissioner for Refugees (UNHCR)); (c) institution building (with a lead role assigned to the Organization for Security and Co-operation in Europe (OSCE)); and (d) reconstruction (with a lead role assigned to the European Union).

61. On 25 July 1999, the first Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1, which provided in its Section 1.1 that “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General”. Under Section 3 of UNMIK regulation 1999/1, the laws applicable in the territory of Kosovo prior to 24 March 1999 were to continue to apply, but only to the extent that these did not conflict with internationally recognized human rights standards and non-discrimination or the fulfilment of the mandate given to UNMIK under resolution 1244 (1999). Section 3 was repealed by UNMIK regulation 1999/25 promulgated by the Special Representative of the Secretary-General on 12 December 1999, with retroactive effect to 10 June 1999. Section 1.1 of UNMIK regulation 1999/24 of 12 December 1999 provides that “[t]he law applicable in Kosovo shall be: (a) the regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and (b) the law in force in Kosovo on 22 March 1989”. Section 4, entitled “Transitional Provision”, reads as follows:

“All legal acts, including judicial decisions, and the legal effects of events which occurred, during the period from 10 June 1999 up to the date of the present regulation, pursuant to the laws in force during that period under section 3 of UNMIK Regulation No. 1999/1 of 25 July 1999, shall remain valid, insofar as they do not conflict

with the standards referred to in section 1 of the present regulation or any UNMIK regulation in force at the time of such acts.”

62. The powers and responsibilities thus laid out in Security Council resolution 1244 (1999) were set out in more detail in UNMIK regulation 2001/9 of 15 May 2001 on a Constitutional Framework for Provisional Self-Government (hereinafter “Constitutional Framework”), which defined the responsibilities relating to the administration of Kosovo between the Special Representative of the Secretary-General and the Provisional Institutions of Self-Government of Kosovo. With regard to the role entrusted to the Special Representative of the Secretary-General under Chapter 12 of the Constitutional Framework,

“[t]he exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the SRSG to ensure full implementation of UNSCR 1244 (1999), including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework”.

Moreover, pursuant to Chapter 2 (a), “[t]he Provisional Institutions of Self-Government and their officials shall . . . [e]xercise their authorities consistent with the provisions of UNSCR 1244 (1999) and the terms set forth in this Constitutional Framework”. Similarly, according to the ninth preambular paragraph of the Constitutional Framework,

“the exercise of the responsibilities of the Provisional Institutions of Self-Government in Kosovo shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of UNSCR 1244 (1999)”.

In his periodical report to the Security Council of 7 June 2001, the Secretary-General stated that the Constitutional Framework contained

“broad authority for my Special Representative to intervene and correct any actions of the provisional institutions of self-government that are inconsistent with Security Council resolution 1244 (1999), including the power to veto Assembly legislation, where necessary” (Report of the Secretary-General on the United Nations Interim

Administration Mission in Kosovo, United Nations doc. S/2001/565, 7 June 2001).

63. Having described the framework put in place by the Security Council to ensure the interim administration of the territory of Kosovo, the Court now turns to the relevant events in the final status process which preceded the declaration of independence of 17 February 2008.

B. The Relevant Events in the Final Status Process Prior to 17 February 2008

64. In June 2005, the Secretary-General appointed Kai Eide, Permanent Representative of Norway to the North Atlantic Treaty Organization, as his Special Envoy to carry out a comprehensive review of Kosovo. In the wake of the Comprehensive Review report he submitted to the Secretary-General (attached to United Nations doc. S/2005/635 (7 October 2005)), there was consensus within the Security Council that the final status process should be commenced:

“The Security Council agrees with Ambassador Eide’s overall assessment that, notwithstanding the challenges still facing Kosovo and the wider region, the time has come to move to the next phase of the political process. The Council therefore supports the Secretary-General’s intention to start a political process to determine Kosovo’s Future Status, as foreseen in Security Council resolution 1244 (1999).” (Statement by the President of the Security Council of 24 October 2005, United Nations doc. S/PRST/2005/51.)

65. In November 2005, the Secretary-General appointed Mr. Martti Ahtisaari, former President of Finland, as his Special Envoy for the future status process for Kosovo. This appointment was endorsed by the Security Council (see Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, United Nations doc. S/2005/709). Mr. Ahtisaari’s Letter of Appointment included, as an annex to it, a document entitled “Terms of Reference” which stated that the Special Envoy “is expected to revert to the Secretary-General at all stages of the process”. Furthermore, “[t]he pace and duration of the future status process will be determined by the Special Envoy on the basis of consultations with the Secretary-General, taking into account the co-operation of the parties and the situation on the ground” (Terms of Reference, dated 10 November 2005, as an appendix to the Letter of the Secretary-General to Mr. Martti Ahtisaari of 14 November 2005, United Nations dossier No. 198).

66. The Security Council did not comment on these Terms of Reference. Instead, the members of the Council attached to their approval of

Mr. Ahtisaari's appointment the Guiding Principles of the Contact Group (an informal grouping of States formed in 1994 to address the situation in the Balkans and composed of France, Germany, Italy, the Russian Federation, the United Kingdom and the United States). Members of the Security Council further indicated that the Guiding Principles were meant for the Secretary-General's (and therefore also for the Special Envoy's) "reference". These Principles stated, *inter alia*, that

"[t]he Contact Group . . . welcomes the intention of the Secretary-General to appoint a Special Envoy to lead this process . . .

A negotiated solution should be an international priority. Once the process has started, it cannot be blocked and must be brought to a conclusion. The Contact Group calls on the parties to engage in good faith and constructively, to refrain from unilateral steps and to reject any form of violence.

.
The Security Council will remain actively seized of the matter. The final decision on the status of Kosovo should be endorsed by the Security Council." (Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo, as Annexed to the Letter Dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, United Nations doc. S/2005/709.)

67. Between 20 February and 8 September 2006, several rounds of negotiations were held, at which delegations of Serbia and Kosovo addressed, in particular, the decentralization of Kosovo's governmental and administrative functions, cultural heritage and religious sites, economic issues, and community rights (Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, United Nations docs. S/2006/361, S/2006/707 and S/2006/906). According to the Reports of the Secretary-General, "the parties remain[ed] far apart on most issues" (Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/707; S/2006/906).

68. On 2 February 2007, the Special Envoy of the Secretary-General submitted a draft comprehensive proposal for the Kosovo status settlement to the parties and invited them to engage in a consultative process (recalled in the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, United Nations doc. S/2007/134, 9 March 2007). On 10 March 2007, a final round of negotiations was held in Vienna to discuss the settlement proposal. As reported by the Secretary-General, "the parties were unable to make any additional progress" at those negotiations (Report of the Secretary-General on the United

Nations Interim Administration Mission in Kosovo, United Nations doc. S/2007/395, 29 June 2007, p. 1).

69. On 26 March 2007, the Secretary-General submitted the report of his Special Envoy to the Security Council. The Special Envoy stated that "after more than one year of direct talks, bilateral negotiations and expert consultations, it [had] become clear to [him] that the parties [were] not able to reach an agreement on Kosovo's future status" (Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo's future status, United Nations doc. S/2007/168, 26 March 2007). After emphasizing that his

"mandate explicitly provides that [he] determine the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the co-operation of the parties and the situation on the ground" (*ibid.*, para. 3),

the Special Envoy concluded:

"It is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse.

.
The time has come to resolve Kosovo's status. Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community." (*ibid.*, paras. 3 and 5.)

70. The Special Envoy's conclusions were accompanied by his finalized Comprehensive Proposal for the Kosovo Status Settlement (United Nations doc. S/2007/168/Add. 1, 26 March 2007), which, in his words, set forth "international supervisory structures, [and] provide[d] the foundations for a future independent Kosovo" (United Nations doc. S/2007/168, para. 5). The Comprehensive Proposal called for the immediate convening of a Constitutional Commission to draft a Constitution for Kosovo (*ibid.*, Add. 1, 26 March 2007, Art. 10.1), established guidelines concerning the membership of that Commission (*ibid.*, Art. 10.2), set numerous requirements concerning principles and provisions to be contained in that Constitution (*ibid.*, Art. 1.3 and Ann. I), and required that the Assembly of Kosovo approve the Constitution by a two-thirds vote within 120 days (*ibid.*, Art. 10.4). Moreover, it called for the expiry of the UNMIK mandate after a 120-day transition period, after which "all legislative and executive authority vested in UNMIK shall be transferred *en bloc* to the governing authorities of Kosovo, unless otherwise provided for in this Settlement" (*ibid.*, Art. 15.1). It mandated the holding of general and municipal elections no later than nine months from the entry into force

of the Constitution (UN doc. S/2007/168/Add. 1, 26 March 2007, Art. 11.1). The Court further notes that the Comprehensive Proposal for the Kosovo Status Settlement provided for the appointment of an International Civilian Representative (ICR), who would have the final authority in Kosovo regarding interpretation of the Settlement (*ibid.*, Art. 12). The Comprehensive Proposal also specified that the mandate of the ICR would be reviewed “no later than two years after the entry into force of [the] Settlement, with a view to gradually reducing the scope of the powers of the ICR and the frequency of intervention” (*ibid.*, Ann. IX, Art. 5.1) and that

“[t]he mandate of the ICR shall be terminated when the International Steering Group [a body composed of France, Germany, Italy, the Russian Federation, the United Kingdom, the United States, the European Union, the European Commission and NATO] determine[d] that Kosovo ha[d] implemented the terms of [the] Settlement” (*ibid.*, Art. 5.2).

71. The Secretary-General “fully support[ed] both the recommendation made by [his] Special Envoy in his report on Kosovo’s future status and the Comprehensive Proposal for the Kosovo Status Settlement” (letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, United Nations doc. S/2007/168). The Security Council, for its part, decided to undertake a mission to Kosovo (see Report of the Security Council mission on the Kosovo issue, United Nations doc. S/2007/256, 4 May 2007), but was not able to reach a decision regarding the final status of Kosovo. A draft resolution was circulated among the Council’s members (see draft resolution sponsored by Belgium, France, Germany, Italy, the United Kingdom and the United States, United Nations doc. S/2007/437 Prov., 17 July 2007) but was withdrawn after some weeks when it had become clear that it would not be adopted by the Security Council.

72. Between 9 August and 3 December 2007, further negotiations on the future status of Kosovo were held under the auspices of a Troika comprising representatives of the European Union, the Russian Federation and the United States. On 4 December 2007, the Troika submitted its report to the Secretary-General, which came to the conclusion that, despite intensive negotiations, “the parties were unable to reach an agreement on Kosovo’s status” and “[n]either side was willing to yield on the basic question of sovereignty” (Report of the European Union/United States/Russian Federation Troika on Kosovo, 4 December 2007, annexed to S/2007/723).

73. On 17 November 2007, elections were held for the Assembly of Kosovo, 30 municipal assemblies and their respective mayors (Report of

the Secretary-General on the United Nations Interim Administration Mission in Kosovo, United Nations doc. S/2007/768). The Assembly of Kosovo held its inaugural session on 4 and 9 January 2008 (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, United Nations doc. S/2008/211).

C. *The Events of 17 February 2008 and Thereafter*

74. It is against this background that the declaration of independence was adopted on 17 February 2008. The Court observes that the original language of the declaration is Albanian. For the purposes of the present Opinion, when quoting from the text of the declaration, the Court has used the translations into English and French included in the dossier submitted on behalf of the Secretary-General.

In its relevant passages, the declaration of independence states that its authors were “[c]onvened in an extraordinary meeting on 17 February 2008, in Pristina, the capital of Kosovo” (first preambular paragraph); it “[r]ecall[ed] the years of internationally-sponsored negotiations between Belgrade and Pristina over the question of [Kosovo’s] future political status” and “[r]egrett[ed] that no mutually-acceptable status outcome was possible” (tenth and eleventh preambular paragraphs). It further declared that the authors were “[d]etermined to see [Kosovo’s] status resolved in order to give [its] people clarity about their future, move beyond the conflicts of the past and realise the full democratic potential of [its] society” (thirteenth preambular paragraph).

75. In its operative part, the declaration of independence of 17 February 2008 states:

“1. We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.

2. We declare Kosovo to be a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes.

5. We welcome the international community’s continued support

of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission.

9.
 We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK)

12. We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan We declare publicly that all States are entitled to rely upon this declaration⁵⁶

76. The declaration of independence was adopted at a meeting held on 17 February 2008 by 109 out of the 120 members of the Assembly of Kosovo, including the Prime Minister of Kosovo and by the President of Kosovo (who was not a member of the Assembly). The ten members of the Assembly representing the Kosovo Serb community and one member representing the Kosovo Gorani community decided not to attend this meeting. The declaration was written down on two sheets of papyrus and read out, voted upon and then signed by all representatives present. It was not transmitted to the Special Representative of the Secretary-General and was not published in the Official Gazette of the Provisional Institutions of Self-Government of Kosovo.

77. After the declaration of independence was issued, the Republic of Serbia informed the Secretary-General that it had adopted a decision stating that that declaration represented a forceful and unilateral secession of a part of the territory of Serbia, and did not produce legal effects either in Serbia or in the international legal order (United Nations doc. S/PV.5839; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, United Nations doc. S/2008/211). Further to a request from Serbia, an emergency public meeting of the Security Council took place on 18 February 2008, in which Mr. Boris Tadić, the President of the Republic of Serbia, participated and denounced the declaration of independence as an unlawful act which had been declared null and void by the National Assembly of Serbia (United Nations doc. S/PV.5839).

IV. THE QUESTION WHETHER THE DECLARATION OF INDEPENDENCE IS IN ACCORDANCE WITH INTERNATIONAL LAW

78. The Court now turns to the substance of the request submitted by the General Assembly. The Court recalls that it has been asked by the General Assembly to assess the accordance of the declaration of independence of 17 February 2008 with “international law” (resolution 63/3 of the General Assembly, 8 October 2008). The Court will first turn its attention to certain questions concerning the lawfulness of declarations of independence under general international law, against the background of which the question posed falls to be considered, and Security Council resolution 1244 (1999) is to be understood and applied. Once this general framework has been determined, the Court will turn to the legal relevance of Security Council resolution 1244 (1999), and determine whether the resolution creates special rules, and ensuing obligations, under international law applicable to the issues raised by the present request and having a bearing on the lawfulness of the declaration of independence of 17 February 2008.

A. General International Law

79. During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation (cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, pp. 31-32, paras. 52-53; *East Timor (Portugal v. Australia)*, *Judgment*, I.C.J. Reports 1995, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, I.C.J. Reports 2004 (I), pp. 171-172, para. 88). A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.

80. Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity.

The Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4, which provides that:

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

In General Assembly resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations”, which reflects customary international law (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*), *Merits, Judgment, I.C.J. Reports 1986*, pp. 101-103, paras. 191-193), the General Assembly reiterated “[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State”. This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that “[t]he participating States will respect the territorial integrity of each of the participating States” (Art. IV). Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States.

81. Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, *inter alia*, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska.

The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a preemptory character (*jus cogens*). In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above

appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.

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82. A number of participants in the present proceedings have claimed, although in almost every instance only as a secondary argument, that the population of Kosovo has the right to create an independent State either as a manifestation of a right to self-determination or pursuant to what they described as a right of “remedial secession” in the face of the situation in Kosovo.

The Court has already noted (see paragraph 79 above) that one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination. Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of “remedial secession” and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of “remedial secession” were actually present in Kosovo.

83. The Court considers that it is not necessary to resolve these questions in the present case. The General Assembly has requested the Court’s opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of “remedial secession”, however, concern the right to separate from a State. As the Court has already noted (see paragraphs 49 to 56 above), and as almost all participants agreed, that issue is beyond the scope of the question posed by the General Assembly. To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the *lex specialis* created by Security Council resolution 1244 (1999).

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84. For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international

law. Having arrived at that conclusion, the Court now turns to the legal relevance of Security Council resolution 1244, adopted on 10 June 1999.

B. Security Council Resolution 1244 (1999) and the UNMIK Constitutional Framework Created Thereunder

85. Within the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law. The Court has had the occasion to interpret and apply such Security Council resolutions on a number of occasions and has consistently treated them as part of the framework of obligations under international law (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p. 16; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Provisional Measures, Order of 14 April 1992*, I.C.J. Reports 1992, p. 15, paras. 39-41; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *Provisional Measures, Order of 14 April 1992*, I.C.J. Reports 1992, pp. 126-127, paras. 42-44). Resolution 1244 (1999) was expressly adopted by the Security Council on the basis of Chapter VII of the United Nations Charter, and therefore clearly imposes international legal obligations. The Court notes that none of the participants has questioned the fact that resolution 1244 (1999), which specifically deals with the situation in Kosovo, is part of the law relevant in the present situation.

86. The Court notes that there are a number of other Security Council resolutions adopted on the question of Kosovo, notably Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1239 (1999); however, the Court sees no need to pronounce specifically on resolutions of the Security Council adopted prior to resolution 1244 (1999), which are, in any case, recalled in the second preambular paragraph of the latter.

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87. A certain number of participants have dealt with the question whether regulations adopted on behalf of UNMIK by the Special Representative of the Secretary-General, notably the Constitutional Framework (see paragraph 62 above), also form part of the applicable international law within the meaning of the General Assembly's request.

88. In particular, it has been argued before the Court that the Constitutional Framework is an act of an internal law rather than an interna-

tional law character. According to that argument, the Constitutional Framework would not be part of the international law applicable in the present instance and the question of the compatibility of the declaration of independence therewith would thus fall outside the scope of the General Assembly's request.

The Court observes that UNMIK regulations, including regulation 2001/9, which promulgated the Constitutional Framework, are adopted by the Special Representative of the Secretary-General on the basis of the authority derived from Security Council resolution 1244 (1999), notably its paragraphs 6, 10, and 11, and thus ultimately from the United Nations Charter. The Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore possesses an international legal character.

89. At the same time, the Court observes that the Constitutional Framework functions as part of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in Kosovo and the purpose of which is to regulate, during the interim phase established by resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than international, law. Regulation 2001/9 opens with the statement that the Constitutional Framework was promulgated

“[f]or the purposes of developing meaningful self-government in Kosovo pending a final settlement, and establishing provisional institutions of self-government in the legislative, executive and judicial fields through the participation of the people of Kosovo in free and fair elections”.

The Constitutional Framework therefore took effect as part of the body of law adopted for the administration of Kosovo during the interim phase. The institutions which it created were empowered by the Constitutional Framework to take decisions which took effect within that body of law. In particular, the Assembly of Kosovo was empowered to adopt legislation which would have the force of law within that legal order, subject always to the overriding authority of the Special Representative of the Secretary-General.

90. The Court notes that both Security Council resolution 1244 (1999) and the Constitutional Framework entrust the Special Representative of the Secretary-General with considerable supervisory powers with regard to the Provisional Institutions of Self-Government established under the authority of the United Nations Interim Administration Mission in Kosovo. As noted above (see paragraph 58), Security Council resolution 1244 (1999) envisages “an interim administration for Kosovo . . . which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions” (para. 10). Resolution 1244 (1999) further states that “the main responsibilities of the international civil presence will include . . . [o]rganizing and overseeing the development of provisional institutions for demo-

cratic and autonomous self-government pending a political settlement, including the holding of elections” (paragraph 11 (c)). Similarly, as described above (see paragraph 62), under the Constitutional Framework, the Provisional Institutions of Self-Government were to function in conjunction with and subject to the direction of the Special Representative of the Secretary-General in the implementation of Security Council resolution 1244 (1999).

91. The Court notes that Security Council resolution 1244 (1999) and the Constitutional Framework were still in force and applicable as at 17 February 2008. Paragraph 19 of Security Council resolution 1244 (1999) expressly provides that “the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise”. No decision amending resolution 1244 (1999) was taken by the Security Council at its meeting held on 18 February 2008, when the declaration of independence was discussed for the first time, or at any subsequent meeting. The Presidential Statement of 26 November 2008 (SPRST/2008/44) merely “welcom[ed] the co-operation between the UN and other international actors, within the framework of Security Council resolution 1244 (1999)” (emphasis added). In addition, pursuant to paragraph 21 of Security Council resolution 1244 (1999), the Security Council decided “to remain actively seized of the matter” and maintained the item “Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998), 1239 (1999) and 1244 (1999)” on its agenda (see, most recently, Report of the Security Council, 1 August 2008-31 July 2009, General Assembly, Official Records, 64th session, Supplement No. 2, pp. 39 ff. and 132 ff.). Furthermore, Chapter 14.3 of the Constitutional Framework sets forth that “[t]he SRSG . . . may effect amendments to this Constitutional Framework”. Minor amendments were effected by virtue of UNMIK regulations UNMIK/REG/2002/9 of 3 May 2002, UNMIK/REG/2007/29 of 4 October 2007, UNMIK/REG/2008/1 of 8 January 2008 and UNMIK/REG/2008/9 of 8 February 2008. Finally, neither Security Council resolution 1244 (1999) nor the Constitutional Framework contains a clause providing for its termination and neither has been repealed; they therefore constituted the international law applicable to the situation prevailing in Kosovo on 17 February 2008.

92. In addition, the Special Representative of the Secretary-General continues to exercise his functions in Kosovo. Moreover, the Secretary-General has continued to submit periodic reports to the Security Council, as required by paragraph 20 of Security Council resolution 1244 (1999) (see the most recent quarterly Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2010/169, 6 April 2010, as well as the preceding Reports S/2008/692 of 24 Novem-

ber 2008, S/2009/149 of 17 March 2009, S/2009/300 of 10 June 2009, S/2009/497 of 30 September 2009 and S/2010/5 of 5 January 2010).

93. From the foregoing, the Court concludes that Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for the advisory opinion.

1. *Interpretation of Security Council resolution 1244 (1999)*

94. Before continuing further, the Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p. 54, para. 116), irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.

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95. The Court first notes that resolution 1244 (1999) must be read in conjunction with the general principles set out in annexes 1 and 2 thereto, since in the resolution itself, the Security Council: “1. *Decide[d]* that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2.” Those general principles sought to defuse the Kosovo crisis first by ensuring an end to the violence and repression in Kosovo and by the establishment of an interim administration. A

longer-term solution was also envisaged, in that resolution 1244 (1999) was to initiate

“[a] political process towards the establishing of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA” (Security Council resolution 1244 (1999) of 10 June 1999, Ann. 1, sixth principle; *ibid.*, Ann. 2, para. 8).

Further, it bears recalling that the tenth preambular paragraph of resolution 1244 (1999) also recalled the sovereignty and the territorial integrity of the Federal Republic of Yugoslavia.

96. Having earlier outlined the principal characteristics of Security Council resolution 1244 (1999) (see paragraphs 58 to 59), the Court next observes that three distinct features of that resolution are relevant for discerning its object and purpose.

97. First, resolution 1244 (1999) establishes an international civil and security presence in Kosovo with full civil and political authority and sole responsibility for the governance of Kosovo. As described above (see paragraph 60), on 12 June 1999, the Secretary-General presented to the Security Council his preliminary operational concept for the overall organization of the civil presence under UNMIK. On 25 July 1999, the Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1, deemed to have entered into force as of 10 June 1999, the date of adoption of Security Council resolution 1244 (1999). Under this regulation, “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary”, was vested in UNMIK and exercised by the Special Representative. Viewed together, resolution 1244 (1999) and UNMIK regulation 1999/1 therefore had the effect of superseding the legal order in force at that time in the territory of Kosovo and setting up an international territorial administration. For this reason, the establishment of civil and security presences in Kosovo deployed on the basis of resolution 1244 (1999) must be understood as an exceptional measure relating to civil, political and security aspects and aimed at addressing the crisis existing in that territory in 1999.

98. Secondly, the solution embodied in resolution 1244 (1999), namely, the implementation of an interim international territorial administration, was designed for humanitarian purposes; to provide a means for the stabilization of Kosovo and for the re-establishment of a basic public order in an area beset by crisis. This becomes apparent in the text of resolution 1244 (1999) itself which, in its second preambular paragraph, recalls Security Council resolution 1239, adopted on 14 May 1999, in which the Security Council had expressed “grave concern at the humanitarian crisis

in and around Kosovo”. The priorities which are identified in paragraph 11 of resolution 1244 (1999) were elaborated further in the so-called “four pillars” relating to the governance of Kosovo described in the Report of the Secretary-General of 12 June 1999 (paragraph 60 above). By placing an emphasis on these “four pillars”, namely, interim civil administration, humanitarian affairs, institution building and reconstruction, and by assigning responsibility for these core components to different international organizations and agencies, resolution 1244 (1999) was clearly intended to bring about stabilization and reconstruction. The interim administration in Kosovo was designed to suspend temporarily Serbia’s exercise of its authority flowing from its continuing sovereignty over the territory of Kosovo. The purpose of the legal régime established under resolution 1244 (1999) was to establish, organize and oversee the development of local institutions of self-government in Kosovo under the aegis of the interim international presence.

99. Thirdly, resolution 1244 (1999) clearly establishes an interim régime; it cannot be understood as putting in place a permanent institutional framework in the territory of Kosovo. This resolution mandated UNMIK merely to facilitate the desired negotiated solution for Kosovo’s future status, without prejudging the outcome of the negotiating process.

100. The Court thus concludes that the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis.

2. *The question whether the declaration of independence is in accordance with Security Council resolution 1244 (1999) and the measures adopted thereunder*

101. The Court will now turn to the question whether Security Council resolution 1244 (1999), or the measures adopted thereunder, introduces a specific prohibition on issuing a declaration of independence, applicable to those who adopted the declaration of independence of 17 February 2008. In order to answer this question, it is first necessary, as explained in paragraph 52 above, for the Court to determine precisely who issued that declaration.

(a) *The identity of the authors of the declaration of independence*

102. The Court needs to determine whether the declaration of independence of 17 February 2008 was an act of the “Assembly of Kosovo”, one of the Provisional Institutions of Self-Government, established under

Chapter 9 of the Constitutional Framework, or whether those who adopted the declaration were acting in a different capacity.

103. The Court notes that different views have been expressed regarding this question. On the one hand, it has been suggested in the proceedings before the Court that the meeting in which the declaration was adopted was a session of the Assembly of Kosovo, operating as a Provisional Institution of Self-Government within the limits of the Constitutional Framework. Other participants have observed that both the language of the document and the circumstances under which it was adopted clearly indicate that the declaration of 17 February 2008 was not the work of the Provisional Institutions of Self-Government and did not take effect within the legal framework created for the Government of Kosovo during the interim phase.

104. The Court notes that, when opening the meeting of 17 February 2008 at which the declaration of independence was adopted, the President of the Assembly and the Prime Minister of Kosovo made reference to the Assembly of Kosovo and the Constitutional Framework. The Court considers, however, that the declaration of independence must be seen in its larger context, taking into account the events preceding its adoption, notably relating to the so-called “final status process” (see paragraphs 64 to 73). Security Council resolution 1244 (1999) was mostly concerned with setting up an interim framework of self-government for Kosovo (see paragraph 58 above). Although, at the time of the adoption of the resolution, it was expected that the final status of Kosovo would flow from, and be developed within, the framework set up by the resolution, the specific contours, let alone the outcome, of the final status process were left open by Security Council resolution 1244 (1999). Accordingly, its paragraph 11, especially in its subparagraphs (d), (e) and (f), deals with final status issues only in so far as it is made part of UNMIK’s responsibilities to “[f]acilitat[e] a political process designed to determine Kosovo’s future status, taking into account the Rambouillet accords” and “[i]n a final stage, [to oversee] the transfer of authority from Kosovo’s provisional institutions to institutions established under a political settlement”.

105. The declaration of independence reflects the awareness of its authors that the final status negotiations had failed and that a critical moment for the future of Kosovo had been reached. The preamble of the declaration refers to the “years of internationally-sponsored negotiations between Belgrade and Pristina over the question of our future political status” and expressly puts the declaration in the context of the failure of the final status negotiations, inasmuch as it states that “no mutually-acceptable status outcome was possible” (tenth and eleventh preambular paragraphs). Proceeding from there, the authors of the declaration of independence emphasize their determination to “resolve” the status of Kosovo and to give the people of Kosovo “clarity about their future”

(thirteenth preambular paragraph). This language indicates that the authors of the declaration did not seek to act within the standard framework of interim self-administration of Kosovo, but aimed at establishing Kosovo “as an independent and sovereign State” (para. 1). The declaration of independence, therefore, was not intended by those who adopted it to take effect within the legal order created for the interim phase, nor was it capable of doing so. On the contrary, the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order.

106. This conclusion is reinforced by the fact that the authors of the declaration undertook to fulfil the international obligations of Kosovo, notably those created for Kosovo by UNMIK (para. 9), and expressly and solemnly declared Kosovo to be bound vis-à-vis third States by the commitments made in the declaration (para. 12). By contrast, under the régime of the Constitutional Framework, all matters relating to the management of the external relations of Kosovo were the exclusive prerogative of the Special Representative of the Secretary-General:

- “(m) concluding agreements with states and international organizations in all matters within the scope of UNSCR 1244 (1999);
- (n) overseeing the fulfilment of commitments in international agreements entered into on behalf of UNMIK;
- (o) external relations, including with States and international organizations . . .” (Chap. 8.1 of the Constitutional Framework, “Powers and Responsibilities Reserved to the SRSG”),

with the Special Representative of the Secretary-General only consulting and co-operating with the Provisional Institutions of Self-Government in these matters.

107. Certain features of the text of the declaration and the circumstances of its adoption also point to the same conclusion. Nowhere in the original Albanian text of the declaration (which is the sole authentic text) is any reference made to the declaration being the work of the Assembly of Kosovo. The words “Assembly of Kosovo” appear at the head of the declaration only in the English and French translations contained in the dossier submitted on behalf of the Secretary-General. The language used in the declaration differs from that employed in acts of the Assembly of Kosovo in that the first paragraph commences with the phrase “We, the democratically-elected leaders of our people . . .”, whereas acts of the Assembly of Kosovo employ the third person singular.

Moreover, the procedure employed in relation to the declaration differed from that employed by the Assembly of Kosovo for the adoption of legislation. In particular, the declaration was signed by all those present when it was adopted, including the President of Kosovo, who (as noted in paragraph 76 above) was not a member of the Assembly of Kosovo. In fact, the self-reference of the persons adopting the declaration of independence as “the democratically-elected leaders of our people” immediately precedes the actual declaration of independence within the text (“hereby declare Kosovo to be an independent and sovereign State”; para. 1). It is also noticeable that the declaration was not forwarded to the Special Representative of the Secretary-General for publication in the Official Gazette.

108. The reaction of the Special Representative of the Secretary-General to the declaration of independence is also of some significance. The Constitutional Framework gave the Special Representative power to oversee and, in certain circumstances, annul the acts of the Provisional Institutions of Self-Government. On previous occasions, in particular in the period between 2002 and 2005, when the Assembly of Kosovo took initiatives to promote the independence of Kosovo, the Special Representative had qualified a number of acts as being incompatible with the Constitutional Framework on the grounds that they were deemed to be “beyond the scope of [the Assembly’s] competencies” (United Nations dossier No. 189, 7 February 2003) and therefore outside the powers of the Assembly of Kosovo.

The silence of the Special Representative of the Secretary-General in the face of the declaration of independence of 17 February 2008 suggests that he did not consider that the declaration was an act of the Provisional Institutions of Self-Government designed to take effect within the legal order for the supervision of which he was responsible. As the practice shows, he would have been under a duty to take action with regard to acts of the Assembly of Kosovo which he considered to be *ultra vires*.

The Court accepts that the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, submitted to the Security Council on 28 March 2008, stated that “the Assembly of Kosovo held a session during which it adopted a ‘declaration of independence’, declaring Kosovo an independent and sovereign State” (United Nations doc. S/2008/211, para. 3). This was the normal periodic report on UNMIK activities, the purpose of which was to inform the Security Council about developments in Kosovo; it was not intended as a legal analysis of the declaration or the capacity in which those who adopted it had acted.

109. The Court thus arrives at the conclusion that, taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who

acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.

(b) *The question whether the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999) or the measures adopted thereunder*

110. Having established the identity of the authors of the declaration of independence, the Court turns to the question whether their act in promulgating the declaration was contrary to any prohibition contained in Security Council resolution 1244 (1999) or the Constitutional Framework adopted thereunder.

111. The Court recalls that this question has been a matter of controversy in the present proceedings. Some participants to the proceedings have contended that the declaration of independence of 17 February 2008 was a unilateral attempt to bring to an end the international presence established by Security Council resolution 1244 (1999), a result which it is said could only be effectuated by a decision of the Security Council itself. It has also been argued that a permanent settlement for Kosovo could only be achieved either by agreement of all parties involved (notably including the consent of the Republic of Serbia) or by a specific Security Council resolution endorsing a specific final status for Kosovo, as provided for in the Guiding Principles of the Contact Group. According to this view, the unilateral action on the part of the authors of the declaration of independence cannot be reconciled with Security Council resolution 1244 (1999) and thus constitutes a violation of that resolution.

112. Other participants have submitted to the Court that Security Council resolution 1244 (1999) did not prevent or exclude the possibility of Kosovo’s independence. They argued that the resolution only regulates the interim administration of Kosovo, but not its final or permanent status. In particular, the argument was put forward that Security Council resolution 1244 (1999) does not create obligations under international law prohibiting the issuance of a declaration of independence or making it invalid, and does not make the authors of the declaration of independence its addressees. According to this position, if the Security Council had wanted to preclude a declaration of independence, it would have done so in clear and unequivocal terms in the text of the resolution, as it did in resolution 787 (1992) concerning the Republika Srpska. In addition, it was argued that the references, in the annexes of Security Council resolution 1244 (1999), to the Rambouillet accords and thus indirectly to the “will of the people” (see Chapter 8.3 of the Rambouillet accords) of Kosovo, support the view that Security Council resolution 1244 (1999) not only did not oppose the declaration of independence, but indeed contemplated it. Other participants contended that at least once the negoti-

ating process had been exhausted, Security Council resolution 1244 (1999) was no longer an obstacle to a declaration of independence.

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113. The question whether resolution 1244 (1999) prohibits the authors of the declaration of 17 February 2008 from declaring independence from the Republic of Serbia can only be answered through a careful reading of this resolution (see paras. 94 *et seq.*).

114. First, the Court observes that Security Council resolution 1244 (1999) was essentially designed to create an interim régime for Kosovo, with a view to channelling the long-term political process to establish its final status. The resolution did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement.

In this regard the Court notes that contemporaneous practice of the Security Council shows that in situations where the Security Council has decided to establish restrictive conditions for the permanent status of a territory, those conditions are specified in the relevant resolution. For example, although the factual circumstances differed from the situation in Kosovo, only 19 days after the adoption of resolution 1244 (1999), the Security Council, in its resolution 1251 of 29 June 1999, reaffirmed its position that a “Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded” (para. 11). The Security Council thus set out the specific conditions relating to the permanent status of Cyprus.

By contrast, under the terms of resolution 1244 (1999) the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo.

Resolution 1244 (1999) thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level: unlike resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status of Kosovo.

115. Secondly, turning to the question of the addressees of Security Council resolution 1244 (1999), as described above (see paragraph 58), it sets out a general framework for the “deployment in Kosovo, under United Nations auspices, of international civil and security presences” (para. 5). It is mostly concerned with creating obligations and authorizations for United Nations Member States as well as for organs of the United Nations such as the Secretary-General and his Special Representative (see notably paras. 3, 5, 6, 7, 9, 10 and 11 of Security Council resolution 1244 (1999)). The only point at which resolution 1244 (1999)

expressly mentions other actors relates to the Security Council’s demand, on the one hand, “that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization” (para. 15) and, on the other hand, for the “full co-operation by all concerned, including the international security presence, with the International Tribunal for the former Yugoslavia” (para. 14). There is no indication, in the text of Security Council resolution 1244 (1999), that the Security Council intended to impose, beyond that, a specific obligation to act or a prohibition from acting, addressed to such other actors.

116. The Court recalls in this regard that it has not been uncommon for the Security Council to make demands on actors other than United Nations Member States and inter-governmental organizations. More specifically, a number of Security Council resolutions adopted on the subject of Kosovo prior to Security Council resolution 1244 (1999) contained demands addressed *eo nomine* to the Kosovo Albanian leadership. For example, resolution 1160 (1998) “[l]all[ed] upon the authorities in Belgrade and the leadership of the Kosovo Albanian community urgently to enter without preconditions into a meaningful dialogue on political status issues” (resolution 1160 (1998), para. 4; emphasis added). Resolution 1199 (1998) included four separate demands on the Kosovo Albanian leadership, i.e., improving the humanitarian situation, entering into a dialogue with the Federal Republic of Yugoslavia, pursuing their goals by peaceful means only, and co-operating fully with the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (resolution 1199 (1998), paras. 2, 3, 6 and 13). Resolution 1203 (1998) “[j]em[and]f] . . . that the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998) and co-operate fully with the OSCE Verification Mission in Kosovo” (resolution 1203 (1998), para. 4). The same resolution also called upon the “Kosovo Albanian leadership to enter immediately into a meaningful dialogue without preconditions and with international involvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo”; demanded that “the Kosovo Albanian leadership and all others concerned respect the freedom of movement of the OSCE Verification Mission and other international personnel”; “[i]n[sist]ed that the Kosovo Albanian leadership condemn all terrorist actions”; and demanded that the Kosovo Albanian leadership “co-operate with international efforts to improve the humanitarian situation and to avert the impending humanitarian catastrophe” (resolution 1203 (1998), paras. 5, 6, 10 and 11).

117. Such reference to the Kosovo Albanian leadership or other actors, notwithstanding the somewhat general reference to “all concerned”

(para. 14), is missing from the text of Security Council resolution 1244 (1999). When interpreting Security Council resolutions, the Court must establish, on a case-by-case basis, considering all relevant circumstances, for whom the Security Council intended to create binding legal obligations. The language used by the resolution may serve as an important indicator in this regard. The approach taken by the Court with regard to the binding effect of Security Council resolutions in general is, *mutatis mutandis*, also relevant here. In this context, the Court recalls its previous statement that:

“The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, I.C.J. Reports 1971, p. 53, para. 114.)

118. Bearing this in mind, the Court cannot accept the argument that Security Council resolution 1244 (1999) contains a prohibition, binding on the authors of the declaration of independence, against declaring independence; nor can such a prohibition be derived from the language of the resolution understood in its context and considering its object and purpose. The language of Security Council resolution 1244 (1999) is at best ambiguous in this regard. The object and purpose of the resolution, as has been explained in detail (see paragraphs 96 to 100), is the establishment of an interim administration for Kosovo, without making any definitive determination on final status issues. The text of the resolution explains that the

“main responsibilities of the international civil presence will include . . . [o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a *political settlement*” (para. 11 (c) of the resolution; emphasis added).

The phrase “political settlement”, often cited in the present proceedings, does not modify this conclusion. First, that reference is made within the context of enumerating the responsibilities of the international civil presence, i.e., the Special Representative of the Secretary-General in Kosovo and UNMIK, and not of other actors. Secondly, as the diverging views presented to the Court on this matter illustrate, the term “political settlement” is subject to various interpretations. The Court therefore con-

cludes that this part of Security Council resolution 1244 (1999) cannot be construed to include a prohibition, addressed in particular to the authors of the declaration of 17 February 2008, against declaring independence.

119. The Court accordingly finds that Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia. Hence, the declaration of independence did not violate Security Council resolution 1244 (1999).

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120. The Court therefore turns to the question whether the declaration of independence of 17 February 2008 has violated the Constitutional Framework established under the auspices of UNMIK. Chapter 5 of the Constitutional Framework determines the powers of the Provisional Institutions of Self-Government of Kosovo. It was argued by a number of States which participated in the proceedings before the Court that the promulgation of a declaration of independence is an act outside the powers of the Provisional Institutions of Self-Government as set out in the Constitutional Framework.

121. The Court has already held, however (see paragraphs 102 to 109 above), that the declaration of independence of 17 February 2008 was not issued by the Provisional Institutions of Self-Government, nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated. It follows that the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government. Accordingly, the Court finds that the declaration of independence did not violate the Constitutional Framework.

* * *

V. GENERAL CONCLUSION

122. The Court has concluded above that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.

* * *

123. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By nine votes to five,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: *President Owada*; *Judges Al-Khasawneh, Buergenthal, Simma, Abraham, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood*;
AGAINST: *Vice-President Tomka*; *Judges Koroma, Keith, Bennouna, Skotnikov*;

(3) By ten votes to four,

Is of the opinion that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law.

IN FAVOUR: *President Owada*; *Judges Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood*;
AGAINST: *Vice-President Tomka*; *Judges Koroma, Bennouna, Skotnikov*.

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

(*Signed*) Hisashi OWADA,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Vice-President TOMKA appends a declaration to the Advisory Opinion of the Court; Judge KOROMA appends a dissenting opinion to the Advisory Opinion of the Court; Judge SIMMA appends a declaration to the Advisory Opinion of the Court; Judges KEITH and SEPÚLVEDA-AMOR append separate opinions to the Advisory Opinion of the Court; Judges BENNOUNA and SKOTNIKOV append dissenting opinions to the Advisory Opinion of the Court; Judges CANÇADO TRINDADE and YUSUF append separate opinions to the Advisory Opinion of the Court.

(*Initialled*) H.O.
(*Initialled*) Ph.C.

**Report of the International Law Commission, Selection of
Guidelines from the Guide to Practice on Reservations to
Treaties**

International Law Commission, Sixty-third session (26 April-
3 June and 4 July-12 August 2011), A/66/10, p. 19

Report of the International Law Commission

Sixty-third session (26 April-3 June and 4 July-12 August 2011)

Guide to Practice on Reservations to Treaties

1. Definitions

1.1 Definition of reservations

1. "Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, ... , whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.2 Definition of interpretative declarations

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.

1.4 Conditional interpretative declarations

1. A conditional interpretative declaration is a unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof.
2. Conditional interpretative declarations are subject to the rules applicable to reservations.

2.3 Late formulation of reservations

A State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty, unless the treaty otherwise provides or none of the other contracting States and contracting organizations opposes the late formulation of the reservation.

2.4.4 Time at which an interpretative declaration may be formulated

Without prejudice to the provisions of guidelines 1.4 and 2.4.7, an interpretative declaration may be formulated at any time.

2.6.1 Definition of objections to reservations

"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation formulated by another State or international organization, whereby the former State or organization purports to preclude the reservation from having its intended effects or otherwise opposes the reservation.

2.6.12 Time period for formulating objections

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation within a period of twelve months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

2.8.1 Forms of acceptance of reservations

The acceptance of a reservation may arise from a unilateral statement to this effect or from silence of a contracting State or contracting organization during the periods specified in guideline 2.6.12.

2.8.8 Acceptance of a reservation to the constituent instrument of an international organization

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

2.8.11 Acceptance of a reservation to a constituent instrument that has not yet entered into force

In the case set forth in guideline 2.8.8 and where the constituent instrument has not yet entered into force, a reservation is considered to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation within a period of twelve months after they were notified of that reservation. Such a unanimous acceptance, once obtained, is final.

3.1.5 Incompatibility of a reservation with the object and purpose of the treaty

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty.

3.1.5.1 Determination of the object and purpose of the treaty

The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.

3.1.5.2 Vague or general reservations

A reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess in particular its compatibility with the object and purpose of the treaty.

3.2.1 Competence of the treaty monitoring bodies to assess the permissibility of reservations

1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.
2. The assessment made by such a body in the exercise of this competence has no greater legal effect than that of the act which contains it.

4.3.1 Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation

An objection by a contracting State or by a contracting organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, except in the case mentioned in guideline 4.3.5.

4.3.6 Effect of an objection on treaty relations

1. When a State or an international organization objecting to a valid reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.

4.5.1 Nullity of an invalid reservation

A reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of any legal effect.

4.5.2 Reactions to a reservation considered invalid

1. The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.
2. Nevertheless, a State or an international organization which considers that a reservation is invalid should formulate a reasoned objection as soon as possible.

4.5.3 Status of the author of an invalid reservation in relation to the treaty

1. The status of the author of an invalid reservation in relation to a treaty depends on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by the treaty.
2. Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting

organization without the benefit of the reservation.

3. Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may express at any time its intention not to be bound by the treaty without the benefit of the reservation.

4. If a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organization intends not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment.

4.7.1 Clarification of the terms of the treaty by an interpretative declaration

1. An interpretative declaration does not modify treaty obligations.

International Court of Justice

**Dispute regarding Navigational and Related Rights
(Costa Rica v. Nicaragua)
Judgment**

I.C.J. Reports 2009, pp. 213-248, paras. 1-84

Mr. Sergio Vinocour, Minister and Consul General of Costa Rica in the French Republic,
 Mr. Norman Lizano, Consul General of Costa Rica in the Kingdom of the Netherlands,
 Mr. Carlos Garbanzo, Counsellor at the Permanent Mission of Costa Rica to the United Nations Office at Geneva,
 Mr. Fouad Zarbiev, PhD candidate, Graduate Institute of International and Development Studies, Geneva,
 Mr. Leonardo Salazar, National Geographic Institute of Costa Rica,
 as Advisers;

Mr. Allan Solís, Third Secretary at the Embassy of Costa Rica in the Kingdom of the Netherlands,
 as Assistant Adviser,

and

the Republic of Nicaragua,
 represented by

H.E. Mr. Carlos José Argüello Gómez, Ambassador of Nicaragua to the Kingdom of the Netherlands,
 as Agent and Counsel;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., member of the English Bar, former Chairman of the International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de Droit international, Distinguished Fellow, All Souls College, Oxford,

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, former member of the International Law Commission,
 Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, associate member of the Institut de droit international,
 Mr. Paul Reichler, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Bar of the District of Columbia,

Mr. Antonio Remiro Brotons, Professor of International Law, Universidad Autónoma, Madrid, associate member of the Institut de droit international,
 as Counsel and Advocates;

Ms Irene Blázquez Navarro, Doctor of Public International Law, Universidad Autónoma, Madrid,
 Ms Clara E. Brillenbourg, Foley Hoag LLP, member of the Bars of the District of Columbia and New York,

Mr. Lawrence H. Martin, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Massachusetts Bar, member of the Bar of the District of Columbia,
 Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

Ms Tania Elena Pacheco Blandino, Counsellor, Embassy of Nicaragua in the Kingdom of the Netherlands,
 Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

Mr. César Vega Masís, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs of Nicaragua,
 as Assistant Counsel,

THE COURT,

composed as above,
 after deliberation,

delivers the following Judgment:

1. On 29 September 2005 the Republic of Costa Rica (hereinafter “Costa Rica”) filed in the Registry of the Court an Application of the same date, instituting proceedings against the Republic of Nicaragua (hereinafter “Nicaragua”) with regard to a “dispute concerning navigational and related rights of Costa Rica on the San Juan River”.

In its Application, Costa Rica seeks to found the jurisdiction of the Court on the declaration it made on 20 February 1973 under Article 36, paragraph 2, of the Statute, as well as on the declaration which Nicaragua made on 24 September 1929 under Article 36 of the Statute of the Permanent Court of International Justice and which is deemed, pursuant to Article 36, paragraph 5, of the Statute of the present Court, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of this Court. Costa Rica also seeks to found the jurisdiction of the Court on the Tovar-Caldera Agreement signed between the Parties on 26 September 2002. In addition, Costa Rica invokes as a basis of the Court’s jurisdiction the provisions of Article XXXI of the American Treaty on Pacific Settlement, officially designated, according to Article LX thereof, as the “Treaty of Bogotá”.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Registrar immediately communicated a certified copy of the Application to the Government of Nicaragua; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar moreover addressed to the Organization of American States the notification provided for in Article 34, paragraph 3, of the Statute of the Court, and asked that organization whether or not it intended to furnish observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court.

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise its right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Costa Rica chose Mr. Antônio Cançado Trindade and Nicaragua Mr. Gilbert Guillaume. Mr. Cançado Trindade was subsequently elected as a Member of the Court. Costa Rica informed the Court that it had decided not to choose a new judge *ad hoc*.

5. By an Order dated 29 November 2005, the Court fixed 29 August 2006 and 29 May 2007, respectively, as the time-limits for the filing of the Memorial of Costa Rica and the Counter-Memorial of Nicaragua; those pleadings were duly filed within the time-limits so prescribed.

6. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of the Republic of Ecuador and the Government of the Republic of Colombia respectively asked to be furnished with copies of the pleadings and documents annexed. Having ascertained the views of the Parties pursuant to that Article, the Court decided not to grant these requests. The Registrar communicated the Court's decision to the Government of the Republic of Ecuador and the Government of the Republic of Colombia, as well as to the Parties.

7. By an Order of 9 October 2007, the Court authorized the submission of a Reply by Costa Rica and a Rejoinder by Nicaragua, and fixed 15 January 2008 and 15 July 2008 as the respective time-limits for the filing of those pleadings. The Reply and the Rejoinder were duly filed within the time-limits so prescribed.

8. By letter of 27 November 2008, the Agent of Costa Rica expressed his Government's desire to produce five new documents, in accordance with Article 56 of the Rules of Court. As provided for in paragraph 1 of that Article, those documents were communicated to Nicaragua. By letter of 10 December 2008, the Agent of Nicaragua informed the Court that his Government did not give its consent to the production of the requested documents.

The Court decided, pursuant to Article 56, paragraph 2, of the Rules, to authorize the production of four of the five documents submitted by Costa Rica, it being understood that Nicaragua would have the opportunity, pursuant to paragraph 3 of that Article, to comment subsequently thereon and to submit documents in support of those comments. That decision was communicated to the Parties by letters from the Registrar dated 18 December 2008.

9. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after ascertaining the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

10. Public hearings were held between 2 and 12 March 2009, at which the Court heard the oral arguments and replies of:

For Costa Rica: H.E. Mr. Edgar Ugalde-Alvarez,
Mr. Arnoldo Brenes,
Mr. Sergio Ugalde,
Mr. Lucius Caffisch,
Mr. Marcelo G. Kohen,
Mr. James Crawford,
Ms. Kate Parlett.

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez,
Mr. Ian Brownlie,
Mr. Antonio Remiro Brotons,
Mr. Alain Pellet,
Mr. Paul Reichler,
Mr. Stephen C. McCaffrey.

11. At the hearings, Members of the Court put questions to the Parties, to which replies were given in writing, within the time-limit fixed by the President in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, each of the Parties submitted comments on the written replies provided by the other.

*

12. In its Application, the following claims were made by Costa Rica:

“For these reasons, and reserving the right to supplement, amplify or amend the present Application, as well as to request the Court to establish provisional measures which might be necessary to protect its rights and to prevent the aggravation of the dispute, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations as referred to in paragraph 1 of this Application in denying to Costa Rica the free exercise of its rights of navigation and associated rights on the San Juan River. In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has violated:

- (a) the obligation to facilitate and expedite traffic on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888;
- (b) the obligation to allow Costa Rican boats and their passengers to navigate freely and without impediment on the San Juan River for commercial purposes, including the transportation of passengers and tourism;
- (c) the obligation to allow Costa Rican boats and their passengers while engaged in such navigation to moor freely on any of the San Juan River banks without paying any charges, unless expressly agreed by both Governments;
- (d) the obligation not to require Costa Rican boats and their passengers to stop at any Nicaraguan post along the river;
- (e) the obligation not to impose any charges or fees on Costa Rican boats and their passengers for navigating on the river;
- (f) the obligation to allow Costa Rica the right to navigate the river in accordance with Article Second of the Cleveland Award;
- (g) the obligation to allow Costa Rica the right to navigate the San Juan River in official boats for supply purposes, exchange of personnel of the border posts along the right bank of the San Juan River, with their official equipment, including the necessary arms and ammunition, and for the purposes of protection, as established in the pertinent instruments;
- (h) the obligation to collaborate with Costa Rica in order to carry out those undertakings and activities which require a common effort by both States in order to facilitate and expedite traffic in the San Juan River within the terms of the Treaty of Limits and its interpretation given by the Cleveland Award, and other pertinent instruments;
- (i) the obligation not to aggravate and extend the dispute by adopting

measures against Costa Rica, including unlawful economic sanctions contrary to treaties in force or general international law, or involving further changes in the régime of navigation and associated rights on the San Juan River not permitted by the instruments referred to above.

Further, the Court is requested to determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to in paragraph 10 above.”

Paragraph 10 of the Application reads as follows:

“Costa Rica seeks the cessation of this Nicaraguan conduct which prevents the free and full exercise and enjoyment of the rights that Costa Rica possesses on the San Juan River, and which also prevents Costa Rica from fulfilling its responsibilities under Article II of the 1956 Agreement and otherwise. In the event that Nicaragua imposes the economic sanctions referred to above, or any other unlawful sanctions, or otherwise takes steps to aggravate and extend the present dispute, Costa Rica further seeks the cessation of such conduct and full reparation for losses suffered.”

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

On behalf of the Government of Costa Rica,
in the Memorial and in the Reply:

“1. For these reasons, and reserving the right to supplement, amplify or amend the present submissions, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations in denying to Costa Rica the free exercise of its rights of navigation and related rights on the San Juan.

2. In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has violated:

- (a) the obligation to allow all Costa Rican vessels and their passengers to navigate freely on the San Juan for purposes of commerce, including communication and the transportation of passengers and tourism;
- (b) the obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the River;
- (c) the obligation not to require persons exercising the right of free navigation on the River to carry passports or obtain Nicaraguan visas;
- (d) the obligation not to require Costa Rican vessels and their passengers to stop at any Nicaraguan post along the River;
- (e) the obligation not to impose other impediments on the exercise of the right of free navigation, including timetables for navigation and conditions relating to flags;
- (f) the obligation to allow Costa Rican vessels and their passengers while engaged in such navigation to land on any part of the bank where navigation is common without paying any charges, unless expressly agreed by both Governments;

- (g) the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular Article 2 of the Cleveland Award;
- (h) the obligation to facilitate and expedite traffic on the San Juan, within the terms of the Treaty of 15 April 1858 and its interpretation by the Cleveland Award of 1888, in accordance with Article 1 of the bilateral Agreement of 9 January 1956;
- (i) the obligation to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes.

3. Further, the Court is requested to adjudge and declare that by reason of the above violations, Nicaragua is obliged:

- (a) immediately to cease all the breaches of obligations which have a continuing character;
- (b) to make reparation to Costa Rica for all injuries caused to Costa Rica by the breaches of Nicaragua’s obligations referred to above, in the form of the restoration of the situation prior to the Nicaraguan breaches and compensation in an amount to be determined in a separate phase of these proceedings; and
- (c) to give appropriate assurances and guarantees that it shall not repeat its unlawful conduct, in such form as the Court may order.”

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

“On the basis of the facts and legal considerations set forth in the Counter-Memorial, the Court is requested:

To adjudge and declare that the requests of Costa Rica in her Memorial are rejected, on the following bases:

- (a) either because there is no breach of the provisions of the Treaty of 15 April 1858 on the facts;
- (b) or, as appropriate, because the obligation breach of which is alleged is not included in the provisions of the Treaty of 15 April 1858.

Moreover, the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section 2 of Chapter 7.”

The relevant part of Section 2 of Chapter 7 of the Counter-Memorial reads as follows:

“Finally, in view of the above considerations, and in particular those indicated in Chapter 2 (E), Nicaragua requests the Court to declare that:

- (i) Costa Rica is obliged to comply with the regulations for navigation (and landing) in the San Juan imposed by Nicaraguan authorities in particular related to matters of health and security;
- (ii) Costa Rica has to pay for any special services provided by Nicaragua

gua in the use of the San Juan either for navigation or landing on the Nicaraguan banks;

- (iii) Costa Rica has to comply with all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858;
- (iv) revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty;
- (v) Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other present day recipients of this flow such as the Colorado River.”

in the Rejoinder:

“On the basis of the facts and legal considerations set forth in the Counter-Memorial and the Rejoinder, the Court is requested:

To adjudge and declare that the requests of Costa Rica in her Memorial and Reply are rejected in general, and in particular, on the following bases:

- (a) either because there is no breach of the provisions of the Treaty of Limits of 15 April 1858 or any other international obligation of Nicaragua;
 - (b) or, as appropriate, because the obligation breach of which is alleged, is not an obligation under the provisions of the Treaty of Limits of 15 April 1858 or under general international law.
- Moreover, the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section II of Chapter VII of her Counter-Memorial and reiterated in Chapter VI, Section I, of her Rejoinder.”

The relevant part of Chapter VI, Section I, of the Rejoinder reads as follows:

- “(i) Costa Rica is obliged to comply with the regulations for navigation (and landing) in the San Juan imposed by Nicaraguan authorities in particular related to matters of health and security;
- (ii) Costa Rica has to pay for any special services provided by Nicaragua in the use of the San Juan either for navigation or landing on the Nicaraguan banks;
- (iii) Costa Rica has to comply with all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858;
- (iv) revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty;
- (v) Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other present day recipients of this flow such as the Colorado River.”

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

On behalf of the Government of Costa Rica,
at the hearing of 9 March 2009:

“Having regard to the written and oral pleadings and to the evidence submitted by the Parties, may it please the Court to adjudge and declare that, by its conduct, the Republic of Nicaragua has violated:

- (a) the obligation to allow all Costa Rican vessels and their passengers to navigate freely on the San Juan for purposes of commerce, including communication and the transportation of passengers and tourism;
- (b) the obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the River;
- (c) the obligation not to require persons exercising the right of free navigation on the River to carry passports or obtain Nicaraguan visas;
- (d) the obligation not to require Costa Rican vessels and their passengers to stop at any Nicaraguan post along the River;
- (e) the obligation not to impose other impediments on the exercise of the right of free navigation, including timetables for navigation and conditions relating to flags;
- (f) the obligation to allow Costa Rican vessels and their passengers while engaged in such navigation to land on any part of the bank where navigation is common without paying any charges, unless expressly agreed by both Governments;
- (g) the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular the Second article of the Cleveland Award;
- (h) the obligation to facilitate and expedite traffic on the San Juan, within the terms of the Treaty of 15 April 1858 and its interpretation by the Cleveland Award of 1888, in accordance with Article 1 of the bilateral Agreement of 9 January 1956;
- (i) the obligation to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes.

Further, the Court is requested to adjudge and declare that by reason of the above violations, Nicaragua is obliged:

- (a) immediately to cease all the breaches of obligations which have a continuing character;
- (b) to make reparation to Costa Rica for all injuries caused to Costa Rica by the breaches of Nicaragua’s obligations referred to above, in the form of the restoration of the situation prior to the Nicaraguan breaches and compensation in an amount to be determined in a separate phase of these proceedings; and
- (c) to give appropriate assurances and guarantees that it shall not repeat its unlawful conduct, in such form as the Court may order.

The Court is requested to reject Nicaragua's request for a declaration."

On behalf of the Government of Nicaragua,

at the hearing of 12 March 2009:

"On the basis of the facts and legal considerations set forth in the Counter-Memorial, Rejoinder and oral pleadings,

May it please the Court to adjudge and declare that:

The requests of Costa Rica in her Memorial, Reply and oral pleadings are rejected in general, and in particular, on the following bases:

- (a) either because there is no breach of the provisions of the Treaty of Limits of 15 April 1858 or any other international obligation of Nicaragua;
- (b) or, as appropriate, because the obligation breach of which is alleged, is not an obligation under the provisions of the Treaty of Limits of 15 April 1858 or under general international law.

Moreover the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section II of Chapter VII of her Counter-Memorial, in Section I, Chapter VI, of her Rejoinder and as reiterated in these oral pleadings."

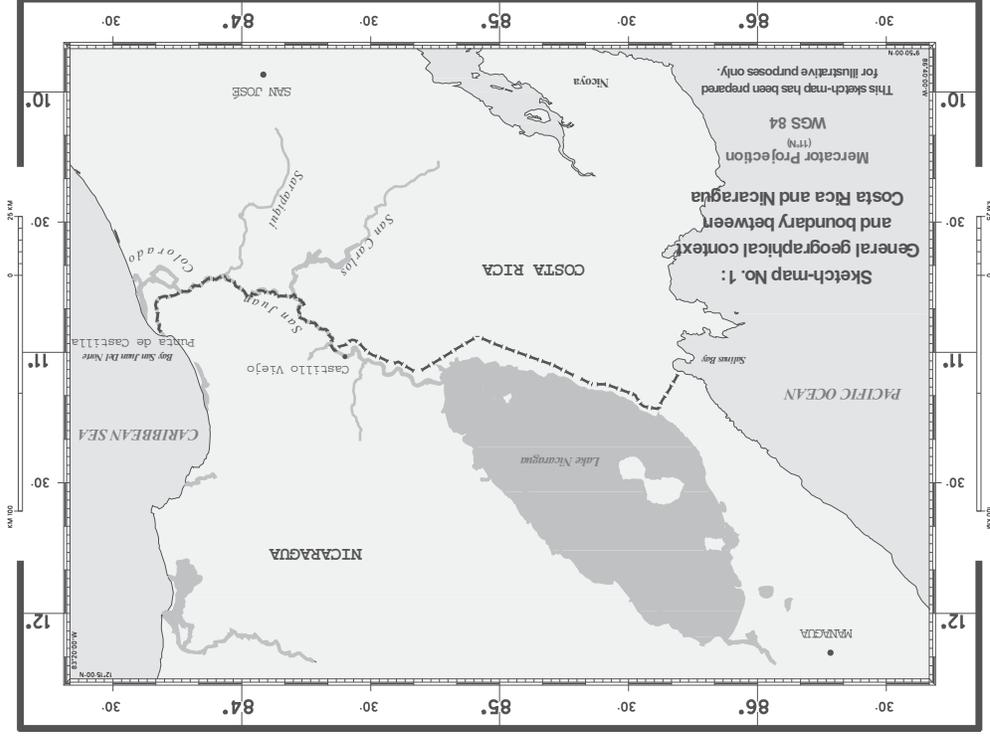
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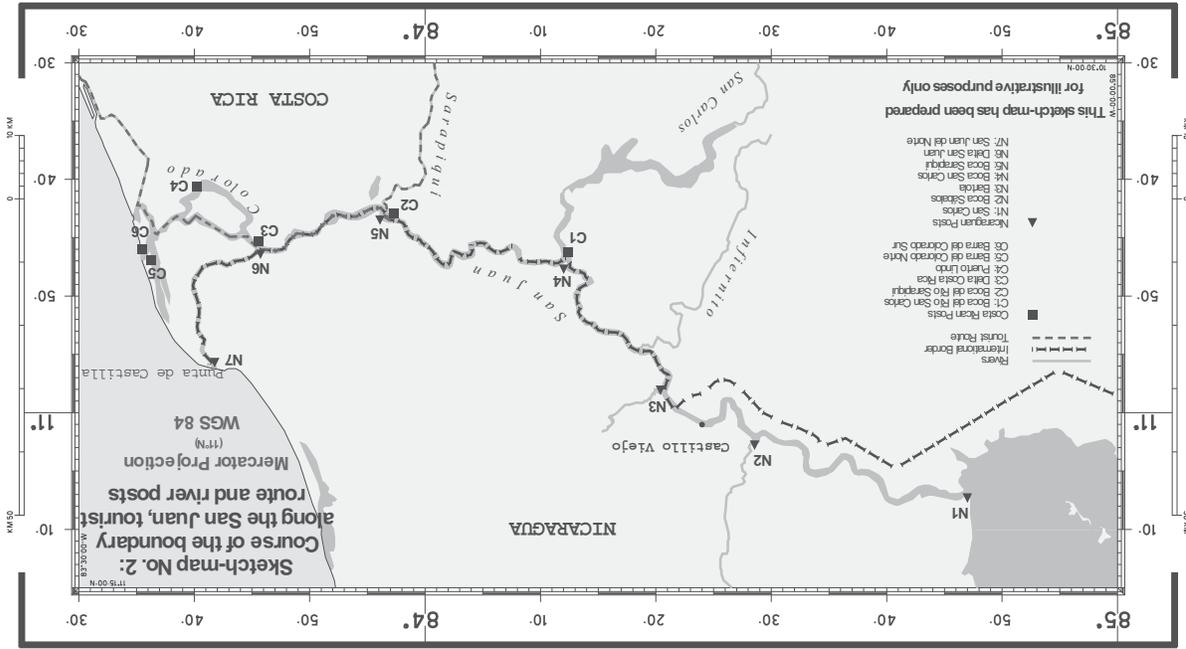
I. GEOGRAPHICAL AND HISTORICAL CONTEXT AND ORIGIN OF THE DISPUTE

15. The San Juan River runs approximately 205 kilometres from Lake Nicaragua to the Caribbean Sea (see sketch-maps Nos. 1 and 2). Some 19 kilometres from the Caribbean Sea it divides into two branches: the San Juan itself continues as the northerly of the two branches and empties into the Caribbean Sea at the bay of San Juan del Norte; the Colorado River is the southern and larger of the two branches and runs entirely within Costa Rica reaching the Caribbean Sea at Barra de Colorado.

16. Part of the border between Costa Rica and Nicaragua runs along the right bank (i.e. the Costa Rican side) of the San Juan River from a point three English miles below Castillo Viejo, a small town in Nicaragua, to the end of Punta de Castilla, where the river enters the Caribbean Sea. Between Lake Nicaragua and the point below Castillo Viejo, the river runs entirely through Nicaraguan territory.

17. Both Costa Rica and Nicaragua, which had been under Spanish colonial rule, became independent States in 1821. Shortly after independence, Costa Rica and Nicaragua, together with El Salvador, Guatemala and Honduras, decided to constitute the Federal Republic of Central America. In 1824 the people living in the district of Nicoya on the Pacific coast, originally within Nicaragua, opted by plebiscite to become part of





Costa Rica. On 9 December 1825 the Federal Congress of Central America issued a decree which provided that Nicoya would be “for the time being . . . separated from the State of Nicaragua and annexed to that of Costa Rica”. The situation regarding Nicoya remained unchanged at the time of the dissolution of the Federal Republic of Central America in 1839. Thereafter, Nicaragua did not however recognize Nicoya as belonging to Costa Rica.

18. During the mid-1850s, Nicaragua underwent a period of internal conflict which involved a group of American adventurers, known as “filibusters” (“filibusteros”), led by William Walker. The Government of Costa Rica as well as those of El Salvador, Guatemala and Honduras joined Nicaragua’s efforts to defeat the filibusters. In May 1857, Walker capitulated and abandoned Nicaraguan territory. Following the defeat of the filibusters, war broke out between Costa Rica and Nicaragua. At the end of those hostilities, the two countries engaged in negotiations to settle outstanding bilateral matters between them, relating, *inter alia*, to their common boundary, to the navigational régime on the San Juan River, and to the possibility of building an inter-oceanic canal across the Central American isthmus.

19. On 6 July 1857 a Treaty of Limits was signed, dealing with territorial limits and the status of the San Juan River, but was not ratified by Costa Rica. On 8 December 1857 a Treaty of Peace was signed by the Parties but was not ratified by either Costa Rica or Nicaragua. Through the mediation of the Salvadoran Minister for Foreign Affairs, the Governments of Costa Rica and Nicaragua reached agreement on 15 April 1858 on a Treaty of Limits, which was ratified by Costa Rica on 16 April 1858 and by Nicaragua on 26 April 1858. The 1858 Treaty of Limits fixed the course of the boundary between Costa Rica and Nicaragua from the Pacific Ocean to the Caribbean Sea. According to the boundary thus drawn the district of Nicoya lay within the territory of Costa Rica. Between a point three English miles from Castillo Viejo and the Caribbean Sea, the Treaty fixed the boundary along the right bank of the San Juan River. It established Nicaragua’s dominion and sovereign jurisdiction over the waters of the San Juan River, but at the same time affirmed Costa Rica’s navigational rights “con objetos de comercio” on the lower course of the river (Article VI). The 1858 Treaty established other rights and obligations for both parties, including, *inter alia*, an obligation to contribute to the defence of the common bays of San Juan del Norte and Salinas as well as to the defence of the San Juan River in case of external aggression (Article IV), an obligation on behalf of Nicaragua to consult with Costa Rica before entering into any canalization or transit agreements regarding the San Juan River (Article VIII) and an obligation not to commit acts of hostility against each other (Article IX).

20. Following challenges by Nicaragua on various occasions to the validity of the 1858 Treaty, the Parties submitted the question to arbitration by the President of the United States. The Parties agreed in addition that if the 1858 Treaty were found to be valid, President Cleveland

should also decide whether Costa Rica could navigate the San Juan River with vessels of war or of the revenue service. In his Award rendered on 22 March 1888, President Cleveland held that the 1858 Treaty was valid. He further stated, with reference to Article VI of the 1858 Treaty, that Costa Rica did not have the right of navigation on the San Juan River with vessels of war, but that it could navigate with such vessels of the Revenue Service as may be connected to navigation “for the purposes of commerce”.

21. Following the Cleveland Award, a boundary commission was established to demarcate the boundary line. An engineer, Mr. Edward Alexander, was charged with the task of resolving any “disputed point or points” which might arise in the field during the demarcation process, which began in 1897 and was concluded in 1900. Mr. Alexander rendered five awards to this end.

22. On 5 August 1914, Nicaragua signed a treaty with the United States (the Chamorro-Bryan Treaty) which granted the United States perpetual and “exclusive proprietary rights” for the construction and maintenance of an inter-oceanic canal through the San Juan River. On 24 March 1916 Costa Rica filed a case against Nicaragua before the Central American Court of Justice claiming that Nicaragua had breached its obligation to consult with Costa Rica prior to entering into any canalization project in accordance with Article VIII of the 1858 Treaty. On 30 September 1916, the Central American Court of Justice ruled that, by not consulting Costa Rica, Nicaragua had violated the rights guaranteed to the latter by the 1858 Treaty of Limits and the 1888 Cleveland Award.

23. On 9 January 1956 Costa Rica and Nicaragua concluded an Agreement (the Fournier-Sevilla Agreement) according to the terms of which the Parties agreed to facilitate and expedite traffic in particular through the San Juan River and agreed to co-operate to safeguard the common border.

24. In the 1980s various incidents started to occur relating to the navigational régime of the San Juan River. During that period Nicaragua introduced certain restrictions on Costa Rican navigation on the San Juan River which it justified as temporary, exceptional measures to protect Nicaragua’s national security in the context of an armed conflict. Some of the restrictions were suspended when Costa Rica protested. During the mid-1990s further measures were introduced by Nicaragua, including the charging of fees for passengers travelling on Costa Rican vessels navigating on the San Juan River and the requirement for Costa Rican vessels to stop at Nicaraguan Army posts along the river.

25. On 8 September 1995 the Commander-in-Chief of the Nicaraguan Army and the Costa Rican Minister of Public Security signed a document, known as the Cuadra-Castro Joint Communiqué, which provided for the co-ordination of operations in the border areas of the two States against the illegal trafficking of persons, vehicles and contraband.

26. In July 1998 further disagreements between the Parties regarding the extent of Costa Rica’s navigational rights on the San Juan River led to the adoption by Nicaragua of certain measures. In particular, on 14 July 1998, Nicaragua prohibited the navigation of Costa Rican vessels that transported members of Costa Rica’s police force. On 30 July 1998, the Nicaraguan Minister of Defence and the Costa Rican Minister of Public Security signed a document, known as the Cuadra-Lizano Joint Communiqué. The text allowed for Costa Rican armed police vessels to navigate on the river to re-supply their boundary posts on the Costa Rican side, provided that the Costa Rican agents in those vessels only carried their service arms and prior notice was given to the Nicaraguan authorities, which could decide on whether the Costa Rican vessels should be accompanied by a Nicaraguan escort. On 11 August 1998, Nicaragua declared that it considered the Cuadra-Lizano Joint Communiqué to be legally null and void. Costa Rica did not accept this unilateral declaration. Differences regarding the navigational régime on the San Juan River persisted between the Parties.

27. On 24 October 2001, Nicaragua made a reservation to its declaration accepting the jurisdiction of the Court (see paragraph 1 above), according to which it would no longer accept the jurisdiction of the Court in regard to “any matter or claim based on interpretations of treaties or arbitral awards that were signed and ratified or made, respectively, prior to 31 December 1901”. Under the Tovar-Caldera Agreement, signed by the Parties on 26 September 2002, Nicaragua agreed to a three year moratorium with regard to the reservation it had made in 2001 to its declaration accepting the jurisdiction of the Court. For its part, Costa Rica agreed that during the same three year period it would not initiate any action before the International Court of Justice nor before any other authority on any matter or protest mentioned in treaties or agreements currently in force between both countries.

28. Once the agreed three year period had elapsed without the Parties having been able to settle their differences, Costa Rica, on 29 September 2005, instituted proceedings before the Court against Nicaragua with regard to its disputed navigational and related rights on the San Juan River (see paragraph 1 above). Nicaragua has not raised any objections to the jurisdiction of the Court to entertain the case.

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29. Taking account of the subject of the dispute as summarized above and of the Parties’ submissions and arguments, the Court will proceed in the following manner.

It will first determine the extent of Costa Rica’s right of free navigation on the San Juan River (II).

It will next ascertain whether, and to what extent, within the ambit of

the right thus defined, Nicaragua has the power to regulate navigation by Costa Rican boats and whether the specific measures it has decided and put into effect to this end during the period of the dispute are compatible with Costa Rica's rights (III).

It will then consider the question of the right which Costa Rica claims for inhabitants of the Costa Rican bank of the river to engage in subsistence fishing (IV).

Finally, in the light of its reasoning on the preceding points, it will consider the Parties' claims as presented to it in their final submissions, in respect in particular of the appropriate remedies (V).

II. COSTA RICA'S RIGHT OF FREE NAVIGATION ON THE SAN JUAN RIVER

30. The Parties agree that Costa Rica possesses a right of free navigation on the section of the San Juan River where the right bank, i.e. the Costa Rican side, marks the border between the two States by virtue of the Treaty of Limits (the Jerez-Cañas Treaty) concluded between them on 15 April 1858. This is the part of the river which runs from a point three English miles below Castillo Viejo, a town in Nicaraguan territory, to the mouth of the river at the Caribbean Sea (see paragraph 16 above).

Upstream from the point referred to above, the San Juan flows entirely in Nicaraguan territory from its source in Lake Nicaragua, in the sense that both its banks belong to Nicaragua. The section of the river in which the right bank belongs to Costa Rica, the section at issue in this dispute, is some 140 kilometres long.

31. While it is not contested that the section of the river thus defined belongs to Nicaragua, since the border lies on the Costa Rican bank, with Costa Rica possessing a right of free navigation, the Parties differ both as to the legal basis of that right and, above all, as to its precise extent, in other words as to the types of navigation which it covers.

1. *The Legal Basis of the Right of Free Navigation*

32. According to Costa Rica, its right of free navigation on the part of the San Juan River that is in dispute derives on the one hand from certain treaty provisions in force between the Parties, primarily but not exclusively the Treaty of Limits of 15 April 1858, and on the other hand from the rules of general international law that are applicable, even in the absence of treaty provisions, to navigation on "international rivers". The San Juan is said to fall into this category, at least as regards the section

whose course follows the border, with Costa Rica thus possessing a customary right of free navigation in its capacity as a riparian State.

33. According to Nicaragua, on the contrary, the San Juan is not an "international river", since it flows entirely within the territory of a single country by virtue of the provisions of the 1858 Treaty of Limits, which establish the border in such a way that no part of the river falls under the sovereignty of a State other than Nicaragua. Moreover, Nicaragua challenges the existence of a general régime that might be applicable, under customary international law, to rivers whose course, or one of whose banks, constitutes the border between two States, and more widely to "international rivers". Lastly, according to Nicaragua, even if such a régime were to exist, it would be superseded in this case by the treaty provisions which define the status of the San Juan River and govern the riparian States' right of navigation. It is these special provisions which should be applied in order to settle the present dispute, in any event that part of it relating to the right of navigation on the river.

34. The Court does not consider that it is required to take a position in this case on whether and to what extent there exists, in customary international law, a régime applicable to navigation on "international rivers", either of universal scope or of a regional nature covering the geographical area in which the San Juan is situated. Nor does it consider, as a result, that it is required to settle the question of whether the San Juan falls into the category of "international rivers", as Costa Rica maintains, or is a national river which includes an international element, that being the argument of Nicaragua.

35. Indeed, even if categorization as an "international river" would be legally relevant in respect of navigation, in that it would entail the application of rules of customary international law to that question, such rules could only be operative, at the very most, in the absence of any treaty provisions that had the effect of excluding them, in particular because those provisions were intended to define completely the régime applicable to navigation, by the riparian States on a specific river or a section of it.

36. That is precisely the case in this instance. The 1858 Treaty of Limits completely defines the rules applicable to the section of the San Juan River that is in dispute in respect of navigation. Interpreted in the light of the other treaty provisions in force between the Parties, and in accordance with the arbitral or judicial decisions rendered on it, that Treaty is sufficient to settle the question of the extent of Costa Rica's right of free navigation which is now before the Court. Consequently, the Court has no need to consider whether, if these provisions did not exist, Costa Rica could nevertheless have relied for this purpose on rules derived from international, universal or regional custom.

37. The main provision which founds Costa Rica's right of free navi-

gation is contained in Article VI of the 1858 Treaty (see paragraphs 43 and 44 below); this has been the focus of the arguments exchanged between the Parties as to the extent of the right of navigation on the San Juan.

Article VI, after conferring on Nicaragua full and exclusive sovereignty (“exclusivamente el dominio y sumo imperio”) over the whole of the San Juan, from its source in the lake to its mouth at the sea, grants Costa Rica, on the section of the river which follows the border between the two States (see paragraph 30 above), a perpetual right (“los derechos perpetuos”) of free navigation “con objetos de comercio”, according to the terms of the Spanish version of the Treaty, which is the only authoritative one, the meaning of which the Court will be required to return to below. In addition, Article VI gives vessels of both riparian countries the right to land freely on either bank without being subject to any taxes (“ninguna clase de impuestos”), unless agreed by both Governments.

38. Other provisions of the 1858 Treaty, though of less importance for the purposes of the present case, are not without relevance as regards the right of navigation on the river. This applies in particular to Article IV, which obliges Costa Rica to contribute to the security of the river “for the part that belongs to her of the banks”, to Article VIII, which obliges Nicaragua to consult Costa Rica before entering into any agreements with a third State for canalization or transit on the river, and of course to Article II, which establishes the border as the Costa Rican bank on the section of the river which is at issue in this dispute.

39. Besides the 1858 Treaty, mention should be made, among the treaty instruments likely to have an effect on determining the right of navigation on the river and the conditions for exercising it, of the agreement concluded on 9 January 1956 between the two States (known as the Fournier-Sevilla Agreement), whereby the Parties agreed to collaborate to the best of their ability, in particular in order to facilitate and expedite traffic on the San Juan in accordance with the 1858 Treaty and the Arbitral Award made by President Cleveland in 1888 (for the text of the relevant provision of the 1956 Agreement, see paragraph 94 below).

40. Costa Rica has also invoked before the Court the joint ministerial communiqués published on 8 September 1995 (known as the Cuadra-Castro Joint Communiqué; see paragraph 25 above) and 30 July 1998 (known as the Cuadra-Lizano Joint Communiqué; see paragraph 26 above). In the Court’s view, however, these statements issued by the ministers responsible, on each side, for matters of defence and public security, cannot be included in the conventional basis of the right of free navigation granted to Costa Rica. Rather, these are practical arrangements, in part aimed at implementing previous treaty commitments, including in particular the obligation of co-operation referred to in the Agreement of 9 January 1956 (see paragraph 23 above and paragraph 94 below). The legal effects of such arrangements are more limited than the

conventional acts themselves: modalities for co-operation which they put in place are likely to be revised in order to suit the Parties. Furthermore, the second of them was promptly declared null and void by Nicaragua (see paragraph 26 above).

41. The above-mentioned treaty instruments must be understood in the light of two important decisions which settled differences that emerged between the Parties in determining their respective rights and obligations: the Arbitral Award made by the President of the United States on 22 March 1888 (known as the Cleveland Award); and the decision rendered, on the application of Costa Rica, by the Central American Court of Justice on 30 September 1916.

The first of these two decisions settled several questions concerning the interpretation of the 1858 Treaty which divided the Parties in that case; the second found that Nicaragua, by concluding an agreement with the United States permitting the construction and maintenance of an interoceanic canal through the San Juan River, had disregarded Costa Rica’s right under Article VIII of that Treaty to be consulted before the conclusion of any agreement of that nature.

Although neither of these decisions directly settles the questions that are now before the Court, they contain certain indications which it will be necessary to take into account for the purposes of the present case.

2. *The Extent of the Right of Free Navigation Attributed to Costa Rica*

42. Having thus defined the legal basis of the right which Costa Rica argues has been partly disregarded by Nicaragua, the Court must now determine its precise extent, in other words, its field of application. The Parties disagree considerably over the definition of this field of application, i.e., as to the types of navigation which are covered by the “perpetual right” granted to Costa Rica by the 1858 Treaty. Their difference essentially concerns the interpretation of the words “libre navegación . . . con objetos de comercio” in Article VI of the Treaty of Limits; this brings with it a major disagreement as to the definition of the activities covered by the right in question and of those which, not being thus covered, are subject to Nicaragua’s sovereign power to authorize and regulate as it sees fit any activity that takes place on its territory, of which the river forms part.

(a) *The meaning and scope of the expression “libre navegación . . . con objetos de comercio”*

43. In its Spanish version, which is the only authoritative one, Article VI of the Treaty of Limits of 1858 reads as follows:

“La República de Nicaragua tendrá exclusivamente el dominio y

sumo imperio sobre las aguas del río de San Juan desde su salida del Lago, hasta su desembocadura en el Atlántico; pero la República de Costa Rica tendrá en dichas aguas los derechos perpetuos de libre navegación, desde la expresada desembocadura hasta tres millas inglesas antes de llegar al Castillo Viejo, con objetos de comercio, ya sea con Nicaragua ó al interior de Costa Rica por los ríos de San Carlos ó Sarapiquí, ó cualquiera otra vía procedente de la parte que en la ribera del San Juan se establece corresponden á esta República. Las embarcaciones de uno ú otro país podrán indistintamente atracar en las riberas del río, en la parte en que la navegación es común, sin cobrarse ninguna clase de impuestos, á no ser que se establezcan de acuerdo entre ambos Gobiernos.”

44. Leaving aside for the moment the phrase whose interpretation, and indeed translation into English and French, divides the Parties, this article may be translated thus:

“The Republic of Nicaragua shall have exclusive *dominium* and *imperium* over the waters of the San Juan River from its origin in the lake to its mouth at the Atlantic Ocean; the Republic of Costa Rica shall however have a perpetual right of free navigation on the said waters between the mouth of the river and a point located three English miles below Castillo Viejo, [*con objetos de comercio*], whether with Nicaragua or with the interior of Costa Rica by the rivers San Carlos or Sarapiquí or any other waterway starting from the section of the bank of the San Juan established as belonging to that Republic. The vessels of both countries may land indiscriminately on either bank of the section of the river where navigation is common, without paying any taxes, unless agreed by both Governments.” [*Translation by the Court.*]

45. The Parties’ disagreement is greatest on the meaning of the words “con objetos de comercio”. For Nicaragua, this expression must be translated into French as “avec des marchandises de commerce” and into English as “with articles of trade”; in other words, the “objetos” in question here are objects in the concrete and material sense of the term. Consequently, the freedom of navigation guaranteed to Costa Rica by Article VI relates only to the transport of goods intended to be sold in a commercial exchange. For Costa Rica, on the contrary, the expression means in French “à des fins de commerce” and in English “for the purposes of commerce”; the “objetos” in the original text are therefore said to be objects in the abstract sense of ends and purposes. Consequently, according to Costa Rica, the freedom of navigation given to it by the Treaty must be attributed the broadest possible scope, and in any event encompasses not only the transport of goods but also the transport of passengers, including tourists.

46. Before directly addressing the question which has been submitted to it, the Court will make three preliminary observations of a more general nature. It will then consider what is to be understood by “con objetos” and then by “comercio” within the meaning of Article VI, since there is in fact a twofold disagreement between the Parties.

(i) *Preliminary observations*

47. In the first place, it is for the Court to interpret the provisions of a treaty in the present case. It will do so in terms of customary international law on the subject, as reflected in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, as the Court has stated on several occasions (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment*, I.C.J. Reports 2007 (I), pp. 109-110, para. 160; see also *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, *Judgment*, I.C.J. Reports 1994, pp. 21-22, para. 41.)

Consequently, neither the circumstance that Nicaragua is not a party to the Vienna Convention on the Law of Treaties nor the fact that the treaty which is to be interpreted here considerably pre-dates the drafting of the said Convention has the effect of preventing the Court from referring to the principles of interpretation set forth in Articles 31 and 32 of the Vienna Convention.

48. In the second place, the Court is not convinced by Nicaragua’s argument that Costa Rica’s right of free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river conferred by the Treaty on Nicaragua, that being the most important principle set forth by Article VI.

While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way. A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e. in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.

A simple reading of Article VI shows that the Parties did not intend to establish any hierarchy as between Nicaragua’s sovereignty over the river and Costa Rica’s right of free navigation, characterized as “perpetual”, with each of these affirmations counter-balancing the other. Nicaragua’s sovereignty is affirmed only to the extent that it does not prejudice the substance of Costa Rica’s right of free navigation in its domain, the establishment of which is precisely the point at issue; the right of free navigation, albeit “perpetual”, is granted only on condition that it does not prejudice the key prerogatives of territorial sovereignty.

There are thus no grounds for supposing, *a priori*, that the words “libre navegación . . . con objetos de comercio” should be given a specially restrictive interpretation, any more than an extensive one.

49. Lastly, the Court observes that none of the points under examination in this case was settled by the Cleveland Award of 1888 or by the decision of the Central American Court of Justice of 1916. Each of the Parties has sought to use these previous decisions as an argument to support its own case. However, these attempts do not convince the Court one way or the other.

The Cleveland Award confined itself to settling the questions of interpretation which the Parties had expressly submitted to the arbitrator. Those questions did not concern the meaning of the words “con objetos de comercio”; it is therefore futile to seek in the Award the answer to a question that was not put before the arbitrator. Consequently, while the Award declares that Costa Rica does not have the right, under the Treaty, to navigate on the San Juan with vessels of war, whereas it does have the right to do so with vessels of its revenue service, there is nothing to be inferred from this with regard to vessels belonging to the State and not falling into either of those two categories. Likewise, while the arbitrator used the words “for the purposes of commerce” and placed them in quotation marks, it may be supposed that this was simply because that was the English translation of the words “con objetos de comercio” which both Parties had supplied to the arbitrator, who did not wish, in his interpretation of the Treaty, to go beyond the questions which had been put before him.

As for the decision of the Central American Court of Justice of 1916, however important this might be, its operative part was based only on the application of the express provisions of Article VIII of the Treaty, which are not at issue in the present case.

(ii) *The meaning of the phrase “con objetos”*

50. It is now appropriate to consider the issue of the meaning of the phrase “con objetos de” as used in Article VI of the 1858 Treaty, specifically whether it means “for the purposes of” — as Costa Rica contends — or “with articles of” — as Nicaragua contends.

51. It should first be observed that the Spanish word “objetos” can, depending on its context, have either of the two meanings put forward. Thus, the context must be examined to ascertain the meaning to be ascribed here. The two meanings — one concrete and the other abstract — are sufficiently different that examination of the context will generally allow for a firm conclusion to be reached.

52. Having conducted this examination, the Court is of the view that the interpretation advocated by Nicaragua cannot be upheld.

The main reason for this is that ascribing the meaning “with goods” or “with articles” to the phrase “con objetos” results in rendering meaningless the entire sentence in which the phrase appears.

The part of Article VI which is relevant in this connection reads: “Costa Rica tendrá . . . los derechos perpetuos de libre navegación . . . con objetos de comercio, ya sea con Nicaragua ó al interior de Costa Rica.”

If Nicaragua’s interpretation were to be accepted, there would be no intelligible relationship between the clause following the phrase “con objetos de comercio”, i.e., “ya sea con Nicaragua ó al interior de Costa Rica” (“whether with Nicaragua or with the interior of Costa Rica”), and the preceding part of the sentence.

Either the words “with Nicaragua” would relate to “objetos de comercio”, which would hardly make sense, since it would not be meaningful to speak of “goods (or articles) of trade with Nicaragua”; or these words relate to “navegación” and that would make even less sense, because the expression “navegación . . . con Nicaragua” would simply be incomprehensible.

By contrast, Costa Rica’s interpretation of the words “con objetos” allows the entire sentence to be given coherent meaning. If the phrase means “purposes of commerce”, then the immediately following clause, “ya sea con Nicaragua . . .”, plainly relates to “comercio” (“for the purposes of commerce with Nicaragua . . .”), and the sentence then conveys a perfectly comprehensible idea.

Thus, in the present instance a literal analysis of the sentence containing the words requiring interpretation leads to one of the proposed meanings being preferred over the other.

53. The preceding finding is supported by three additional arguments which all point to the same conclusion.

54. First, “objetos” is used in another article of the 1858 Treaty, Article VIII, in which context it can only have the abstract meaning of “purposes” or “subjects”: “Nicaragua se compromete á no concluir otro (contrato) sobre los expresados objetos . . .” (“Nicaragua engages not to conclude any other contract for those purposes . . .”).

It is reasonable to infer that the Parties tended to understand “objetos” in its abstract sense, or, at least, that this meaning was familiar to them in their treaty practice.

55. Second, a further indication may be deduced from the “Cañas-Martínez” Peace Treaty signed by the Parties on 8 December 1857 but which was never ratified and hence did not enter into force. On the question of navigation on the San Juan, this instrument, replaced by the 1858 Treaty of Limits, which repeats some of the earlier provisions, included the expression “artículos de comercio”, which undoubtedly translates as “articles” or “goods” of commerce. This would tend to show that when the Parties at the time wished to refer to physical property giving rise to commercial transactions, they used a term other than “objetos de comercio”, a term having the advantage of being unambiguous. Further, it is reasonable to believe that the Parties’ replacement of one word with another in two successive instruments, the second of

which was drafted shortly after the first, indicates that the Parties wished in the second to refer to something different from that in the first and that the two terms used must not be taken to mean the same thing.

56. Finally, the Court also considers it significant that in 1887, when the two Parties each submitted an English translation of the 1858 Treaty to President Cleveland for use in the arbitration proceedings he was asked to conduct, even though their translations were not identical on all points, they did use the same phrase to render the original “con objetos de comercio”: “for the purposes of commerce”.

By itself, this argument is undoubtedly not conclusive, because the only authoritative version of the instrument is the Spanish one and at the time the Parties might have made the same mistake in translation, which cannot be treated as an implicit amendment of the 1858 Treaty. It is also no doubt true that Nicaragua might have paid insufficient heed to the meaning of the term “objetos de comercio”, which was not at issue in the questions submitted to the arbitrator; this could be the explanation for a translation done by it in haste. It nonetheless remains the case that this concurrence, occurring relatively soon after the Treaty was concluded, is a significant indication that at the time both Parties understood “con objetos de comercio” to mean “for the purposes of commerce”.

This is the meaning accepted by the Court.

(iii) *The meaning of the word “commerce”*

57. The preceding finding does not entirely resolve the issue of interpretation argued by the Parties. Now that it has been determined that “con objetos de comercio” means “for the purposes of commerce”, the meaning to be ascribed to the word “commerce” in the context of Article VI remains to be determined, so that the exact extent of the right of free navigation can be defined. On this point as well, the Parties disagree.

58. In Nicaragua’s view, for purposes of the Treaty, “commerce” covers solely the purchase and sale of merchandise, of physical goods, and excludes all services, such as passenger transport. This interpretation is clearly consistent with Nicaragua’s contention, just rejected, that “con objetos” means “with merchandise”. But, Nicaragua argues, even if the phrase is translated as “for the purposes of commerce”, the result is the same, because in 1858 the word “commerce” necessarily meant trade in goods and did not extend to services, the inclusion of services being a very recent development. Nicaragua admits that passengers were already being transported on the San Juan in 1858, and even that this was an especially profitable activity, but it adds that this activity did not fall within the scope of what was commonly called “commerce” at that time. As for the transport of tourists, there was no such activity at the time in the area in question.

Nicaragua contends that it is important to give the words used in the Treaty the meaning they had at the time the Treaty was concluded, not their current meaning, which can be quite different, because this is the only way to remain true to the intent of the drafters of the Treaty; and determining that intent is the main task in the work of interpretation.

59. Costa Rica argues that “commerce” as used in the Treaty takes in any activity in pursuit of commercial purposes and includes, *inter alia*, the transport of passengers, tourists among them, as well as of goods. The Applicant adds that “commerce” is a broad concept which extends even beyond for-profit activities; in this regard it cites the nineteenth-century editions of the *Dictionary of the Royal Spanish Academy*, which gives the word “comercio” the second meaning of “comunicación y trato de unas gentes ó pueblos con otros”, or communication and dealings of some persons or peoples with others. It follows, argues Costa Rica, that “commerce” includes movement and contact between inhabitants of the villages on the Costa Rican bank of the San Juan River, and the use of the river for purposes of navigation by Costa Rican public officials providing the local population with essential services, in areas such as health, education and security.

60. The Court can subscribe to neither the particularly broad interpretation advocated by Costa Rica nor the excessively narrow one put forward by Nicaragua.

61. In respect of the first, the Court observes that, were it to be accepted, the result would be to bring within the ambit of “navigation for the purposes of commerce” all, or virtually all, forms of navigation on the river. If that had been the intent of the parties to the Treaty, it would be difficult to see why they went to the trouble of specifying that the right of free navigation was guaranteed “for the purposes of commerce”, given that this language would have had virtually no effect. While Costa Rica did maintain in the hearings that the phrase “for the purposes of commerce” in the context of Article VI did not result in restricting the scope of the “right of free navigation” granted earlier in the same sentence, but rather was intended to enlarge that right, the Court cannot adopt this view: expressly stating the purpose for which a right may be exercised implies in principle the exclusion of all other purposes and, consequently, imposes the limitation thus defined on the field of application of the right in question — subject to the possibility that the right may be exercisable beyond that scope on separate legal bases.

Thus, the language found in Article VI means that the right of free navigation granted to Costa Rica in that provision applies exclusively within the ambit of navigation “for the purposes of commerce” and ceases to apply beyond that ambit; the bounds of which it is now for the Court to determine. This determination is without effect on the existence of any right of navigation which Costa Rica may enjoy pursuant to provisions other than Article VI.

62. In respect of the narrow interpretation advanced by Nicaragua,

the Court observes that it is supported mainly by two arguments: the first is based on the Respondent's interpretation of the phrase "con objetos", which has just been rejected; the second is based on the assertion that "commerce" should be given the narrow meaning it had when the Treaty was entered into.

63. The Court does not agree with this second argument.

It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion. That may lead a court seized of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties' common intention. The Court has so proceeded in certain cases requiring it to interpret a term whose meaning had evolved since the conclusion of the treaty at issue, and in those cases the Court adhered to the original meaning (to this effect, see, for example, the Judgment of 27 August 1952 in the case concerning *Rights of Nationals of the United States of America in Morocco (France v. United States of America)* (*I.C.J. Reports 1952*, p. 176), on the question of the meaning of "dispute" in the context of a treaty concluded in 1836, the Court having determined the meaning of this term in Morocco when the treaty was concluded; the Judgment of 13 December 1999 in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)* (*I.C.J. Reports 1999 (II)*, p. 1062, para. 25) in respect of the meaning of "centre of the main channel" and "thalweg" when the Anglo-German Agreement of 1890 was concluded).

64. This does not however signify that, where a term's meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it.

On the one hand, the subsequent practice of the parties, within the meaning of Article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.

65. A good illustration of this reasoning is found in the Judgment handed down by the Court on 18 December 1978 in the case concerning *Aegean Sea Continental Shelf (Greece v. Turkey)* (*I.C.J. Reports 1978*, p. 3).

Called upon to interpret a State's reservation to a treaty excluding

from the Court's jurisdiction "disputes relating to territorial status" of that State, where the meaning of "territorial status" was contested, the Court stated:

"Once it is established that the expression 'the territorial status of Greece' was used in Greece's instrument of accession [to the General Act of 1928] as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like 'domestic jurisdiction' and 'territorial status' were intended to have a fixed content regardless of the subsequent evolution of international law." (*Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, *I.C.J. Reports 1978*, p. 32, para. 77.)

66. Though adopted in connection with the interpretation of a reservation to a treaty, the Court's reasoning in that case is fully transposable for purposes of interpreting the terms themselves of a treaty.

It is founded on the idea that, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.

67. This is so in the present case in respect of the term "comercio" as used in Article VI of the 1858 Treaty. First, this is a generic term, referring to a class of activity. Second, the 1858 Treaty was entered into for an unlimited duration; from the outset it was intended to create a legal régime characterized by its perpetuity.

68. This last observation is buttressed by the object itself of the Treaty, which was to achieve a permanent settlement between the parties of their territorial disputes. The territorial rules laid down in treaties of this type are, by nature, particularly marked in their permanence, for, as the Court has recently recalled:

"[I]t is a principle of international law that a territorial régime established by treaty 'achieves a permanence which the treaty itself does not necessarily enjoy' and the continued existence of that régime is not dependent upon the continuing life of the treaty under which the régime is agreed" (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, *I.C.J. Reports 2007 (II)*, p. 861, para. 89).

69. This is true as well of the right of free navigation guaranteed to Costa Rica by Article VI. This right, described as “perpetual”, is so closely linked with the territorial settlement defined by the Treaty — to such an extent that it can be considered an integral part of it — that it is characterized by the same permanence as the territorial régime *stricto sensu* itself.

70. The Court concludes from the foregoing that the terms by which the extent of Costa Rica’s right of free navigation has been defined, including in particular the term “comercio”, must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning.

Thus, even assuming that the notion of “commerce” does not have the same meaning today as it did in the mid-nineteenth century, it is the present meaning which must be accepted for purposes of applying the Treaty.

71. Accordingly, the Court finds that the right of free navigation in question applies to the transport of persons as well as the transport of goods, as the activity of transporting persons can be commercial in nature nowadays. This is the case if the carrier engages in the activity for profit-making purposes. A decisive consideration in this respect is whether a price (other than a token price) is paid to the carrier — the boat operator — by the passengers or on their behalf. If so, then the carrier’s activity is commercial in nature and the navigation in question must be regarded as “for the purposes of commerce” within the meaning of Article VI. The Court sees no persuasive reason to exclude the transport of tourists from this category, subject to fulfilment of the same condition.

On the other hand, any navigation not carried out either to transport goods intended to form the subject of commercial transactions or to transport passengers in exchange for money paid by them or on their behalf cannot be regarded as falling within the “purposes of commerce” under Article VI. That is the case, in particular, of navigation by vessels used in the performance of governmental activities or to provide public services which are not commercial in nature.

(b) *The activities covered by the right of free navigation belonging to Costa Rica*

72. Based on the foregoing, the Court is now in a position to determine with greater precision the types of activities which are covered by Costa Rica’s right of free navigation, and those which are not.

For the sake of convenience, the Court, in addressing this issue, will distinguish between private navigation — that is to say navigation by vessels belonging to private owners — and that of “official (or public) vessels” — that is to say vessels which are the property of the Republic of

Costa Rica including all its public authorities —, although this distinction, as will be explained below, is of only limited relevance.

(i) *Private navigation*

73. As has just been said, two types of private navigation are certainly covered by the right of free navigation pursuant to Article VI of the 1858 Treaty: the navigation of vessels carrying goods intended for commercial transactions; and that of vessels carrying passengers who pay a price other than a token price (or for whom a price is paid) in exchange for the service thus provided.

In the first instance, the commercial activity is conducted by persons who are the owners of the goods intended for sale. These persons may themselves be carried on the vessel: they can also entrust their goods for carriage to the vessel’s operator for an agreed price or free of charge. This last aspect is of no relevance: in any event, navigation which is carried out in order to transport goods intended for sale, or goods that have just been purchased, in the context of a commercial exchange must be regarded as taking place “for the purposes of commerce”, whether or not the owner of the goods is onboard the vessel, and whether or not the vessel’s operator has been paid to provide carriage. It is understood that navigation “for the purposes of commerce” also includes the return journey of persons who have transported goods intended for sale.

In the second instance, however, the fact that the vessel’s owner receives payment for his activity is critical. Indeed, if the carriage of passengers is considered, it is not the passengers themselves who are exercising a commercial activity (unless they are travelling in order to transport goods, in which case the journey falls under the previous instance), it is the carrier, provided that he does so to make a profit.

74. The question was raised as to whether the navigation of vessels belonging to the inhabitants of the villages on the Costa Rican bank of the river in order to meet the basic requirements of everyday life, such as taking children to school or in order to give or receive medical treatment, was protected by the right of free navigation when it is carried out free of charge. The Parties discussed the issue: according to Nicaragua the answer is no, since the Respondent considers that only the carriage of goods benefits from the guarantee provided by Article VI of the Treaty; according to Costa Rica the answer is yes, based on the particularly broad definition of “commerce” adopted by the Applicant.

75. The Court has already indicated that it could not subscribe to a definition of the word “commerce” as broad as the one put forward by Costa Rica. It has also indicated (in paragraph 71 above) that the carriage of passengers free of charge, or the movement of persons on their

own vessels for purposes other than the conduct of commercial transactions, could not fall within the scope of “navigation for the purposes of commerce” within the meaning of Article VI of the 1858 Treaty.

76. It does not necessarily follow that such activities are not at all covered by freedom of navigation: other provisions of the 1858 Treaty may have the effect of guaranteeing the right of the inhabitants of the Costa Rican bank to navigate on the river, within certain limits, even when they are not doing so within the context of commercial activities.

77. In this regard, the Court is of the opinion that there is reason to take into account the provisions of the Treaty as a whole, especially those fixing the boundary between the two States, in order to draw, if need be, certain necessary implications. In other words, even if no provision expressly guaranteeing a right of non-commercial navigation to the inhabitants of the Costa Rican bank can be found in the Treaty, the question must be asked whether such a right does not flow from other provisions with a different purpose, but of which it may, to a certain extent, be the necessary consequence.

78. As has been said, the two States decided, by the Treaty of Limits, to fix their common boundary on the south bank of the San Juan River along the whole stretch of the river running from its mouth to a point located three English miles downstream from Castillo Viejo. This was decided in Article II of the 1858 Treaty. At the time, there was already a population inhabiting the Costa Rican side of the boundary thus defined, that is to say living on the bank of the river or not far from it. In view of the great difficulty of travelling inland, due to the limited inland communications network, that population commonly used and still uses the river for travel for the purpose of meeting the essential needs of everyday life which require expeditious transportation, such as transport to and from school or for medical care.

79. The Court is of the opinion that it cannot have been the intention of the authors of the 1858 Treaty to deprive the inhabitants of the Costa Rican bank of the river, where that bank constitutes the boundary between the two States, of the right to use the river to the extent necessary to meet their essential requirements, even for activities of a non-commercial nature, given the geography of the area. While choosing, in Article II of the Treaty, to fix the boundary on the river bank, the parties must be presumed, in view of the historical background to the conclusion of this Treaty and of the Treaty’s object and purpose as defined by the Preamble and Article I, to have intended to preserve for the Costa Ricans living on that bank a minimal right of navigation for the purposes of continuing to live a normal life in the villages along the river. The Court considers that while such a right cannot be derived from the express language of Article VI, it can be inferred from the provisions of the Treaty as a whole and, in particular, the manner in which the boundary is fixed.

(ii) “*Official vessels*”

80. It is clear that the 1858 Treaty does not establish, in its Article VI, any special régime for “official” (or “public”) vessels.

The only criterion provided for by Article VI is based not on the public or private ownership of the vessel but on the purpose of navigation: either it is undertaken for the “purposes of commerce” and benefits from the freedom established; or it is undertaken for purposes other than “commerce” and it does not. From this point of view the distinction between public and private vessels is devoid of legal significance. In the same way that a part of private navigation is not covered by the “*perpetual right of free navigation*” (in the case of pleasure craft for example), conversely, it is not conceivable that “*public vessels*” might sail for the “*purposes of commerce*”, if they met the conditions on which such a characterization depends.

81. In reality, when debating the question of “*official vessels*” the Parties particularly had in mind those used by the Costa Rican authorities for the exercise of public order activities — such as the police and customs — or for the provision of public services having no object of financial gain and therefore no commercial character.

82. As has already been noted (paragraph 49 above), the Cleveland Award only came to a decision regarding Costa Rican vessels of war and revenue service vessels, by denying the former the right to navigate on the San Juan and authorizing the navigation of the latter “as may be related and connected to her enjoyment of the ‘purposes of commerce’ accorded to her in said article [Article VII] or as may be necessary to the protection of said enjoyment”. Nothing can thus be inferred from this regarding the navigation of other Costa Rican official vessels.

83. In the light of the foregoing, the Court is of the opinion that, as a general rule, the navigation of Costa Rican vessels for the purposes of public order activities and public services with no object of financial gain, in particular police vessels, lies outside the scope of Article VI of the 1858 Treaty, with the exception of revenue service vessels, the question of which was settled by the 1888 arbitration. Further, it is not convinced that a right for Costa Rica to sail such vessels can be inferred from Article IV of the Treaty, according to which “Costa Rica shall also be obliged, for the part that belongs to her of the banks of the San Juan River . . . to contribute to the security thereof in the same manner as the two Republics shall contribute to its defence in case of aggression from abroad”. This provision, contrary to what Costa Rica contends, does not accord it any right of navigation in ordinary circumstances. It places an obligation upon it to “safeguard” the river from within its own territory.

Moreover, the Court considers that, in any event, Costa Rica has not proved its assertion that river transport is the only means to supply its police posts located along the river bank or to carry out the relief of the personnel stationed in them. Indeed, the materials in the case file show

that the posts in question are accessible, for example, by using the Costa Rican rivers communicating with the San Juan, in proximity of which they are located.

Lastly, for the reasons set out above (paragraph 40), Costa Rica cannot invoke the “Cuadra-Lizano” Joint Communiqué of 30 July 1998 in order to claim a right to navigate with official vessels which are armed or transporting arms.

84. Nonetheless, the Court is of the opinion that the reasons given above (in paragraphs 78 and 79) with regard to private vessels which navigate the river in order to meet the essential requirements of the population living on the river bank, where expeditious transportation is a condition for meeting those requirements, are also valid for certain Costa Rican official vessels which in specific situations are used solely for the purpose of providing that population with what it needs in order to meet the necessities of daily life, as defined in paragraph 78 above.

Consequently, this particular aspect of navigation by “official vessels” is covered by the right of navigation defined in paragraph 79 above: this right is not guaranteed by Article VI of the Treaty but is inferred from the provisions of the Treaty as a whole, in particular from the fixing of the boundary along the river bank.

III. NICARAGUA’S POWER OF REGULATION OF NAVIGATION

85. In this part of the Judgment the Court addresses the power of Nicaragua to regulate the navigation of that part of the San Juan River in which Costa Rica has the right of navigation as determined in Part II of the Judgment. In respect of matters lying outside the scope of Costa Rica’s right of free navigation, and in respect of other parts of the river, which are not subject to the régime of the 1858 Treaty, Nicaragua, as sovereign, has complete power of regulation.

1. General Observations

86. In their written pleadings, the Parties disagreed about the extent or even the very existence of the power of Nicaragua to regulate the use of the river so far as Costa Rica was concerned. In the course of the oral proceedings that difference of positions largely disappeared. However, the Parties continue to disagree on the extent of the regulatory power of Nicaragua and on certain measures which Nicaragua has adopted and continues to apply.

In the first part of the oral proceedings, Nicaragua states that whatever the precise nature and extent of Costa Rica’s rights within the provisions of the Treaty of Limits and the Cleveland Award, Nicaragua

“must have the exclusive competence to exercise the following regulatory powers: (a) the protection and maintenance of the right of navigation, that is to say, the power to maintain public order and standards of safety in respect of navigation; (b) the protection of the border, including resort to immigration procedures in respect of foreign nationals navigating in Nicaragua’s territorial waters; (c) the exercise of normal police powers; (d) the protection of the environment and natural resources; and (e) the maintenance of the treaty provisions prescribing the conditions of navigation in accordance with the Treaty”.

Costa Rica, while accepting that Nicaragua does have a power of regulation, asserts that Nicaragua’s sovereignty over the San Juan must be seen as a part — an important part — of the fluvial régime established in 1858 and that the regulations enacted by Nicaragua must not infringe Costa Rica’s perpetual right of free navigation. It states that the regulations must be lawful, public, reasonable, non-arbitrary and non-discriminatory and adopted to fulfil a legitimate public purpose. Nicaragua accepts Costa Rica’s statement of principle.

The Parties disagree whether Nicaragua is obliged to notify Costa Rica about the regulations it has made or to consult Costa Rica in advance about proposed regulations. The Court rules on these differences in the course of this part of the Judgment.

(a) Characteristics

87. For essentially the reasons given by the Parties, the Court concludes that Nicaragua has the power to regulate the exercise by Costa Rica of its right to freedom of navigation under the 1858 Treaty. That power is not unlimited, being tempered by the rights and obligations of the Parties. A regulation in the present case is to have the following characteristics:

- (1) it must only subject the activity to certain rules without rendering impossible or substantially impeding the exercise of the right of free navigation;
- (2) it must be consistent with the terms of the Treaty, such as the prohibition on the unilateral imposition of certain taxes in Article VI;
- (3) it must have a legitimate purpose, such as safety of navigation, crime prevention and public safety and border control;
- (4) it must not be discriminatory and in matters such as timetabling must apply to Nicaraguan vessels if it applies to Costa Rican ones;
- (5) it must not be unreasonable, which means that its negative impact on the exercise of the right in question must not be manifestly excessive

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 Mr. Norman Lizano, Consul General of Costa Rica in the Kingdom of the Netherlands,
 Mr. Carlos Garbanzo, Counsellor at the Permanent Mission of Costa Rica to the United Nations Office at Geneva,
 Mr. Fouad Zarbiev, PhD candidate, Graduate Institute of International and Development Studies, Geneva,
 Mr. Leonardo Salazar, National Geographic Institute of Costa Rica,
 as Advisers;

Mr. Allan Solis, Third Secretary at the Embassy of Costa Rica in the Kingdom of the Netherlands,
 as Assistant Adviser,

and

the Republic of Nicaragua,
 represented by

H.E. Mr. Carlos José Argüello Gómez, Ambassador of Nicaragua to the Kingdom of the Netherlands,
 as Agent and Counsel;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., member of the English Bar, former Chairman of the International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de Droit international, Distinguished Fellow, All Souls College, Oxford,

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, former member of the International Law Commission,
 Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, associate member of the Institut de droit international,
 Mr. Paul Reichler, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Bar of the District of Columbia,

Mr. Antonio Remiro Brotons, Professor of International Law, Universidad Autónoma, Madrid, associate member of the Institut de droit international,
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Mr. Lawrence H. Martin, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Massachusetts Bar, member of the Bar of the District of Columbia,
 Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

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Ms Tania Elena Pacheco Blandino, Counsellor, Embassy of Nicaragua in the Kingdom of the Netherlands,
 Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

Mr. César Vega Masís, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs of Nicaragua,
 as Assistant Counsel,

THE COURT,

composed as above,
 after deliberation,

delivers the following Judgment:

1. On 29 September 2005 the Republic of Costa Rica (hereinafter “Costa Rica”) filed in the Registry of the Court an Application of the same date, instituting proceedings against the Republic of Nicaragua (hereinafter “Nicaragua”) with regard to a “dispute concerning navigational and related rights of Costa Rica on the San Juan River”.

In its Application, Costa Rica seeks to found the jurisdiction of the Court on the declaration it made on 20 February 1973 under Article 36, paragraph 2, of the Statute, as well as on the declaration which Nicaragua made on 24 September 1929 under Article 36 of the Statute of the Permanent Court of International Justice and which is deemed, pursuant to Article 36, paragraph 5, of the Statute of the present Court, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of this Court. Costa Rica also seeks to found the jurisdiction of the Court on the Tovar-Caldera Agreement signed between the Parties on 26 September 2002. In addition, Costa Rica invokes as a basis of the Court’s jurisdiction the provisions of Article XXXI of the American Treaty on Pacific Settlement, officially designated, according to Article LX thereof, as the “Treaty of Bogotá”.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Registrar immediately communicated a certified copy of the Application to the Government of Nicaragua; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar moreover addressed to the Organization of American States the notification provided for in Article 34, paragraph 3, of the Statute of the Court, and asked that organization whether or not it intended to furnish observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court.

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise its right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Costa Rica chose Mr. Antônio Cançado Trindade and Nicaragua Mr. Gilbert Guillaume. Mr. Cançado Trindade was subsequently elected as a Member of the Court. Costa Rica informed the Court that it had decided not to choose a new judge *ad hoc*.

5. By an Order dated 29 November 2005, the Court fixed 29 August 2006 and 29 May 2007, respectively, as the time-limits for the filing of the Memorial of Costa Rica and the Counter-Memorial of Nicaragua; those pleadings were duly filed within the time-limits so prescribed.

6. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of the Republic of Ecuador and the Government of the Republic of Colombia respectively asked to be furnished with copies of the pleadings and documents annexed. Having ascertained the views of the Parties pursuant to that Article, the Court decided not to grant these requests. The Registrar communicated the Court's decision to the Government of the Republic of Ecuador and the Government of the Republic of Colombia, as well as to the Parties.

7. By an Order of 9 October 2007, the Court authorized the submission of a Reply by Costa Rica and a Rejoinder by Nicaragua, and fixed 15 January 2008 and 15 July 2008 as the respective time-limits for the filing of those pleadings. The Reply and the Rejoinder were duly filed within the time-limits so prescribed.

8. By letter of 27 November 2008, the Agent of Costa Rica expressed his Government's desire to produce five new documents, in accordance with Article 56 of the Rules of Court. As provided for in paragraph 1 of that Article, those documents were communicated to Nicaragua. By letter of 10 December 2008, the Agent of Nicaragua informed the Court that his Government did not give its consent to the production of the requested documents.

The Court decided, pursuant to Article 56, paragraph 2, of the Rules, to authorize the production of four of the five documents submitted by Costa Rica, it being understood that Nicaragua would have the opportunity, pursuant to paragraph 3 of that Article, to comment subsequently thereon and to submit documents in support of those comments. That decision was communicated to the Parties by letters from the Registrar dated 18 December 2008.

9. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after ascertaining the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

10. Public hearings were held between 2 and 12 March 2009, at which the Court heard the oral arguments and replies of:

For Costa Rica: H.E. Mr. Edgar Ugalde-Alvarez,
Mr. Arnoldo Brenes,
Mr. Sergio Ugalde,
Mr. Lucius Caffisch,
Mr. Marcelo G. Kohen,
Mr. James Crawford,
Ms Kate Parlett.

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez,
Mr. Ian Brownlie,
Mr. Antonio Remiro Brotons,
Mr. Alain Pellet,
Mr. Paul Reichler,
Mr. Stephen C. McCaffrey.

11. At the hearings, Members of the Court put questions to the Parties, to which replies were given in writing, within the time-limit fixed by the President in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, each of the Parties submitted comments on the written replies provided by the other.

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12. In its Application, the following claims were made by Costa Rica:

“For these reasons, and reserving the right to supplement, amplify or amend the present Application, as well as to request the Court to establish provisional measures which might be necessary to protect its rights and to prevent the aggravation of the dispute, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations as referred to in paragraph 1 of this Application in denying to Costa Rica the free exercise of its rights of navigation and associated rights on the San Juan River. In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has violated:

- (a) the obligation to facilitate and expedite traffic on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888;
- (b) the obligation to allow Costa Rican boats and their passengers to navigate freely and without impediment on the San Juan River for commercial purposes, including the transportation of passengers and tourism;
- (c) the obligation to allow Costa Rican boats and their passengers while engaged in such navigation to moor freely on any of the San Juan River banks without paying any charges, unless expressly agreed by both Governments;
- (d) the obligation not to require Costa Rican boats and their passengers to stop at any Nicaraguan post along the river;
- (e) the obligation not to impose any charges or fees on Costa Rican boats and their passengers for navigating on the river;
- (f) the obligation to allow Costa Rica the right to navigate the river in accordance with Article Second of the Cleveland Award;
- (g) the obligation to allow Costa Rica the right to navigate the San Juan River in official boats for supply purposes, exchange of personnel of the border posts along the right bank of the San Juan River, with their official equipment, including the necessary arms and ammunition, and for the purposes of protection, as established in the pertinent instruments;
- (h) the obligation to collaborate with Costa Rica in order to carry out those undertakings and activities which require a common effort by both States in order to facilitate and expedite traffic in the San Juan River within the terms of the Treaty of Limits and its interpretation given by the Cleveland Award, and other pertinent instruments;
- (i) the obligation not to aggravate and extend the dispute by adopting

measures against Costa Rica, including unlawful economic sanctions contrary to treaties in force or general international law, or involving further changes in the régime of navigation and associated rights on the San Juan River not permitted by the instruments referred to above.

Further, the Court is requested to determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to in paragraph 10 above.”

Paragraph 10 of the Application reads as follows:

“Costa Rica seeks the cessation of this Nicaraguan conduct which prevents the free and full exercise and enjoyment of the rights that Costa Rica possesses on the San Juan River, and which also prevents Costa Rica from fulfilling its responsibilities under Article II of the 1956 Agreement and otherwise. In the event that Nicaragua imposes the economic sanctions referred to above, or any other unlawful sanctions, or otherwise takes steps to aggravate and extend the present dispute, Costa Rica further seeks the cessation of such conduct and full reparation for losses suffered.”

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

On behalf of the Government of Costa Rica,
in the Memorial and in the Reply:

“1. For these reasons, and reserving the right to supplement, amplify or amend the present submissions, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations in denying to Costa Rica the free exercise of its rights of navigation and related rights on the San Juan.

2. In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has violated:

- (a) the obligation to allow all Costa Rican vessels and their passengers to navigate freely on the San Juan for purposes of commerce, including communication and the transportation of passengers and tourism;
- (b) the obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the River;
- (c) the obligation not to require persons exercising the right of free navigation on the River to carry passports or obtain Nicaraguan visas;
- (d) the obligation not to require Costa Rican vessels and their passengers to stop at any Nicaraguan post along the River;
- (e) the obligation not to impose other impediments on the exercise of the right of free navigation, including timetables for navigation and conditions relating to flags;
- (f) the obligation to allow Costa Rican vessels and their passengers while engaged in such navigation to land on any part of the bank where navigation is common without paying any charges, unless expressly agreed by both Governments;

- (g) the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular Article 2 of the Cleveland Award;
- (h) the obligation to facilitate and expedite traffic on the San Juan, within the terms of the Treaty of 15 April 1858 and its interpretation by the Cleveland Award of 1888, in accordance with Article 1 of the bilateral Agreement of 9 January 1956;
- (i) the obligation to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes.

3. Further, the Court is requested to adjudge and declare that by reason of the above violations, Nicaragua is obliged:

- (a) immediately to cease all the breaches of obligations which have a continuing character;
- (b) to make reparation to Costa Rica for all injuries caused to Costa Rica by the breaches of Nicaragua’s obligations referred to above, in the form of the restoration of the situation prior to the Nicaraguan breaches and compensation in an amount to be determined in a separate phase of these proceedings; and
- (c) to give appropriate assurances and guarantees that it shall not repeat its unlawful conduct, in such form as the Court may order.”

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

“On the basis of the facts and legal considerations set forth in the Counter-Memorial, the Court is requested:

To adjudge and declare that the requests of Costa Rica in her Memorial are rejected, on the following bases:

- (a) either because there is no breach of the provisions of the Treaty of 15 April 1858 on the facts;
- (b) or, as appropriate, because the obligation breach of which is alleged is not included in the provisions of the Treaty of 15 April 1858.

Moreover, the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section 2 of Chapter 7.”

The relevant part of Section 2 of Chapter 7 of the Counter-Memorial reads as follows:

“Finally, in view of the above considerations, and in particular those indicated in Chapter 2 (E), Nicaragua requests the Court to declare that:

- (i) Costa Rica is obliged to comply with the regulations for navigation (and landing) in the San Juan imposed by Nicaraguan authorities in particular related to matters of health and security;
- (ii) Costa Rica has to pay for any special services provided by Nicaragua

gua in the use of the San Juan either for navigation or landing on the Nicaraguan banks;

- (iii) Costa Rica has to comply with all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858;
- (iv) revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty;
- (v) Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other present day recipients of this flow such as the Colorado River.”

in the Rejoinder:

“On the basis of the facts and legal considerations set forth in the Counter-Memorial and the Rejoinder, the Court is requested:

To adjudge and declare that the requests of Costa Rica in her Memorial and Reply are rejected in general, and in particular, on the following bases:

- (a) either because there is no breach of the provisions of the Treaty of Limits of 15 April 1858 or any other international obligation of Nicaragua;
- (b) or, as appropriate, because the obligation breach of which is alleged, is not an obligation under the provisions of the Treaty of Limits of 15 April 1858 or under general international law.

Moreover, the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section II of Chapter VII of her Counter-Memorial and reiterated in Chapter VI, Section I, of her Rejoinder.”

The relevant part of Chapter VI, Section I, of the Rejoinder reads as follows:

- “(i) Costa Rica is obliged to comply with the regulations for navigation (and landing) in the San Juan imposed by Nicaraguan authorities in particular related to matters of health and security;
- (ii) Costa Rica has to pay for any special services provided by Nicaragua in the use of the San Juan either for navigation or landing on the Nicaraguan banks;
- (iii) Costa Rica has to comply with all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858;
- (iv) revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty;
- (v) Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other present day recipients of this flow such as the Colorado River.”

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

On behalf of the Government of Costa Rica,
at the hearing of 9 March 2009:

“Having regard to the written and oral pleadings and to the evidence submitted by the Parties, may it please the Court to adjudge and declare that, by its conduct, the Republic of Nicaragua has violated:

- (a) the obligation to allow all Costa Rican vessels and their passengers to navigate freely on the San Juan for purposes of commerce, including communication and the transportation of passengers and tourism;
- (b) the obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the River;
- (c) the obligation not to require persons exercising the right of free navigation on the River to carry passports or obtain Nicaraguan visas;
- (d) the obligation not to require Costa Rican vessels and their passengers to stop at any Nicaraguan post along the River;
- (e) the obligation not to impose other impediments on the exercise of the right of free navigation, including timetables for navigation and conditions relating to flags;
- (f) the obligation to allow Costa Rican vessels and their passengers while engaged in such navigation to land on any part of the bank where navigation is common without paying any charges, unless expressly agreed by both Governments;
- (g) the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular the Second article of the Cleveland Award;
- (h) the obligation to facilitate and expedite traffic on the San Juan, within the terms of the Treaty of 15 April 1858 and its interpretation by the Cleveland Award of 1888, in accordance with Article 1 of the bilateral Agreement of 9 January 1956;
- (i) the obligation to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes.

Further, the Court is requested to adjudge and declare that by reason of the above violations, Nicaragua is obliged:

- (a) immediately to cease all the breaches of obligations which have a continuing character;
- (b) to make reparation to Costa Rica for all injuries caused to Costa Rica by the breaches of Nicaragua’s obligations referred to above, in the form of the restoration of the situation prior to the Nicaraguan breaches and compensation in an amount to be determined in a separate phase of these proceedings; and
- (c) to give appropriate assurances and guarantees that it shall not repeat its unlawful conduct, in such form as the Court may order.

The Court is requested to reject Nicaragua's request for a declaration."

On behalf of the Government of Nicaragua,

at the hearing of 12 March 2009:

"On the basis of the facts and legal considerations set forth in the Counter-Memorial, Rejoinder and oral pleadings,

May it please the Court to adjudge and declare that:

The requests of Costa Rica in her Memorial, Reply and oral pleadings are rejected in general, and in particular, on the following bases:

- (a) either because there is no breach of the provisions of the Treaty of Limits of 15 April 1858 or any other international obligation of Nicaragua;
- (b) or, as appropriate, because the obligation breach of which is alleged, is not an obligation under the provisions of the Treaty of Limits of 15 April 1858 or under general international law.

Moreover the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section II of Chapter VII of her Counter-Memorial, in Section I, Chapter VI, of her Rejoinder and as reiterated in these oral pleadings."

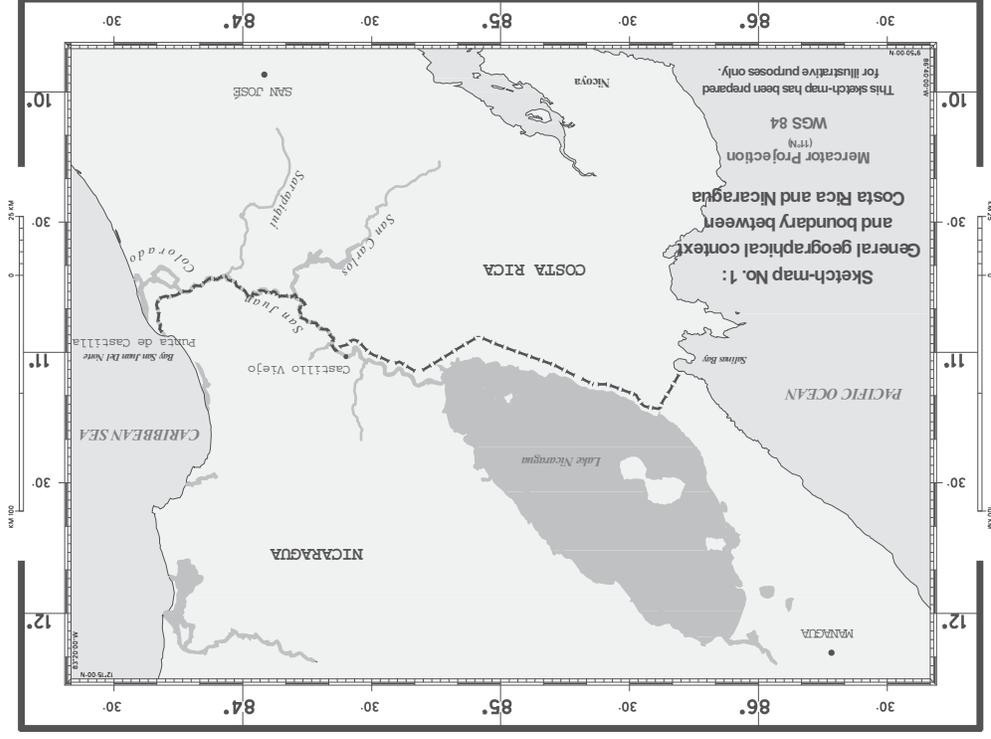
* * *

I. GEOGRAPHICAL AND HISTORICAL CONTEXT AND ORIGIN OF THE DISPUTE

15. The San Juan River runs approximately 205 kilometres from Lake Nicaragua to the Caribbean Sea (see sketch-maps Nos. 1 and 2). Some 19 kilometres from the Caribbean Sea it divides into two branches: the San Juan itself continues as the northerly of the two branches and empties into the Caribbean Sea at the bay of San Juan del Norte; the Colorado River is the southern and larger of the two branches and runs entirely within Costa Rica reaching the Caribbean Sea at Barra de Colorado.

16. Part of the border between Costa Rica and Nicaragua runs along the right bank (i.e. the Costa Rican side) of the San Juan River from a point three English miles below Castillo Viejo, a small town in Nicaragua, to the end of Punta de Castilla, where the river enters the Caribbean Sea. Between Lake Nicaragua and the point below Castillo Viejo, the river runs entirely through Nicaraguan territory.

17. Both Costa Rica and Nicaragua, which had been under Spanish colonial rule, became independent States in 1821. Shortly after independence, Costa Rica and Nicaragua, together with El Salvador, Guatemala and Honduras, decided to constitute the Federal Republic of Central America. In 1824 the people living in the district of Nicoya on the Pacific coast, originally within Nicaragua, opted by plebiscite to become part of



should also decide whether Costa Rica could navigate the San Juan River with vessels of war or of the revenue service. In his Award rendered on 22 March 1888, President Cleveland held that the 1858 Treaty was valid. He further stated, with reference to Article VI of the 1858 Treaty, that Costa Rica did not have the right of navigation on the San Juan River with vessels of war, but that it could navigate with such vessels of the Revenue Service as may be connected to navigation “for the purposes of commerce”.

21. Following the Cleveland Award, a boundary commission was established to demarcate the boundary line. An engineer, Mr. Edward Alexander, was charged with the task of resolving any “disputed point or points” which might arise in the field during the demarcation process, which began in 1897 and was concluded in 1900. Mr. Alexander rendered five awards to this end.

22. On 5 August 1914, Nicaragua signed a treaty with the United States (the Chamorro-Bryan Treaty) which granted the United States perpetual and “exclusive proprietary rights” for the construction and maintenance of an inter-oceanic canal through the San Juan River. On 24 March 1916 Costa Rica filed a case against Nicaragua before the Central American Court of Justice claiming that Nicaragua had breached its obligation to consult with Costa Rica prior to entering into any canalization project in accordance with Article VIII of the 1858 Treaty. On 30 September 1916, the Central American Court of Justice ruled that, by not consulting Costa Rica, Nicaragua had violated the rights guaranteed to the latter by the 1858 Treaty of Limits and the 1888 Cleveland Award.

23. On 9 January 1956 Costa Rica and Nicaragua concluded an Agreement (the Fournier-Sevilla Agreement) according to the terms of which the Parties agreed to facilitate and expedite traffic in particular through the San Juan River and agreed to co-operate to safeguard the common border.

24. In the 1980s various incidents started to occur relating to the navigational régime of the San Juan River. During that period Nicaragua introduced certain restrictions on Costa Rican navigation on the San Juan River which it justified as temporary, exceptional measures to protect Nicaragua’s national security in the context of an armed conflict. Some of the restrictions were suspended when Costa Rica protested. During the mid-1990s further measures were introduced by Nicaragua, including the charging of fees for passengers travelling on Costa Rican vessels navigating on the San Juan River and the requirement for Costa Rican vessels to stop at Nicaraguan Army posts along the river.

25. On 8 September 1995 the Commander-in-Chief of the Nicaraguan Army and the Costa Rican Minister of Public Security signed a document, known as the Cuadra-Castro Joint Communiqué, which provided for the co-ordination of operations in the border areas of the two States against the illegal trafficking of persons, vehicles and contraband.

26. In July 1998 further disagreements between the Parties regarding the extent of Costa Rica’s navigational rights on the San Juan River led to the adoption by Nicaragua of certain measures. In particular, on 14 July 1998, Nicaragua prohibited the navigation of Costa Rican vessels that transported members of Costa Rica’s police force. On 30 July 1998, the Nicaraguan Minister of Defence and the Costa Rican Minister of Public Security signed a document, known as the Cuadra-Lizano Joint Communiqué. The text allowed for Costa Rican armed police vessels to navigate on the river to re-supply their boundary posts on the Costa Rican side, provided that the Costa Rican agents in those vessels only carried their service arms and prior notice was given to the Nicaraguan authorities, which could decide on whether the Costa Rican vessels should be accompanied by a Nicaraguan escort. On 11 August 1998, Nicaragua declared that it considered the Cuadra-Lizano Joint Communiqué to be legally null and void. Costa Rica did not accept this unilateral declaration. Differences regarding the navigational régime on the San Juan River persisted between the Parties.

27. On 24 October 2001, Nicaragua made a reservation to its declaration accepting the jurisdiction of the Court (see paragraph 1 above), according to which it would no longer accept the jurisdiction of the Court in regard to “any matter or claim based on interpretations of treaties or arbitral awards that were signed and ratified or made, respectively, prior to 31 December 1901”. Under the Tovar-Caldera Agreement, signed by the Parties on 26 September 2002, Nicaragua agreed to a three year moratorium with regard to the reservation it had made in 2001 to its declaration accepting the jurisdiction of the Court. For its part, Costa Rica agreed that during the same three year period it would not initiate any action before the International Court of Justice nor before any other authority on any matter or protest mentioned in treaties or agreements currently in force between both countries.

28. Once the agreed three year period had elapsed without the Parties having been able to settle their differences, Costa Rica, on 29 September 2005, instituted proceedings before the Court against Nicaragua with regard to its disputed navigational and related rights on the San Juan River (see paragraph 1 above). Nicaragua has not raised any objections to the jurisdiction of the Court to entertain the case.

*

29. Taking account of the subject of the dispute as summarized above and of the Parties’ submissions and arguments, the Court will proceed in the following manner.

It will first determine the extent of Costa Rica’s right of free navigation on the San Juan River (II).

It will next ascertain whether, and to what extent, within the ambit of

the right thus defined, Nicaragua has the power to regulate navigation by Costa Rican boats and whether the specific measures it has decided and put into effect to this end during the period of the dispute are compatible with Costa Rica's rights (III).

It will then consider the question of the right which Costa Rica claims for inhabitants of the Costa Rican bank of the river to engage in subsistence fishing (IV).

Finally, in the light of its reasoning on the preceding points, it will consider the Parties' claims as presented to it in their final submissions, in respect in particular of the appropriate remedies (V).

II. COSTA RICA'S RIGHT OF FREE NAVIGATION ON THE SAN JUAN RIVER

30. The Parties agree that Costa Rica possesses a right of free navigation on the section of the San Juan River where the right bank, i.e. the Costa Rican side, marks the border between the two States by virtue of the Treaty of Limits (the Jerez-Cañas Treaty) concluded between them on 15 April 1858. This is the part of the river which runs from a point three English miles below Castillo Viejo, a town in Nicaraguan territory, to the mouth of the river at the Caribbean Sea (see paragraph 16 above).

Upstream from the point referred to above, the San Juan flows entirely in Nicaraguan territory from its source in Lake Nicaragua, in the sense that both its banks belong to Nicaragua. The section of the river in which the right bank belongs to Costa Rica, the section at issue in this dispute, is some 140 kilometres long.

31. While it is not contested that the section of the river thus defined belongs to Nicaragua, since the border lies on the Costa Rican bank, with Costa Rica possessing a right of free navigation, the Parties differ both as to the legal basis of that right and, above all, as to its precise extent, in other words as to the types of navigation which it covers.

1. *The Legal Basis of the Right of Free Navigation*

32. According to Costa Rica, its right of free navigation on the part of the San Juan River that is in dispute derives on the one hand from certain treaty provisions in force between the Parties, primarily but not exclusively the Treaty of Limits of 15 April 1858, and on the other hand from the rules of general international law that are applicable, even in the absence of treaty provisions, to navigation on "international rivers". The San Juan is said to fall into this category, at least as regards the section

whose course follows the border, with Costa Rica thus possessing a customary right of free navigation in its capacity as a riparian State.

33. According to Nicaragua, on the contrary, the San Juan is not an "international river", since it flows entirely within the territory of a single country by virtue of the provisions of the 1858 Treaty of Limits, which establish the border in such a way that no part of the river falls under the sovereignty of a State other than Nicaragua. Moreover, Nicaragua challenges the existence of a general régime that might be applicable, under customary international law, to rivers whose course, or one of whose banks, constitutes the border between two States, and more widely to "international rivers". Lastly, according to Nicaragua, even if such a régime were to exist, it would be superseded in this case by the treaty provisions which define the status of the San Juan River and govern the riparian States' right of navigation. It is these special provisions which should be applied in order to settle the present dispute, in any event that part of it relating to the right of navigation on the river.

34. The Court does not consider that it is required to take a position in this case on whether and to what extent there exists, in customary international law, a régime applicable to navigation on "international rivers", either of universal scope or of a regional nature covering the geographical area in which the San Juan is situated. Nor does it consider, as a result, that it is required to settle the question of whether the San Juan falls into the category of "international rivers", as Costa Rica maintains, or is a national river which includes an international element, that being the argument of Nicaragua.

35. Indeed, even if categorization as an "international river" would be legally relevant in respect of navigation, in that it would entail the application of rules of customary international law to that question, such rules could only be operative, at the very most, in the absence of any treaty provisions that had the effect of excluding them, in particular because those provisions were intended to define completely the régime applicable to navigation, by the riparian States on a specific river or a section of it.

36. That is precisely the case in this instance. The 1858 Treaty of Limits completely defines the rules applicable to the section of the San Juan River that is in dispute in respect of navigation. Interpreted in the light of the other treaty provisions in force between the Parties, and in accordance with the arbitral or judicial decisions rendered on it, that Treaty is sufficient to settle the question of the extent of Costa Rica's right of free navigation which is now before the Court. Consequently, the Court has no need to consider whether, if these provisions did not exist, Costa Rica could nevertheless have relied for this purpose on rules derived from international, universal or regional custom.

37. The main provision which founds Costa Rica's right of free navi-

gation is contained in Article VI of the 1858 Treaty (see paragraphs 43 and 44 below); this has been the focus of the arguments exchanged between the Parties as to the extent of the right of navigation on the San Juan.

Article VI, after conferring on Nicaragua full and exclusive sovereignty (“exclusivamente el dominio y sumo imperio”) over the whole of the San Juan, from its source in the lake to its mouth at the sea, grants Costa Rica, on the section of the river which follows the border between the two States (see paragraph 30 above), a perpetual right (“los derechos perpetuos”) of free navigation “con objetos de comercio”, according to the terms of the Spanish version of the Treaty, which is the only authoritative one, the meaning of which the Court will be required to return to below. In addition, Article VI gives vessels of both riparian countries the right to land freely on either bank without being subject to any taxes (“ninguna clase de impuestos”), unless agreed by both Governments.

38. Other provisions of the 1858 Treaty, though of less importance for the purposes of the present case, are not without relevance as regards the right of navigation on the river. This applies in particular to Article IV, which obliges Costa Rica to contribute to the security of the river “for the part that belongs to her of the banks”, to Article VIII, which obliges Nicaragua to consult Costa Rica before entering into any agreements with a third State for canalization or transit on the river, and of course to Article II, which establishes the border as the Costa Rican bank on the section of the river which is at issue in this dispute.

39. Besides the 1858 Treaty, mention should be made, among the treaty instruments likely to have an effect on determining the right of navigation on the river and the conditions for exercising it, of the agreement concluded on 9 January 1956 between the two States (known as the Fournier-Sevilla Agreement), whereby the Parties agreed to collaborate to the best of their ability, in particular in order to facilitate and expedite traffic on the San Juan in accordance with the 1858 Treaty and the Arbitral Award made by President Cleveland in 1888 (for the text of the relevant provision of the 1956 Agreement, see paragraph 94 below).

40. Costa Rica has also invoked before the Court the joint ministerial communiqués published on 8 September 1995 (known as the Cuadra-Castro Joint Communiqué; see paragraph 25 above) and 30 July 1998 (known as the Cuadra-Lizano Joint Communiqué; see paragraph 26 above). In the Court’s view, however, these statements issued by the ministers responsible, on each side, for matters of defence and public security, cannot be included in the conventional basis of the right of free navigation granted to Costa Rica. Rather, these are practical arrangements, in part aimed at implementing previous treaty commitments, including in particular the obligation of co-operation referred to in the Agreement of 9 January 1956 (see paragraph 23 above and paragraph 94 below). The legal effects of such arrangements are more limited than the

conventional acts themselves: modalities for co-operation which they put in place are likely to be revised in order to suit the Parties. Furthermore, the second of them was promptly declared null and void by Nicaragua (see paragraph 26 above).

41. The above-mentioned treaty instruments must be understood in the light of two important decisions which settled differences that emerged between the Parties in determining their respective rights and obligations: the Arbitral Award made by the President of the United States on 22 March 1888 (known as the Cleveland Award); and the decision rendered, on the application of Costa Rica, by the Central American Court of Justice on 30 September 1916.

The first of these two decisions settled several questions concerning the interpretation of the 1858 Treaty which divided the Parties in that case; the second found that Nicaragua, by concluding an agreement with the United States permitting the construction and maintenance of an interoceanic canal through the San Juan River, had disregarded Costa Rica’s right under Article VIII of that Treaty to be consulted before the conclusion of any agreement of that nature.

Although neither of these decisions directly settles the questions that are now before the Court, they contain certain indications which it will be necessary to take into account for the purposes of the present case.

2. *The Extent of the Right of Free Navigation Attributed to Costa Rica*

42. Having thus defined the legal basis of the right which Costa Rica argues has been partly disregarded by Nicaragua, the Court must now determine its precise extent, in other words, its field of application. The Parties disagree considerably over the definition of this field of application, i.e., as to the types of navigation which are covered by the “perpetual right” granted to Costa Rica by the 1858 Treaty. Their difference essentially concerns the interpretation of the words “libre navegación . . . con objetos de comercio” in Article VI of the Treaty of Limits; this brings with it a major disagreement as to the definition of the activities covered by the right in question and of those which, not being thus covered, are subject to Nicaragua’s sovereign power to authorize and regulate as it sees fit any activity that takes place on its territory, of which the river forms part.

(a) *The meaning and scope of the expression “libre navegación . . . con objetos de comercio”*

43. In its Spanish version, which is the only authoritative one, Article VI of the Treaty of Limits of 1858 reads as follows:

“La República de Nicaragua tendrá exclusivamente el dominio y

sumo imperio sobre las aguas del río de San Juan desde su salida del Lago, hasta su desembocadura en el Atlántico; pero la República de Costa Rica tendrá en dichas aguas los derechos perpetuos de libre navegación, desde la expresada desembocadura hasta tres millas inglesas antes de llegar al Castillo Viejo, con objetos de comercio, ya sea con Nicaragua ó al interior de Costa Rica por los ríos de San Carlos ó Sarapiquí, ó cualquiera otra vía procedente de la parte que en la ribera del San Juan se establece corresponden á esta República. Las embarcaciones de uno ú otro país podrán indistintamente atracar en las riberas del río, en la parte en que la navegación es común, sin cobrarse ninguna clase de impuestos, á no ser que se establezcan de acuerdo entre ambos Gobiernos.”

44. Leaving aside for the moment the phrase whose interpretation, and indeed translation into English and French, divides the Parties, this article may be translated thus:

“The Republic of Nicaragua shall have exclusive *dominium* and *imperium* over the waters of the San Juan River from its origin in the lake to its mouth at the Atlantic Ocean; the Republic of Costa Rica shall however have a perpetual right of free navigation on the said waters between the mouth of the river and a point located three English miles below Castillo Viejo, [*con objetos de comercio*], whether with Nicaragua or with the interior of Costa Rica by the rivers San Carlos or Sarapiquí or any other waterway starting from the section of the bank of the San Juan established as belonging to that Republic. The vessels of both countries may land indiscriminately on either bank of the section of the river where navigation is common, without paying any taxes, unless agreed by both Governments.” [*Translation by the Court.*]

45. The Parties’ disagreement is greatest on the meaning of the words “con objetos de comercio”. For Nicaragua, this expression must be translated into French as “avec des marchandises de commerce” and into English as “with articles of trade”; in other words, the “objetos” in question here are objects in the concrete and material sense of the term. Consequently, the freedom of navigation guaranteed to Costa Rica by Article VI relates only to the transport of goods intended to be sold in a commercial exchange. For Costa Rica, on the contrary, the expression means in French “à des fins de commerce” and in English “for the purposes of commerce”; the “objetos” in the original text are therefore said to be objects in the abstract sense of ends and purposes. Consequently, according to Costa Rica, the freedom of navigation given to it by the Treaty must be attributed the broadest possible scope, and in any event encompasses not only the transport of goods but also the transport of passengers, including tourists.

46. Before directly addressing the question which has been submitted to it, the Court will make three preliminary observations of a more general nature. It will then consider what is to be understood by “con objetos” and then by “comercio” within the meaning of Article VI, since there is in fact a twofold disagreement between the Parties.

(i) *Preliminary observations*

47. In the first place, it is for the Court to interpret the provisions of a treaty in the present case. It will do so in terms of customary international law on the subject, as reflected in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, as the Court has stated on several occasions (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), pp. 109-110, para. 160; see also *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, I.C.J. Reports 1994, pp. 21-22, para. 41.)

Consequently, neither the circumstance that Nicaragua is not a party to the Vienna Convention on the Law of Treaties nor the fact that the treaty which is to be interpreted here considerably pre-dates the drafting of the said Convention has the effect of preventing the Court from referring to the principles of interpretation set forth in Articles 31 and 32 of the Vienna Convention.

48. In the second place, the Court is not convinced by Nicaragua’s argument that Costa Rica’s right of free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river conferred by the Treaty on Nicaragua, that being the most important principle set forth by Article VI.

While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way. A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e. in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.

A simple reading of Article VI shows that the Parties did not intend to establish any hierarchy as between Nicaragua’s sovereignty over the river and Costa Rica’s right of free navigation, characterized as “perpetual”, with each of these affirmations counter-balancing the other. Nicaragua’s sovereignty is affirmed only to the extent that it does not prejudice the substance of Costa Rica’s right of free navigation in its domain, the establishment of which is precisely the point at issue; the right of free navigation, albeit “perpetual”, is granted only on condition that it does not prejudice the key prerogatives of territorial sovereignty.

There are thus no grounds for supposing, *a priori*, that the words “libre navegación . . . con objetos de comercio” should be given a specially restrictive interpretation, any more than an extensive one.

49. Lastly, the Court observes that none of the points under examination in this case was settled by the Cleveland Award of 1888 or by the decision of the Central American Court of Justice of 1916. Each of the Parties has sought to use these previous decisions as an argument to support its own case. However, these attempts do not convince the Court one way or the other.

The Cleveland Award confined itself to settling the questions of interpretation which the Parties had expressly submitted to the arbitrator. Those questions did not concern the meaning of the words “con objetos de comercio”; it is therefore futile to seek in the Award the answer to a question that was not put before the arbitrator. Consequently, while the Award declares that Costa Rica does not have the right, under the Treaty, to navigate on the San Juan with vessels of war, whereas it does have the right to do so with vessels of its revenue service, there is nothing to be inferred from this with regard to vessels belonging to the State and not falling into either of those two categories. Likewise, while the arbitrator used the words “for the purposes of commerce” and placed them in quotation marks, it may be supposed that this was simply because that was the English translation of the words “con objetos de comercio” which both Parties had supplied to the arbitrator, who did not wish, in his interpretation of the Treaty, to go beyond the questions which had been put before him.

As for the decision of the Central American Court of Justice of 1916, however important this might be, its operative part was based only on the application of the express provisions of Article VIII of the Treaty, which are not at issue in the present case.

(ii) *The meaning of the phrase “con objetos”*

50. It is now appropriate to consider the issue of the meaning of the phrase “con objetos de” as used in Article VI of the 1858 Treaty, specifically whether it means “for the purposes of” — as Costa Rica contends — or “with articles of” — as Nicaragua contends.

51. It should first be observed that the Spanish word “objetos” can, depending on its context, have either of the two meanings put forward. Thus, the context must be examined to ascertain the meaning to be ascribed here. The two meanings — one concrete and the other abstract — are sufficiently different that examination of the context will generally allow for a firm conclusion to be reached.

52. Having conducted this examination, the Court is of the view that the interpretation advocated by Nicaragua cannot be upheld.

The main reason for this is that ascribing the meaning “with goods” or “with articles” to the phrase “con objetos” results in rendering meaningless the entire sentence in which the phrase appears.

The part of Article VI which is relevant in this connection reads: “Costa Rica tendrá . . . los derechos perpetuos de libre navegación . . . con objetos de comercio, ya sea con Nicaragua ó al interior de Costa Rica.”

If Nicaragua’s interpretation were to be accepted, there would be no intelligible relationship between the clause following the phrase “con objetos de comercio”, i.e., “ya sea con Nicaragua ó al interior de Costa Rica” (“whether with Nicaragua or with the interior of Costa Rica”), and the preceding part of the sentence.

Either the words “with Nicaragua” would relate to “objetos de comercio”, which would hardly make sense, since it would not be meaningful to speak of “goods (or articles) of trade with Nicaragua”; or these words relate to “navegación” and that would make even less sense, because the expression “navegación . . . con Nicaragua” would simply be incomprehensible.

By contrast, Costa Rica’s interpretation of the words “con objetos” allows the entire sentence to be given coherent meaning. If the phrase means “purposes of commerce”, then the immediately following clause, “ya sea con Nicaragua . . .”, plainly relates to “comercio” (“for the purposes of commerce with Nicaragua . . .”), and the sentence then conveys a perfectly comprehensible idea.

Thus, in the present instance a literal analysis of the sentence containing the words requiring interpretation leads to one of the proposed meanings being preferred over the other.

53. The preceding finding is supported by three additional arguments which all point to the same conclusion.

54. First, “objetos” is used in another article of the 1858 Treaty, Article VIII, in which context it can only have the abstract meaning of “purposes” or “subjects”: “Nicaragua se compromete á no concluir otro (contrato) sobre los expresados objetos . . .” (“Nicaragua engages not to conclude any other contract for those purposes . . .”).

It is reasonable to infer that the Parties tended to understand “objetos” in its abstract sense, or, at least, that this meaning was familiar to them in their treaty practice.

55. Second, a further indication may be deduced from the “Cañas-Martínez” Peace Treaty signed by the Parties on 8 December 1857 but which was never ratified and hence did not enter into force. On the question of navigation on the San Juan, this instrument, replaced by the 1858 Treaty of Limits, which repeats some of the earlier provisions, included the expression “artículos de comercio”, which undoubtedly translates as “articles” or “goods” of commerce. This would tend to show that when the Parties at the time wished to refer to physical property giving rise to commercial transactions, they used a term other than “objetos de comercio”, a term having the advantage of being unambiguous. Further, it is reasonable to believe that the Parties’ replacement of one word with another in two successive instruments, the second of

which was drafted shortly after the first, indicates that the Parties wished in the second to refer to something different from that in the first and that the two terms used must not be taken to mean the same thing.

56. Finally, the Court also considers it significant that in 1887, when the two Parties each submitted an English translation of the 1858 Treaty to President Cleveland for use in the arbitration proceedings he was asked to conduct, even though their translations were not identical on all points, they did use the same phrase to render the original “con objetos de comercio”: “for the purposes of commerce”.

By itself, this argument is undoubtedly not conclusive, because the only authoritative version of the instrument is the Spanish one and at the time the Parties might have made the same mistake in translation, which cannot be treated as an implicit amendment of the 1858 Treaty. It is also no doubt true that Nicaragua might have paid insufficient heed to the meaning of the term “objetos de comercio”, which was not at issue in the questions submitted to the arbitrator; this could be the explanation for a translation done by it in haste. It nonetheless remains the case that this concurrence, occurring relatively soon after the Treaty was concluded, is a significant indication that at the time both Parties understood “con objetos de comercio” to mean “for the purposes of commerce”.

This is the meaning accepted by the Court.

(iii) *The meaning of the word “commerce”*

57. The preceding finding does not entirely resolve the issue of interpretation argued by the Parties. Now that it has been determined that “con objetos de comercio” means “for the purposes of commerce”, the meaning to be ascribed to the word “commerce” in the context of Article VI remains to be determined, so that the exact extent of the right of free navigation can be defined. On this point as well, the Parties disagree.

58. In Nicaragua’s view, for purposes of the Treaty, “commerce” covers solely the purchase and sale of merchandise, of physical goods, and excludes all services, such as passenger transport. This interpretation is clearly consistent with Nicaragua’s contention, just rejected, that “con objetos” means “with merchandise”. But, Nicaragua argues, even if the phrase is translated as “for the purposes of commerce”, the result is the same, because in 1858 the word “commerce” necessarily meant trade in goods and did not extend to services, the inclusion of services being a very recent development. Nicaragua admits that passengers were already being transported on the San Juan in 1858, and even that this was an especially profitable activity, but it adds that this activity did not fall within the scope of what was commonly called “commerce” at that time. As for the transport of tourists, there was no such activity at the time in the area in question.

Nicaragua contends that it is important to give the words used in the Treaty the meaning they had at the time the Treaty was concluded, not their current meaning, which can be quite different, because this is the only way to remain true to the intent of the drafters of the Treaty; and determining that intent is the main task in the work of interpretation.

59. Costa Rica argues that “commerce” as used in the Treaty takes in any activity in pursuit of commercial purposes and includes, *inter alia*, the transport of passengers, tourists among them, as well as of goods. The Applicant adds that “commerce” is a broad concept which extends even beyond for-profit activities; in this regard it cites the nineteenth-century editions of the *Dictionary of the Royal Spanish Academy*, which gives the word “comercio” the second meaning of “comunicación y trato de unas gentes ó pueblos con otros”, or communication and dealings of some persons or peoples with others. It follows, argues Costa Rica, that “commerce” includes movement and contact between inhabitants of the villages on the Costa Rican bank of the San Juan River, and the use of the river for purposes of navigation by Costa Rican public officials providing the local population with essential services, in areas such as health, education and security.

60. The Court can subscribe to neither the particularly broad interpretation advocated by Costa Rica nor the excessively narrow one put forward by Nicaragua.

61. In respect of the first, the Court observes that, were it to be accepted, the result would be to bring within the ambit of “navigation for the purposes of commerce” all, or virtually all, forms of navigation on the river. If that had been the intent of the parties to the Treaty, it would be difficult to see why they went to the trouble of specifying that the right of free navigation was guaranteed “for the purposes of commerce”, given that this language would have had virtually no effect. While Costa Rica did maintain in the hearings that the phrase “for the purposes of commerce” in the context of Article VI did not result in restricting the scope of the “right of free navigation” granted earlier in the same sentence, but rather was intended to enlarge that right, the Court cannot adopt this view: expressly stating the purpose for which a right may be exercised implies in principle the exclusion of all other purposes and, consequently, imposes the limitation thus defined on the field of application of the right in question — subject to the possibility that the right may be exercisable beyond that scope on separate legal bases.

Thus, the language found in Article VI means that the right of free navigation granted to Costa Rica in that provision applies exclusively within the ambit of navigation “for the purposes of commerce” and ceases to apply beyond that ambit; the bounds of which it is now for the Court to determine. This determination is without effect on the existence of any right of navigation which Costa Rica may enjoy pursuant to provisions other than Article VI.

62. In respect of the narrow interpretation advanced by Nicaragua,

the Court observes that it is supported mainly by two arguments: the first is based on the Respondent's interpretation of the phrase "con objetos", which has just been rejected; the second is based on the assertion that "commerce" should be given the narrow meaning it had when the Treaty was entered into.

63. The Court does not agree with this second argument.

It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion. That may lead a court seized of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties' common intention. The Court has so proceeded in certain cases requiring it to interpret a term whose meaning had evolved since the conclusion of the treaty at issue, and in those cases the Court adhered to the original meaning (to this effect, see, for example, the Judgment of 27 August 1952 in the case concerning *Rights of Nationals of the United States of America in Morocco (France v. United States of America)* (I.C.J. Reports 1952, p. 176), on the question of the meaning of "dispute" in the context of a treaty concluded in 1836, the Court having determined the meaning of this term in Morocco when the treaty was concluded; the Judgment of 13 December 1999 in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)* (I.C.J. Reports 1999 (II), p. 1062, para. 25) in respect of the meaning of "centre of the main channel" and "thalweg" when the Anglo-German Agreement of 1890 was concluded).

64. This does not however signify that, where a term's meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it.

On the one hand, the subsequent practice of the parties, within the meaning of Article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.

65. A good illustration of this reasoning is found in the Judgment handed down by the Court on 18 December 1978 in the case concerning *Aegean Sea Continental Shelf (Greece v. Turkey)* (I.C.J. Reports 1978, p. 3).

Called upon to interpret a State's reservation to a treaty excluding

from the Court's jurisdiction "disputes relating to territorial status" of that State, where the meaning of "territorial status" was contested, the Court stated:

"Once it is established that the expression 'the territorial status of Greece' was used in Greece's instrument of accession [to the General Act of 1928] as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like 'domestic jurisdiction' and 'territorial status' were intended to have a fixed content regardless of the subsequent evolution of international law." (*Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p. 32, para. 77.)

66. Though adopted in connection with the interpretation of a reservation to a treaty, the Court's reasoning in that case is fully transposable for purposes of interpreting the terms themselves of a treaty.

It is founded on the idea that, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.

67. This is so in the present case in respect of the term "comercio" as used in Article VI of the 1858 Treaty. First, this is a generic term, referring to a class of activity. Second, the 1858 Treaty was entered into for an unlimited duration; from the outset it was intended to create a legal régime characterized by its perpetuity.

68. This last observation is buttressed by the object itself of the Treaty, which was to achieve a permanent settlement between the parties of their territorial disputes. The territorial rules laid down in treaties of this type are, by nature, particularly marked in their permanence, for, as the Court has recently recalled:

"[I]t is a principle of international law that a territorial régime established by treaty 'achieves a permanence which the treaty itself does not necessarily enjoy' and the continued existence of that régime is not dependent upon the continuing life of the treaty under which the régime is agreed" (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, I.C.J. Reports 2007 (II), p. 861, para. 89).

69. This is true as well of the right of free navigation guaranteed to Costa Rica by Article VI. This right, described as “perpetual”, is so closely linked with the territorial settlement defined by the Treaty — to such an extent that it can be considered an integral part of it — that it is characterized by the same permanence as the territorial régime *stricto sensu* itself.

70. The Court concludes from the foregoing that the terms by which the extent of Costa Rica’s right of free navigation has been defined, including in particular the term “comercio”, must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning.

Thus, even assuming that the notion of “commerce” does not have the same meaning today as it did in the mid-nineteenth century, it is the present meaning which must be accepted for purposes of applying the Treaty.

71. Accordingly, the Court finds that the right of free navigation in question applies to the transport of persons as well as the transport of goods, as the activity of transporting persons can be commercial in nature nowadays. This is the case if the carrier engages in the activity for profit-making purposes. A decisive consideration in this respect is whether a price (other than a token price) is paid to the carrier — the boat operator — by the passengers or on their behalf. If so, then the carrier’s activity is commercial in nature and the navigation in question must be regarded as “for the purposes of commerce” within the meaning of Article VI. The Court sees no persuasive reason to exclude the transport of tourists from this category, subject to fulfilment of the same condition.

On the other hand, any navigation not carried out either to transport goods intended to form the subject of commercial transactions or to transport passengers in exchange for money paid by them or on their behalf cannot be regarded as falling within the “purposes of commerce” under Article VI. That is the case, in particular, of navigation by vessels used in the performance of governmental activities or to provide public services which are not commercial in nature.

(b) *The activities covered by the right of free navigation belonging to Costa Rica*

72. Based on the foregoing, the Court is now in a position to determine with greater precision the types of activities which are covered by Costa Rica’s right of free navigation, and those which are not.

For the sake of convenience, the Court, in addressing this issue, will distinguish between private navigation — that is to say navigation by vessels belonging to private owners — and that of “official (or public) vessels” — that is to say vessels which are the property of the Republic of

Costa Rica including all its public authorities —, although this distinction, as will be explained below, is of only limited relevance.

(i) *Private navigation*

73. As has just been said, two types of private navigation are certainly covered by the right of free navigation pursuant to Article VI of the 1858 Treaty: the navigation of vessels carrying goods intended for commercial transactions; and that of vessels carrying passengers who pay a price other than a token price (or for whom a price is paid) in exchange for the service thus provided.

In the first instance, the commercial activity is conducted by persons who are the owners of the goods intended for sale. These persons may themselves be carried on the vessel: they can also entrust their goods for carriage to the vessel’s operator for an agreed price or free of charge. This last aspect is of no relevance: in any event, navigation which is carried out in order to transport goods intended for sale, or goods that have just been purchased, in the context of a commercial exchange must be regarded as taking place “for the purposes of commerce”, whether or not the owner of the goods is onboard the vessel, and whether or not the vessel’s operator has been paid to provide carriage. It is understood that navigation “for the purposes of commerce” also includes the return journey of persons who have transported goods intended for sale.

In the second instance, however, the fact that the vessel’s owner receives payment for his activity is critical. Indeed, if the carriage of passengers is considered, it is not the passengers themselves who are exercising a commercial activity (unless they are travelling in order to transport goods, in which case the journey falls under the previous instance), it is the carrier, provided that he does so to make a profit.

74. The question was raised as to whether the navigation of vessels belonging to the inhabitants of the villages on the Costa Rican bank of the river in order to meet the basic requirements of everyday life, such as taking children to school or in order to give or receive medical treatment, was protected by the right of free navigation when it is carried out free of charge. The Parties discussed the issue: according to Nicaragua the answer is no, since the Respondent considers that only the carriage of goods benefits from the guarantee provided by Article VI of the Treaty; according to Costa Rica the answer is yes, based on the particularly broad definition of “commerce” adopted by the Applicant.

75. The Court has already indicated that it could not subscribe to a definition of the word “commerce” as broad as the one put forward by Costa Rica. It has also indicated (in paragraph 71 above) that the carriage of passengers free of charge, or the movement of persons on their

own vessels for purposes other than the conduct of commercial transactions, could not fall within the scope of “navigation for the purposes of commerce” within the meaning of Article VI of the 1858 Treaty.

76. It does not necessarily follow that such activities are not at all covered by freedom of navigation: other provisions of the 1858 Treaty may have the effect of guaranteeing the right of the inhabitants of the Costa Rican bank to navigate on the river, within certain limits, even when they are not doing so within the context of commercial activities.

77. In this regard, the Court is of the opinion that there is reason to take into account the provisions of the Treaty as a whole, especially those fixing the boundary between the two States, in order to draw, if need be, certain necessary implications. In other words, even if no provision expressly guaranteeing a right of non-commercial navigation to the inhabitants of the Costa Rican bank can be found in the Treaty, the question must be asked whether such a right does not flow from other provisions with a different purpose, but of which it may, to a certain extent, be the necessary consequence.

78. As has been said, the two States decided, by the Treaty of Limits, to fix their common boundary on the south bank of the San Juan River along the whole stretch of the river running from its mouth to a point located three English miles downstream from Castillo Viejo. This was decided in Article II of the 1858 Treaty. At the time, there was already a population inhabiting the Costa Rican side of the boundary thus defined, that is to say living on the bank of the river or not far from it. In view of the great difficulty of travelling inland, due to the limited inland communications network, that population commonly used and still uses the river for travel for the purpose of meeting the essential needs of everyday life which require expeditious transportation, such as transport to and from school or for medical care.

79. The Court is of the opinion that it cannot have been the intention of the authors of the 1858 Treaty to deprive the inhabitants of the Costa Rican bank of the river, where that bank constitutes the boundary between the two States, of the right to use the river to the extent necessary to meet their essential requirements, even for activities of a non-commercial nature, given the geography of the area. While choosing, in Article II of the Treaty, to fix the boundary on the river bank, the parties must be presumed, in view of the historical background to the conclusion of this Treaty and of the Treaty’s object and purpose as defined by the Preamble and Article I, to have intended to preserve for the Costa Ricans living on that bank a minimal right of navigation for the purposes of continuing to live a normal life in the villages along the river. The Court considers that while such a right cannot be derived from the express language of Article VI, it can be inferred from the provisions of the Treaty as a whole and, in particular, the manner in which the boundary is fixed.

(ii) “*Official vessels*”

80. It is clear that the 1858 Treaty does not establish, in its Article VI, any special régime for “official” (or “public”) vessels.

The only criterion provided for by Article VI is based not on the public or private ownership of the vessel but on the purpose of navigation: either it is undertaken for the “purposes of commerce” and benefits from the freedom established; or it is undertaken for purposes other than “commerce” and it does not. From this point of view the distinction between public and private vessels is devoid of legal significance. In the same way that a part of private navigation is not covered by the “*perpetual right of free navigation*” (in the case of pleasure craft for example), conversely, it is not inconceivable that “*public vessels*” might sail for the “*purposes of commerce*”, if they met the conditions on which such a characterization depends.

81. In reality, when debating the question of “*official vessels*” the Parties particularly had in mind those used by the Costa Rican authorities for the exercise of public order activities — such as the police and customs — or for the provision of public services having no object of financial gain and therefore no commercial character.

82. As has already been noted (paragraph 49 above), the Cleveland Award only came to a decision regarding Costa Rican vessels of war and revenue service vessels, by denying the former the right to navigate on the San Juan and authorizing the navigation of the latter “as may be related and connected to her enjoyment of the ‘purposes of commerce’ accorded to her in said article [Article VII] or as may be necessary to the protection of said enjoyment”. Nothing can thus be inferred from this regarding the navigation of other Costa Rican official vessels.

83. In the light of the foregoing, the Court is of the opinion that, as a general rule, the navigation of Costa Rican vessels for the purposes of public order activities and public services with no object of financial gain, in particular police vessels, lies outside the scope of Article VI of the 1858 Treaty, with the exception of revenue service vessels, the question of which was settled by the 1888 arbitration. Further, it is not convinced that a right for Costa Rica to sail such vessels can be inferred from Article IV of the Treaty, according to which “Costa Rica shall also be obliged, for the part that belongs to her of the banks of the San Juan River . . . to contribute to the security thereof in the same manner as the two Republics shall contribute to its defence in case of aggression from abroad”. This provision, contrary to what Costa Rica contends, does not accord it any right of navigation in ordinary circumstances. It places an obligation upon it to “safeguard” the river from within its own territory.

Moreover, the Court considers that, in any event, Costa Rica has not proved its assertion that river transport is the only means to supply its police posts located along the river bank or to carry out the relief of the personnel stationed in them. Indeed, the materials in the case file show

that the posts in question are accessible, for example, by using the Costa Rican rivers communicating with the San Juan, in proximity of which they are located.

Lastly, for the reasons set out above (paragraph 40), Costa Rica cannot invoke the “Cuadra-Lizano” Joint Communiqué of 30 July 1998 in order to claim a right to navigate with official vessels which are armed or transporting arms.

84. Nonetheless, the Court is of the opinion that the reasons given above (in paragraphs 78 and 79) with regard to private vessels which navigate the river in order to meet the essential requirements of the population living on the river bank, where expeditious transportation is a condition for meeting those requirements, are also valid for certain Costa Rican official vessels which in specific situations are used solely for the purpose of providing that population with what it needs in order to meet the necessities of daily life, as defined in paragraph 78 above.

Consequently, this particular aspect of navigation by “official vessels” is covered by the right of navigation defined in paragraph 79 above: this right is not guaranteed by Article VI of the Treaty but is inferred from the provisions of the Treaty as a whole, in particular from the fixing of the boundary along the river bank.

III. NICARAGUA’S POWER OF REGULATION OF NAVIGATION

85. In this part of the Judgment the Court addresses the power of Nicaragua to regulate the navigation of that part of the San Juan River in which Costa Rica has the right of navigation as determined in Part II of the Judgment. In respect of matters lying outside the scope of Costa Rica’s right of free navigation, and in respect of other parts of the river, which are not subject to the régime of the 1858 Treaty, Nicaragua, as sovereign, has complete power of regulation.

1. General Observations

86. In their written pleadings, the Parties disagreed about the extent or even the very existence of the power of Nicaragua to regulate the use of the river so far as Costa Rica was concerned. In the course of the oral proceedings that difference of positions largely disappeared. However, the Parties continue to disagree on the extent of the regulatory power of Nicaragua and on certain measures which Nicaragua has adopted and continues to apply.

In the first part of the oral proceedings, Nicaragua states that whatever the precise nature and extent of Costa Rica’s rights within the provisions of the Treaty of Limits and the Cleveland Award, Nicaragua

“must have the exclusive competence to exercise the following regulatory powers: (a) the protection and maintenance of the right of navigation, that is to say, the power to maintain public order and standards of safety in respect of navigation; (b) the protection of the border, including resort to immigration procedures in respect of foreign nationals navigating in Nicaragua’s territorial waters; (c) the exercise of normal police powers; (d) the protection of the environment and natural resources; and (e) the maintenance of the treaty provisions prescribing the conditions of navigation in accordance with the Treaty”.

Costa Rica, while accepting that Nicaragua does have a power of regulation, asserts that Nicaragua’s sovereignty over the San Juan must be seen as a part — an important part — of the fluvial régime established in 1858 and that the regulations enacted by Nicaragua must not infringe Costa Rica’s perpetual right of free navigation. It states that the regulations must be lawful, public, reasonable, non-arbitrary and non-discriminatory and adopted to fulfil a legitimate public purpose. Nicaragua accepts Costa Rica’s statement of principle.

The Parties disagree whether Nicaragua is obliged to notify Costa Rica about the regulations it has made or to consult Costa Rica in advance about proposed regulations. The Court rules on these differences in the course of this part of the Judgment.

(a) Characteristics

87. For essentially the reasons given by the Parties, the Court concludes that Nicaragua has the power to regulate the exercise by Costa Rica of its right to freedom of navigation under the 1858 Treaty. That power is not unlimited, being tempered by the rights and obligations of the Parties. A regulation in the present case is to have the following characteristics:

- (1) it must only subject the activity to certain rules without rendering impossible or substantially impeding the exercise of the right of free navigation;
- (2) it must be consistent with the terms of the Treaty, such as the prohibition on the unilateral imposition of certain taxes in Article VI;
- (3) it must have a legitimate purpose, such as safety of navigation, crime prevention and public safety and border control;
- (4) it must not be discriminatory and in matters such as timetabling must apply to Nicaraguan vessels if it applies to Costa Rican ones;
- (5) it must not be unreasonable, which means that its negative impact on the exercise of the right in question must not be manifestly excessive

International Court of Justice

**Gabčíkovo-Nagymaros Project
(Hungary/Slovakia)
Judgment**

I.C.J. Reports 1997, pp. 17-24, 38-69, paras. 15-20, 46-115

Czechoslovakia and with regard to which the Slovak Republic is the successor State, has never ceased to be in force and so remains, and that the notification of 19 May 1992 of purported termination of the Treaty by the Republic of Hungary was without legal effect:

2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčıkovo Project for which the 1977 Treaty attributes responsibility to the Republic of Hungary;
3. That the Czech and Slovak Federal Republic was entitled, in November 1991, to proceed with the 'provisional solution' and to put this system into operation from October 1992; and that the Slovak Republic was, and remains, entitled to continue the operation of this system;
4. That the Republic of Hungary shall therefore cease forthwith all conduct which impedes the bona fide implementation of the 1977 Treaty and shall take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty, subject to any amendments which may be agreed between the Parties;
5. That the Republic of Hungary shall give appropriate guarantees that it will not impede the performance of the Treaty, and the continued operation of the system;
6. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary shall, in addition to immediately resuming performance of its Treaty obligations, pay to the Slovak Republic full compensation for the loss and damage, including loss of profits, caused by those breaches together with interest thereon;
7. That the Parties shall immediately begin negotiations with a view, in particular, to adopting a new timetable and appropriate measures for the implementation of the Treaty by both Parties, and to fixing the amount of compensation due by the Republic of Hungary to the Slovak Republic; and that, if the Parties are unable to reach an agreement within six months, either one of them may request the Court to render an additional Judgment to determine the modalities for executing its Judgment."

* * *

15. The present case arose out of the signature, on 16 September 1977, by the Hungarian People's Republic and the Czechoslovak People's Republic, of a treaty "concerning the construction and operation of the Gabčıkovo-Nagymaros System of Locks" (hereinafter called the "1977 Treaty"). The names of the two contracting States have varied over the years: hereinafter they will be referred to as Hungary and Czechoslovakia. The 1977 Treaty entered into force on 30 June 1978.

It provides for the construction and operation of a System of Locks by the parties as a "joint investment". According to its Preamble, the barrage system was designed to attain

"the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water

resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties".

The joint investment was thus essentially aimed at the production of hydroelectricity, the improvement of navigation on the relevant sections of the Danube and the protection of the areas along the banks against flooding. At the same time, by the terms of the Treaty, the contracting parties undertook to ensure that the quality of water in the Danube was not impaired as a result of the Project, and that compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks would be observed.

16. The Danube is the second longest river in Europe, flowing along or across the borders of nine countries in its 2,860-kilometre course from the Black Forest eastwards to the Black Sea. For 142 kilometres, it forms the boundary between Slovakia and Hungary. The sector with which this case is concerned is a stretch of approximately 200 kilometres, between Bratislava in Slovakia and Budapest in Hungary. Below Bratislava, the river gradient decreases markedly, creating an alluvial plain of gravel and sand sediment. This plain is delimited to the north-east, in Slovak territory, by the Malý Danube and to the south-west, in Hungarian territory, by the Mosoni Danube. The boundary between the two States is constituted, in the major part of that region, by the main channel of the river. The area lying between the Malý Danube and that channel, in Slovak territory, constitutes the Zitný Ostrov; the area between the main channel and the Mosoni Danube, in Hungarian territory, constitutes the Szigetköz. Čunovo and, further downstream, Gabčıkovo, are situated in this sector of the river on Slovak territory. Čunovo on the right bank and Gabčıkovo on the left. Further downstream, after the confluence of the various branches, the river enters Hungarian territory and the topography becomes hillier. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Szentendre before reaching Budapest (see sketch-map No. 1, p. 19 below).

17. The Danube has always played a vital part in the commercial and economic development of its riparian States, and has underlined and reinforced their interdependence, making international co-operation essential. Improvements to the navigation channel have enabled the Danube, now linked by canal to the Main and thence to the Rhine, to become an important navigational artery connecting the North Sea to the Black Sea. In the stretch of river to which the case relates, flood protection measures have been constructed over the centuries, farming and forestry practised, and, more recently, there has been an increase in population and industrial activity in the area. The cumulative effects on the river and on the environment of various human activities over the years have not all been favourable, particularly for the water régime.

Only by international co-operation could action be taken to alleviate these problems. Water management projects along the Danube have frequently sought to combine navigational improvements and flood protection with the production of electricity through hydroelectric power plants. The potential of the Danube for the production of hydroelectric power has been extensively exploited by some riparian States. The history of attempts to harness the potential of the particular stretch of the river at issue in these proceedings extends over a 25-year period culminating in the signature of the 1977 Treaty.

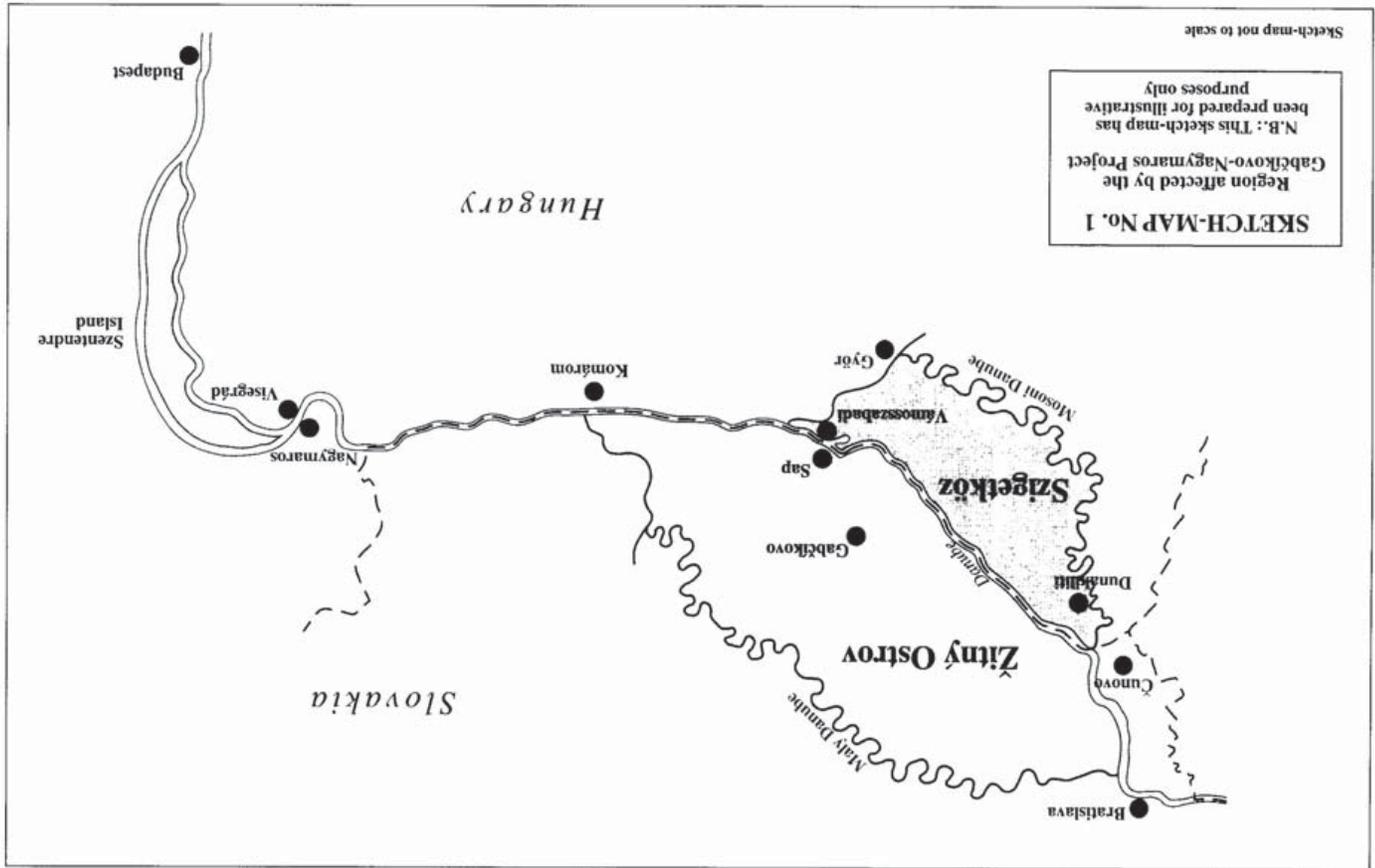
18. Article 1, paragraph 1, of the 1977 Treaty describes the principal works to be constructed in pursuance of the Project. It provided for the building of two series of locks, one at Gabčíkovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute "a single and indivisible operational system of works" (see sketch-map No. 2, p. 21 below). The Court will subsequently have occasion to revert in more detail to those works, which were to comprise, *inter alia*, a reservoir upstream of Dunakiliti, in Hungarian and Czechoslovak territory; a dam at Dunakiliti, in Hungarian territory; a bypass canal, in Czechoslovak territory, on which was to be constructed the Gabčíkovo System of Locks (together with a hydroelectric power plant with an installed capacity of 720 megawatts (MW)); the deepening of the bed of the Danube downstream of the place at which the bypass canal was to rejoin the old bed of the river; a reinforcement of flood-control works along the Danube upstream of Nagymaros; the Nagymaros System of Locks, in Hungarian territory (with a hydroelectric power plant of a capacity of 158 MW); and the deepening of the bed of the Danube downstream.

Article 1, paragraph 4, of the Treaty further provided that the technical specifications concerning the system would be included in the "Joint Contractual Plan" which was to be drawn up in accordance with the Agreement signed by the two Governments for this purpose on 6 May 1976; Article 4, paragraph 1, for its part, specified that "the joint investment [would] be carried out in conformity with the joint contractual plan".

According to Article 3, paragraph 1:

"Operations connected with the realization of the joint investment and with the performance of tasks relating to the operation of the System of Locks shall be directed and supervised by the Governments of the Contracting Parties through . . . ('government delegates')."

Those delegates had, *inter alia*, "to ensure that construction of the System of Locks is . . . carried out in accordance with the approved joint contractual plan and the project work schedule". When the works were brought into operation, they were moreover "To establish the operating



and operational procedures of the System of Locks and ensure compliance therewith."

Article 4, paragraph 4, stipulated that:

"Operations relating to the joint investment [should] be organized by the Contracting Parties in such a way that the power generation plants [would] be put into service during the period 1986-1990."

Article 5 provided that the cost of the joint investment would be borne by the contracting parties in equal measure. It specified the work to be carried out by each one of them. Article 8 further stipulated that the Dunakiliti dam, the bypass canal and the two series of locks at Gabčíkovo and Nagymaros would be "jointly owned" by the contracting parties "in equal measure". Ownership of the other works was to be vested in the State on whose territory they were constructed.

The parties were likewise to participate in equal measure in the use of the system put in place, and more particularly in the use of the base-load and peak-load power generated at the hydroelectric power plants (Art. 9).

According to Article 10, the works were to be managed by the State on whose territory they were located, "in accordance with the jointly-agreed operating and operational procedures", while Article 12 stipulated that the operation, maintenance (repair) and reconstruction costs of jointly owned works of the System of Locks were also to be borne jointly by the contracting parties in equal measure.

According to Article 14,

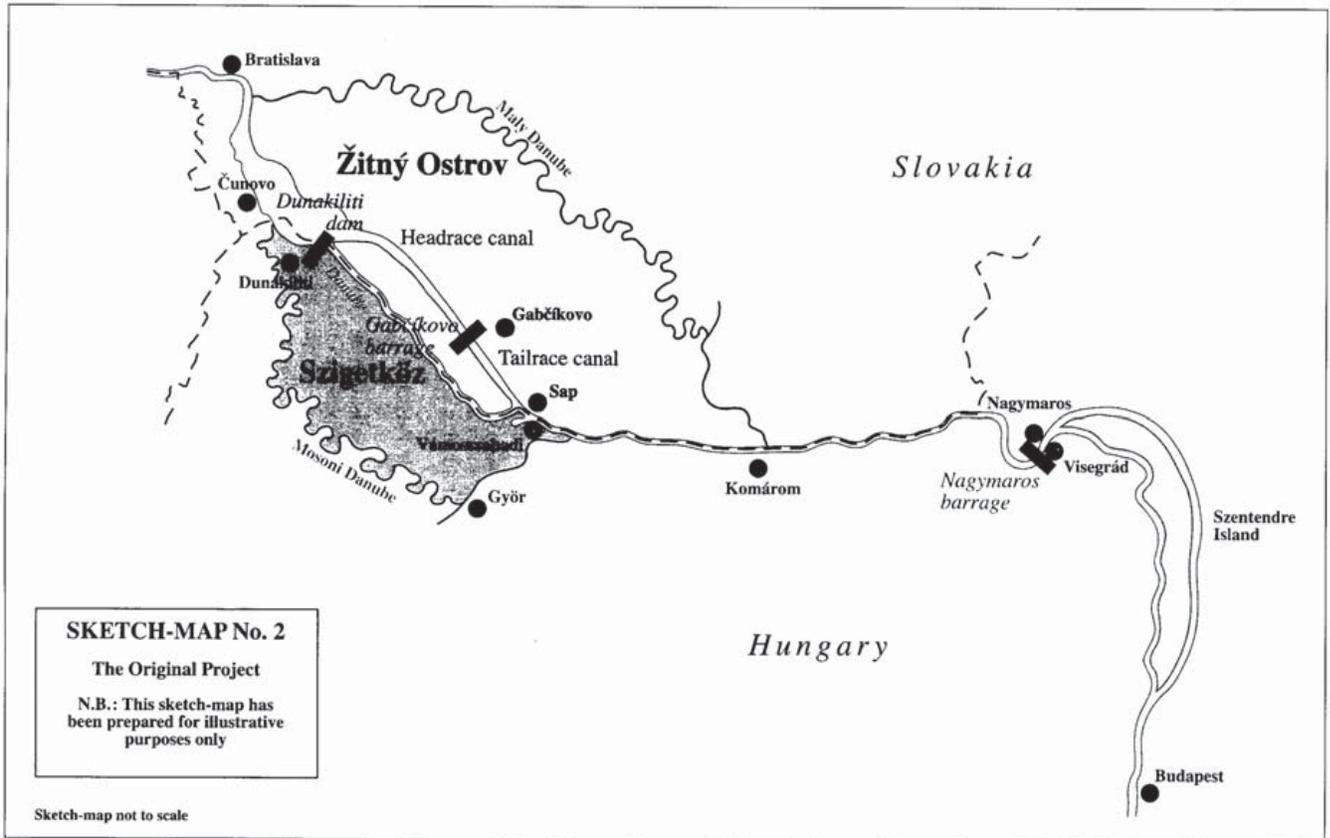
"The discharge specified in the water balance of the approved joint contractual plan shall be ensured in the bed of the Danube [between Dunakiliti and Sap] unless natural conditions or other circumstances temporarily require a greater or smaller discharge."

Paragraph 3 of that Article was worded as follows:

"In the event that the withdrawal of water in the Hungarian-Czechoslovak section of the Danube exceeds the quantities of water specified in the water balance of the approved joint contractual plan and the excess withdrawal results in a decrease in the output of electric power, the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced."

Article 15 specified that the contracting parties

"shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks".



Article 16 set forth the obligations of the contracting parties concerning the maintenance of the bed of the Danube.
Article 18, paragraph 1, provided as follows:

"The Contracting Parties, in conformity with the obligations previously assumed by them, and in particular with article 3 of the Convention concerning the regime of navigation on the Danube, signed at Belgrade on 18 August 1948, shall ensure uninterrupted and safe navigation on the international fairway both during the construction and during the operation of the System of Locks."

It was stipulated in Article 19 that:

"The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks."

Article 20 provided for the contracting parties to take appropriate measures, within the framework of their national investments, for the protection of fishing interests in conformity with the Convention concerning Fishing in the Waters of the Danube, signed at Bucharest on 29 January 1958.

According to Article 22, paragraph 1, of the Treaty, the contracting parties had, in connection with the construction and operation of the System of Locks, agreed on minor revision to the course of the State frontier between them as follows:

"(d) In the Dunakiliti-Hrušov head-water area, the State frontier shall run from boundary point 161.V.O.á. to boundary stone No. I.5. in a straight line in such a way that the territories affected, to the extent of about 10-10 hectares shall be offset between the two States."

It was further provided, in paragraph 2, that the revision of the State frontier and the exchange of territories so provided for should be effected "by the Contracting Parties on the basis of a separate treaty". No such treaty was concluded.

Finally a dispute settlement provision was contained in Article 27, worded as follows:

"1. The settlement of disputes in matters relating to the realization and operation of the System of Locks shall be a function of the government delegates.

2. If the government delegates are unable to reach agreement on the matters in dispute, they shall refer them to the Governments of the Contracting Parties for decision."

19. The Joint Contractual Plan, referred to in the previous paragraph, set forth, on a large number of points, both the objectives of the system

and the characteristics of the works. In its latest version it specified in paragraph 6.2 that the Gabčíkovo bypass canal would have a discharge capacity of 4,000 cubic metres per second (m^3/s). The power plant would include "Eight . . . turbines with 9.20 m diameter running wheels" and would "mainly operate in peak-load time and continuously during high water". This type of operation would give an energy production of 2,650 gigawatt/hours (GWh) per annum. The Plan further stipulated in paragraph 4.4.2:

"The low waters are stored every day, which ensures the peak-load time operation of the Gabčíkovo hydropower plant . . . a minimum of 50 m^3/s additional water is provided for the old bed [of the Danube] besides the water supply of the branch system."

The Plan further specified that, in the event that the discharge into the bypass canal exceeded 4,000-4,500 m^3/s , the excess amounts of water would be channelled into the old bed. Lastly, according to paragraph 7.7 of the Plan:

"The common operational regulation stipulates that concerning the operation of the Dunakiliti barrage in the event of need during the growing season 200 m^3/s discharge must be released into the old Danube bed, in addition to the occasional possibilities for rinsing the bed."

The Joint Contractual Plan also contained "Preliminary Operating and Maintenance Rules", Article 23 of which specified that "The final operating rules [should] be approved within a year of the setting into operation of the system." (Joint Contractual Plan, Summary Documentation, Vol. O-1-A.)

Nagymaros, with six turbines, was, according to paragraph 6.3 of the Plan, to be a "hydropower station . . . type of a basic power-station capable of operating in peak-load time for five hours at the discharge interval between 1,000-2,500 m^3/s " per day. The intended annual production was to be 1,025 GWh (i.e., 38 per cent of the production of Gabčíkovo, for an installed power only equal to 21 per cent of that of Gabčíkovo).

20. Thus, the Project was to have taken the form of an integrated joint project with the two contracting parties on an equal footing in respect of the financing, construction and operation of the works. Its single and indivisible nature was to have been realized through the Joint Contractual Plan which complemented the Treaty. In particular, Hungary would have had control of the sluices at Dunakiliti and the works at Nagymaros, whereas Czechoslovakia would have had control of the works at Gabčíkovo.

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21. The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977, at

tion of the provisions of Article 27 of the 1977 Treaty (see paragraph 18 above), which it submits required prior recourse to the machinery for dispute settlement provided for in that Article.

* * *

46. The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62 (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports, 1971*, p. 47, and *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 18; see also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, pp. 95-96).

Neither has the Court lost sight of the fact that the Vienna Convention is in any event applicable to the Protocol of 6 February 1989 whereby Hungary and Czechoslovakia agreed to accelerate completion of the works relating to the Gabčíkovo-Nagymaros Project.

47. Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.

Thus the Vienna Convention of 1969 on the Law of Treaties confines itself to defining — in a limitative manner — the conditions in which a treaty may lawfully be denounced or suspended; while the effects of a denunciation or suspension seen as not meeting those conditions are, on the contrary, expressly excluded from the scope of the Convention by operation of Article 73. It is moreover well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect (cf. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 228; and see Article 17 of the Draft Articles on State Responsi-

bility provisionally adopted by the International Law Commission on first reading, *Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 32).

48. The Court cannot accept Hungary's argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary's conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as "single and indivisible".

The Court moreover observes that, when it invoked the state of necessity in an effort to justify that conduct, Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful. The state of necessity claimed by Hungary — supposing it to have been established — thus could not permit of the conclusion that, in 1989, it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did. Lastly, the Court points out that Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.

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49. The Court will now consider the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments.

50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading. That provision is worded as follows:

"Article 33. *State of Necessity*

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

- (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.
2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:
- (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
- (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
- (c) if the State in question has contributed to the occurrence of the state of necessity." (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 34.)

In its Commentary, the Commission defined the "state of necessity" as being

"the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State" (*ibid.*, para. 1).

It concluded that "the notion of state of necessity is . . . deeply rooted in general legal thinking" (*ibid.*, p. 49, para. 31).

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft

"in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception — and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness . . ." (*ibid.*, p. 51, para. 40).

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

52. In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must

have been the "only means" of safeguarding that interest; that act must not have "seriously impaired" an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law.

The Court will now endeavour to ascertain whether those conditions had been met at the time of the suspension and abandonment, by Hungary, of the works that it was to carry out in accordance with the 1977 Treaty.

53. The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagyymaros Project related to an "essential interest" of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.

The Commission, in its Commentary, indicated that one should not, in that context, reduce an "essential interest" to a matter only of the "existence" of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see *Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, "a grave danger to . . . the ecological preservation of all or some of [the] territory [of a State]" (*ibid.*, p. 35, para. 3); and specified, with reference to State practice, that "It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an 'essential interest' of all States." (*Ibid.*, p. 39, para. 14.)

The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:

"the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 241-242, para. 29.)

54. The verification of the existence, in 1989, of the "peril" invoked by Hungary, of its "grave and imminent" nature, as well as of the absence of any "means" to respond to it, other than the measures taken by Hungary to suspend and abandon the works, are all complex processes.

As the Court has already indicated (see paragraphs 33 *et seq.*), Hungary on several occasions expressed, in 1989, its “uncertainties” as to the ecological impact of putting in place the Gabčíkovo-Nagymaros barrage system, which is why it asked insistently for new scientific studies to be carried out.

The Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a “peril” in the sense of a component element of a state of necessity. The word “peril” certainly evokes the idea of “risk”; that is precisely what distinguishes “peril” from material damage. But a state of necessity could not exist without a “peril” duly established at the relevant point in time; the mere apprehension of a possible “peril” could not suffice in that respect. It could moreover hardly be otherwise, when the “peril” constituting the state of necessity has at the same time to be “grave” and “imminent”. “Imminence” is synonymous with “immediacy” or “proximity” and goes far beyond the concept of “possibility”. As the International Law Commission emphasized in its commentary, the “extremely grave and imminent” peril must “have been a threat to the interest at the actual time” (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a “peril” appearing in the long term might be held to be “imminent” as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.

The Hungarian argument on the state of necessity could not convince the Court unless it was at least proven that a real, “grave” and “imminent” “peril” existed in 1989 and that the measures taken by Hungary were the only possible response to it.

Both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments. The Court has given most careful attention to this material, in which the Parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that, as will be shown below, it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.

55. The Court will begin by considering the situation at Nagymaros. As has already been mentioned (see paragraph 40), Hungary maintained that, if the works at Nagymaros had been carried out as planned, the environment — and in particular the drinking water resources — in the area would have been exposed to serious dangers on account of problems linked to the upstream reservoir on the one hand and, on the other, the risks of erosion of the riverbed downstream.

The Court notes that the dangers ascribed to the upstream reservoir were mostly of a long-term nature and, above all, that they remained uncertain. Even though the Joint Contractual Plan envisaged that the Gab-

číkovo power plant would “mainly operate in peak-load time and continuously during high water”, the final rules of operation had not yet been determined (see paragraph 19 above); however, any dangers associated with the putting into service of the Nagymaros portion of the Project would have been closely linked to the extent to which it was operated in peak mode and to the modalities of such operation. It follows that, even if it could have been established — which, in the Court’s appreciation of the evidence before it, was not the case — that the reservoir would ultimately have constituted a “grave peril” for the environment in the area, one would be bound to conclude that the peril was not “imminent” at the time at which Hungary suspended and then abandoned the works relating to the dam.

With regard to the lowering of the riverbed downstream of the Nagymaros dam, the danger could have appeared at once more serious and more pressing, in so far as it was the supply of drinking water to the city of Budapest which would have been affected. The Court would however point out that the bed of the Danube in the vicinity of Szentendre had already been deepened prior to 1980 in order to extract building materials, and that the river had from that time attained, in that sector, the depth required by the 1977 Treaty. The peril invoked by Hungary had thus already materialized to a large extent for a number of years, so that it could not, in 1989, represent a peril arising entirely out of the project. The Court would stress, however, that, even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. It could for example have proceeded regularly to discharge gravel into the river downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The two Parties expressly recognized that that possibility remained open even though — and this is not determinative of the state of necessity — the purification of the river water, like the other measures envisaged, clearly would have been a more costly technique.

56. The Court now comes to the Gabčíkovo sector. It will recall that Hungary’s concerns in this sector related on the one hand to the quality of the surface water in the Dunakiliti reservoir, with its effects on the quality of the groundwater in the region, and on the other hand, more generally, to the level, movement and quality of both the surface water and the groundwater in the whole of the Szigetköz, with their effects on the fauna and flora in the alluvial plain of the Danube (see paragraph 40 above).

Whether in relation to the Dunakiliti site or to the whole of the Szigetköz, the Court finds here again, that the peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. As Hungary itself acknowledges, the damage that it appre-

hended had primarily to be the result of some relatively slow natural processes, the effects of which could not easily be assessed.

Even if the works were more advanced in this sector than at Nagymaros, they had not been completed in July 1989 and, as the Court explained in paragraph 34 above, Hungary expressly undertook to carry on with them, early in June 1989. The report dated 23 June 1989 by the *ad hoc* Committee of the Hungarian Academy of Sciences, which was also referred to in paragraph 35 of the present Judgment, does not express any awareness of an authenticated peril — even in the form of a definite peril, whose realization would have been inevitable in the long term — when it states that:

"The measuring results of an at least five-year monitoring period following the completion of the Gabčíkovo construction are indispensable to the trustworthy prognosis of the ecological impacts of the barrage system. There is undoubtedly a need for the establishment and regular operation of a comprehensive monitoring system, which must be more developed than at present. The examination of biological indicator objects that can sensitively indicate the changes happening in the environment, neglected till today, have to be included."

The report concludes as follows:

"It can be stated, that the environmental, ecological and water quality impacts were not taken into account properly during the design and construction period until today. Because of the complexity of the ecological processes and lack of the measured data and the relevant calculations the environmental impacts cannot be evaluated."

The data of the monitoring system newly operating on a very limited area are not enough to forecast the impacts probably occurring over a longer term. In order to widen and to make the data more frequent a further multi-year examination is necessary to decrease the further degradation of the water quality playing a dominant role in this question. The expected water quality influences equally the aquatic ecosystems, the soils and the recreational and tourist land-use."

The Court also notes that, in these proceedings, Hungary acknowledged that, as a general rule, the quality of the Danube waters had improved over the past 20 years, even if those waters remained subject to hypertrophic conditions.

However "grave" it might have been, it would accordingly have been difficult, in the light of what is said above, to see the alleged peril as sufficiently certain and therefore "imminent" in 1989.

The Court moreover considers that Hungary could, in this context

also, have resorted to other means in order to respond to the dangers that it apprehended. In particular, within the framework of the original Project, Hungary seemed to be in a position to control at least partially the distribution of the water between the bypass canal, the old bed of the Danube and the side-arms. It should not be overlooked that the Dunakiliti dam was located in Hungarian territory and that Hungary could construct the works needed to regulate flows along the old bed of the Danube and the side-arms. Moreover, it should be borne in mind that Article 14 of the 1977 Treaty provided for the possibility that each of the parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan, while making it clear that, in such an event, "the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced".

57. The Court concludes from the foregoing that, with respect to both Nagymaros and Gabčíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation "characterized so aptly by the maxim *summum jus summa injuria*" (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 31).

Moreover, the Court notes that Hungary decided to conclude the 1977 Treaty, a Treaty which — whatever the political circumstances prevailing at the time of its conclusion — was treated by Hungary as valid and in force until the date declared for its termination in May 1992. As can be seen from the material before the Court, a great many studies of a scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under the Treaty. Hungary contended before the Court that those studies had been inadequate and that the state of knowledge at that time was not such as to make possible a complete evaluation of the ecological implications of the Gabčíkovo-Nagymaros Project. It is nonetheless the case that although the principal object of the 1977 Treaty was the construction of a System of Locks for the production of electricity, improvement of navigation on the Danube and protection against flooding, the need to ensure the protection of the environment had not escaped the parties, as can be seen from Articles 15, 19 and 20 of the Treaty.

What is more, the Court cannot fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. In 1983, Hungary asked that the works under the Treaty should go forward more slowly,

for reasons that were essentially economic but also, subsidiarily, related to ecological concerns. In 1989, when, according to Hungary itself, the state of scientific knowledge had undergone a significant development, it asked for the works to be speeded up, and then decided, three months later, to suspend them and subsequently to abandon them. The Court is not however unaware that profound changes were taking place in Hungary in 1989, and that, during that transitory phase, it might have been more than usually difficult to co-ordinate the different points of view prevailing from time to time.

The Court infers from all these elements that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

58. It follows that the Court has no need to consider whether Hungary, by proceeding as it did in 1989, "seriously impaired] an essential interest" of Czechoslovakia, within the meaning of the aforementioned Article 33 of the Draft of the International Law Commission — a finding which does not in any way prejudice the damage Czechoslovakia claims to have suffered on account of the position taken by Hungary.

Nor does the Court need to examine the argument put forward by Hungary, according to which certain breaches of Articles 15 and 19 of the 1977 Treaty, committed by Czechoslovakia even before 1989, contributed to the purported state of necessity; and neither does it have to reach a decision on the argument advanced by Slovakia, according to which Hungary breached the provisions of Article 27 of the Treaty, in 1989, by taking unilateral measures without having previously had recourse to the machinery of dispute settlement for which that Article provides.

* *

59. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (a), of the Special Agreement (see paragraph 27 above), finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

* * *

60. By the terms of Article 2, paragraph 1 (b), of the Special Agreement, the Court is asked in the second place to decide

"(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution'

and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course)".

61. The Court will recall that, as soon as Hungary suspended the works at Nagymaros on 13 May 1989 and extended that suspension to certain works to be carried out at Dunakiliti, Czechoslovakia informed Hungary that it would feel compelled to take unilateral measures if Hungary were to persist in its refusal to resume the works. This was *inter alia* expressed as follows in Czechoslovakia's Note Verbale of 30 October 1989 to which reference is made in paragraph 37 above:

"Should the Republic of Hungary fail to meet its liabilities and continue unilaterally to breach the Treaty and related legal documents then the Czechoslovak party will be forced to commence a provisional, substitute project on the territory of the Czechoslovak Socialist Republic in order to prevent further losses. Such a provisional project would entail directing as much water into the Gabčíkovo dam as agreed in the Joint Construction Plan."

As the Court has already indicated (see paragraph 23), various alternative solutions were contemplated by Czechoslovakia. In September 1990, the Hungarian authorities were advised of seven hypothetical alternatives defined by the firm of Hydroconsult of Bratislava. All of those solutions implied an agreement between the parties, with the exception of one variant, subsequently known as "Variant C", which was presented as a provisional solution which could be brought about without Hungarian co-operation. Other contacts between the parties took place, without leading to a settlement of the dispute. In March 1991, Hungary acquired information according to which perceptible progress had been made in finalizing the planning of Variant C; it immediately gave expression to the concern this caused.

62. Inter-governmental negotiation meetings were held on 22 April and 15 July 1991.

On 22 April 1991, Hungary proposed the suspension, until September 1993, of all the works begun on the basis of the 1977 Treaty, on the understanding that the parties undertook to abstain from any unilateral action, and that joint studies would be carried out in the interval. Czechoslovakia maintained its previous position according to which the studies contemplated should take place within the framework of the 1977 Treaty and without any suspension of the works.

On 15 July 1991, Czechoslovakia confirmed its intention of putting the

Gabčíkovo power plant into service and indicated that the available data enabled the effects of four possible scenarios to be assessed, each of them requiring the co-operation of the two Governments. At the same time, it proposed the setting up of a tripartite committee of experts (Hungary, Czechoslovakia, European Communities) which would help in the search for technical solutions to the problems arising from the entry into operation of the Gabčíkovo sector. Hungary, for its part, took the view that:

“In the case of a total lack of understanding the so-called C variation or ‘theoretical opportunity’ suggested by the Czecho-Slovak party as a unilateral solution would be such a grave transgression of Hungarian territorial integrity and International Law for which there is no precedent even in the practices of the formerly socialist countries for the past 30 years”;

it further proposed the setting up of a bilateral committee for the assessment of environmental consequences, subject to work on Czechoslovak territory being suspended.

63. By a letter dated 24 July 1991, the Government of Hungary communicated the following message to the Prime Minister of Slovakia:

“Hungarian public opinion and the Hungarian Government anxiously and attentively follows the [Czechoslovakian] press reports of the unilateral steps of the Government of the Slovak Republic in connection with the barrage system.

The preparatory works for diverting the water of the Danube near the Dunakiliti dam through unilaterally are also alarming. These steps are contrary to the 1977 Treaty and to the good relationship between our nations.”

On 30 July 1991 the Slovak Prime Minister informed the Hungarian Prime Minister of

“the decision of the Slovak Government and of the Czech and Slovak Federal Government to continue work on the Gabčíkovo power plant, as a provisional solution, which is aimed at the commencement of operations on the territory of the Czech and Slovak Federal Republic”.

On the same day, the Government of Hungary protested, by a Note Verbale, against the filling of the headrace canal by the Czechoslovak construction company, by pumping water from the Danube.

By a letter dated 9 August 1991 and addressed to the Prime Minister of Slovakia, the Hungarian authorities strenuously protested against “any unilateral step that would be in contradiction with the interests of our [two] nations and international law” and indicated that they considered it “very important [to] receive information as early as possible on the

details of the provisional solution”. For its part, Czechoslovakia, in a Note Verbale dated 27 August 1991, rejected the argument of Hungary that the continuation of the works under those circumstances constituted a violation of international law, and made the following proposal:

“Provided the Hungarian side submits a concrete technical solution aimed at putting into operation the Gabčíkovo system of locks and a solution of the system of locks based on the 1977 Treaty in force and the treaty documents related to it, the Czechoslovak side is prepared to implement the mutually agreed solution.”

64. The construction permit for Variant C was issued on 30 October 1991. In November 1991 construction of a dam started at Čunovo, where both banks of the Danube are on Czechoslovak (now Slovak) territory.

In the course of a new inter-governmental negotiation meeting, on 2 December 1991, the parties agreed to entrust the task of studying the whole of the question of the Gabčíkovo-Nagyymaros Project to a Joint Expert Committee which Hungary agreed should be complemented with an expert from the European Communities. However whereas, for Hungary, the work of that Committee would have been meaningless if Czechoslovakia continued construction of Variant C, for Czechoslovakia, the suspension of the construction, even on a temporary basis, was unacceptable.

That meeting was followed by a large number of exchanges of letters between the parties and various meetings between their representatives at the end of 1991 and early in 1992. On 23 January 1992, Czechoslovakia expressed its readiness “to stop work on the provisional solution and continue the construction upon mutual agreement” if the tripartite committee of experts whose constitution it proposed, and the results of the test operation of the Gabčíkovo part, were to “confirm that negative ecological effects exceed its benefits”. However, the positions of the parties were by then comprehensively defined, and would scarcely develop any further. Hungary considered, as it indicated in a Note Verbale of 14 February 1992, that Variant C was in contravention

“of [the Treaty of 1977] . . . and the convention ratified in 1976 regarding the water management of boundary waters.

with the principles of sovereignty, territorial integrity, with the inviolability of State borders, as well as with the general customary norms on international rivers and the spirit of the 1948 Belgrade Danube Convention”;

and the suspension of the implementation of Variant C was, in its view, a prerequisite. As for Czechoslovakia, it took the view that recourse to Variant C had been rendered inevitable, both for economic and ecologi-

cal as well as navigational reasons, because of the unlawful suspension and abandonment by Hungary of the works for which provision was made in the 1977 Treaty. Any negotiation had, in its view, to be conducted within the framework of the Treaty and without the implementation of Variant C — described as “provisional” — being called into question.

65. On 5 August 1992, the Czechoslovak representative to the Danube Commission informed it that “work on the severance cutting through of the Danube’s flow will begin on 15 October 1992 at the 1,851.759-kilometre line” and indicated the measures that would be taken at the time of the “severance”. The Hungarian representative on the Commission protested on 17 August 1992, and called for additional explanations.

During the autumn of 1992, the implementation of Variant C was stepped up. The operations involved in damming the Danube at Čunovo had been scheduled by Czechoslovakia to take place during the second half of October 1992, at a time when the waters of the river are generally at their lowest level. On the initiative of the Commission of the European Communities, trilateral negotiations took place in Brussels on 21 and 22 October 1992, with a view to setting up a committee of experts and defining its terms of reference. On that date, the first phase of the operations leading to the damming of the Danube (the reinforcement of the riverbed and the narrowing of the principal channel) had been completed. The closure of the bed was begun on 23 October 1992 and the construction of the actual dam continued from 24 to 27 October 1992: a pontoon bridge was built over the Danube on Czechoslovak territory using river barges, large stones were thrown into the riverbed and reinforced with concrete, while 80 to 90 per cent of the waters of the Danube were directed into the canal designed to supply the Gabčíkovo power plant. The implementation of Variant C did not, however, come to an end with the diversion of the waters, as there still remained outstanding both reinforcement work on the dam and the building of certain auxiliary structures.

The Court has already referred in paragraph 24 to the meeting held in London on 28 October 1992 under the auspices of the European Communities, in the course of which the parties to the negotiations agreed, *inter alia*, to entrust a tripartite Working Group composed of independent experts (i.e., four experts designated by the European Commission, one designated by Hungary and another by Czechoslovakia) with the task of reviewing the situation created by the implementation of Variant C and making proposals as to urgent measures to adopt. After having worked for one week in Bratislava and one week in Budapest, the Working Group filed its report on 23 November 1992.

66. A summary description of the constituent elements of Variant C appears at paragraph 23 of the present Judgment. For the purposes of the question put to the Court, the official description that should be adopted is, according to Article 2, paragraph 1 (b), of the Special Agreement, the one given in the aforementioned report of the Working Group

of independent experts, and it should be emphasized that, according to the Special Agreement, “Variant C” must be taken to include the consequences “on water and navigation course” of the dam closing off the bed of the Danube.

In the section headed “Variant C Structures and Status of Ongoing Work”, one finds, in the report of the Working Group, the following passage:

“In both countries the original structures for the Gabčíkovo scheme are completed except for the closure of the Danube river at Dunakiliti and the

- (1) Completion of the hydropower station (installation and testing of turbines) at Gabčíkovo.

Variant C consists of a complex of structures, located in Czechoslovakia . . . The construction of these are planned for two phases. The structures include . . . :

- (2) By-pass weir controlling the flow into the river Danube.
- (3) Dam closing the Danubian river bed.
- (4) Floodplain weir (weir in the inundation).
- (5) Intake structure for the Mosoni Danube.
- (6) Intake structure in the power canal.
- (7) Earth barrages/dykes connecting structures.
- (8) Ship lock for smaller ships (15 m × 80 m).
- (9) Spillway weir.
- (10) Hydropower station.

The construction of the structures 1-7 are included in Phase 1, while the remaining 8-10 are a part of Phase 2 scheduled for construction 1993-1995.”

* * *

67. Czechoslovakia had maintained that proceeding to Variant C and putting it into operation did not constitute internationally wrongful acts; Slovakia adopted this argument. During the proceedings before the Court Slovakia contended that Hungary’s decision to suspend and subsequently abandon the construction of works at Dunakiliti had made it impossible for Czechoslovakia to carry out the works as initially contemplated by the 1977 Treaty and that the latter was therefore entitled to proceed with a solution which was as close to the original Project as possible. Slovakia invoked what it described as a “principle of approximate application” to justify the construction and operation of Variant C. It explained that this was the only possibility remaining to it “of fulfilling not only the purposes of the 1977 Treaty, but the continuing obligation to implement it in good faith”.

68. Slovakia also maintained that Czechoslovakia was under a duty to mitigate the damage resulting from Hungary’s unlawful actions. It claimed

that a State which is confronted with a wrongful act of another State is under an obligation to minimize its losses and, thereby, the damages claimable against the wrongdoing State. It argued furthermore that "Mitigation of damages is also an aspect of the performance of obligations in good faith." For Slovakia, these damages would have been immense in the present case, given the investments made and the additional economic and environmental prejudice which would have resulted from the failure to complete the works at Dunakiliti/Gabčíkovo and to put the system into operation. For this reason, Czechoslovakia was not only entitled, but even obliged, to implement Variant C.

69. Although Slovakia maintained that Czechoslovakia's conduct was lawful, it argued in the alternative that, even were the Court to find otherwise, the putting into operation of Variant C could still be justified as a countermeasure.

70. Hungary for its part contended that Variant C was a material breach of the 1977 Treaty. It considered that Variant C also violated Czechoslovakia's obligations under other treaties, in particular the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters concluded at Budapest, and its obligations under general international law.

71. Hungary contended that Slovakia's arguments rested on an erroneous presentation of the facts and the law. Hungary denied, *inter alia*, having committed the slightest violation of its treaty obligations which could have justified the putting into operation of Variant C. It considered that "no such rule" of "approximate application" of a treaty exists in international law; as to the argument derived from "mitigation of damages[s]", it claimed that this has to do with the quantification of loss, and could not serve to excuse conduct which is substantively unlawful. Hungary furthermore stated that Variant C did not satisfy the conditions required by international law for countermeasures, in particular the condition of proportionality.

* *

72. Before dealing with the arguments advanced by the Parties, the Court wishes to make clear that it is aware of the serious problems with which Czechoslovakia was confronted as a result of Hungary's decision to relinquish most of the construction of the System of Locks for which it was responsible by virtue of the 1977 Treaty. Vast investments had been made, the construction at Gabčíkovo was all but finished, the bypass canal was completed, and Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect in completing work on the tailrace canal. It emerges from the report, dated 31 October 1992, of the tripartite fact-finding mission the Court has referred to in paragraph 24 of the present Judgment, that not using the system would have

led to considerable financial losses, and that it could have given rise to serious problems for the environment.

73. Czechoslovakia repeatedly denounced Hungary's suspension and abandonment of works as a fundamental breach of the 1977 Treaty and consequently could have invoked this breach as a ground for terminating the Treaty; but this would not have brought the Project any nearer to completion. It therefore chose to insist on the implementation of the Treaty by Hungary, and on many occasions called upon the latter to resume performance of its obligations under the Treaty.

When Hungary steadfastly refused to do so — although it had expressed its willingness to pay compensation for damage incurred by Czechoslovakia — and when negotiations stalled owing to the diametrically opposed positions of the parties, Czechoslovakia decided to put the Gabčíkovo system into operation unilaterally, exclusively under its own control and for its own benefit.

74. That decision went through various stages and, in the Special Agreement, the Parties asked the Court to decide whether Czechoslovakia "was entitled to proceed, in November 1991" to Variant C, and "to put [it] into operation from October 1992".

75. With a view to justifying those actions, Slovakia invoked what it described as "the principle of approximate application", expressed by Judge Sir Hersch Lauterpacht in the following terms:

"It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument — not to change it." (*Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956*, separate opinion of Sir Hersch Lauterpacht, p. 46.)

It claimed that this is a principle of international law and a general principle of law.

76. It is not necessary for the Court to determine whether there is a principle of international law or a general principle of law of "approximate application" because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty.

77. As the Court has already observed, the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabčíkovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works. This element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabčíkovo-Nagymaros Project and for the operation of this joint property as a co-ordinated single unit. By definition all this could not be carried

80. Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained."

It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.

81. Since the Court has found that the putting into operation of Variant C constituted an internationally wrongful act, the duty to mitigate damage invoked by Slovakia does not need to be examined further.

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82. Although it did not invoke the plea of countermeasures as a primary argument, since it did not consider Variant C to be unlawful, Slovakia stated that "Variant C could be presented as a justified countermeasure to Hungary's illegal acts".

The Court has concluded, in paragraph 78 above, that Czechoslovakia committed an internationally wrongful act in putting Variant C into operation. Thus, it now has to determine whether such wrongfulness may be precluded on the ground that the measure so adopted was in response to Hungary's prior failure to comply with its obligations under international law.

83. In order to be justifiable, a countermeasure must meet certain conditions (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 127, para. 249. See also *Arbitral Award of 9 December 1978 in the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XVIII, pp. 443 *et seq.*; also Articles 47 to 50 of the Draft Articles on State Responsibility adopted by the International Law Commission on first reading. "Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996", *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)*, pp. 144-145.)

In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. Although not primarily presented as a countermeasure, it is clear that Variant C was a response to Hungary's suspension and abandon-

ment by unilateral action. In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics.

78. Moreover, in practice, the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river.

Czechoslovakia submitted that Variant C was essentially no more than what Hungary had already agreed to and that the only modifications made were those which had become necessary by virtue of Hungary's decision not to implement its treaty obligations. It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation; but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse.

The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act.

79. The Court notes that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.

Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act" (see for example the Commentary on Article 41 of the Draft Articles on State Responsibility, "Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996", *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)*, p. 141, and *Yearbook of the International Law Commission*, 1993, Vol. II, Part 2, p. 57, para. 14).

*

ment of works and that it was directed against that State; and it is equally clear, in the Court's view, that Hungary's actions were internationally wrongful.

84. Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. It is clear from the facts of the case, as recalled above by the Court (see paragraphs 61 *et seq.*), that Czechoslovakia requested Hungary to resume the performance of its treaty obligations on many occasions.

85. In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

"[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others" (*Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23, p. 27*).

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz — failed to respect the proportionality which is required by international law.

86. Moreover, as the Court has already pointed out (see paragraph 78), the fact that Hungary had agreed in the context of the original Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube) cannot be understood as having authorized Czechoslovakia to proceed with a unilateral diversion of this magnitude without Hungary's consent.

87. The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate. It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obliga-

tions under international law, and that the measure must therefore be reversible.

* * *

88. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (*b*), of the Special Agreement (see paragraph 60), finds that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992.

* * *

89. By the terms of Article 2, paragraph 1 (*c*), of the Special Agreement, the Court is asked, thirdly, to determine "what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary".

The Court notes that it has been asked to determine what are the legal effects of the notification given on 19 May 1992 of the termination of the Treaty. It will consequently confine itself to replying to this question.

90. The Court will recall that, by early 1992, the respective parties to the 1977 Treaty had made clear their positions with regard to the recourse by Czechoslovakia to Variant C. Hungary in a Note Verbale of 14 February 1992 had made clear its view that Variant C was a contravention of the 1977 Treaty (see paragraph 64 above); Czechoslovakia insisted on the implementation of Variant C as a condition for further negotiation. On 26 February 1992, in a letter to his Czechoslovak counterpart, the Prime Minister of Hungary described the impending diversion of the Danube as "a serious breach of international law" and stated that, unless work was suspended while further enquiries took place, "the Hungarian Government [would] have no choice but to respond to this situation of necessity by terminating the 1977 inter-State Treaty". In a Note Verbale dated 18 March 1992, Czechoslovakia reaffirmed that, while it was prepared to continue negotiations "on every level", it could not agree "to stop all work on the provisional solution".

On 24 March 1992, the Hungarian Parliament passed a resolution authorizing the Government to terminate the 1977 Treaty if Czechoslovakia did not stop the works by 30 April 1992. On 13 April 1992, the Vice-President of the Commission of the European Communities wrote to both parties confirming the willingness of the Commission to chair a committee of independent experts including representatives of the two countries, in order to assist the two Governments in identifying a mutu-

ally acceptable solution. Commission involvement would depend on each Government not taking "any steps . . . which would prejudice possible actions to be undertaken on the basis of the report's findings". The Czechoslovak Prime Minister stated in a letter to the Hungarian Prime Minister dated 23 April 1992, that his Government continued to be interested in the establishment of the proposed committee "without any preliminary conditions"; criticizing Hungary's approach, he refused to suspend work on the provisional solution, but added, "in my opinion, there is still time, until the damming of the Danube (i.e., until October 31, 1992), for resolving disputed questions on the basis of agreement of both States".

On 7 May 1992, Hungary, in the very resolution in which it decided on the termination of the Treaty, made a proposal, this time to the Slovak Prime Minister, for a six-month suspension of work on Variant C. The Slovak Prime Minister replied that the Slovak Government remained ready to negotiate, but considered preconditions "inappropriate".

91. On 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Declaration notifying it of the termination by Hungary of the 1977 Treaty as of 25 May 1992. In a letter of the same date from the Hungarian Prime Minister to the Czechoslovak Prime Minister, the immediate cause for termination was specified to be Czechoslovakia's refusal, expressed in its letter of 23 April 1992, to suspend the work on Variant C during mediation efforts of the Commission of the European Communities. In its Declaration, Hungary stated that it could not accept the deleterious effects for the environment and the conservation of nature of the implementation of Variant C which would be practically equivalent to the dangers caused by the realization of the original Project. It added that Variant C infringed numerous international agreements and violated the territorial integrity of the Hungarian State by diverting the natural course of the Danube.

* *

92. During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.

93. On the first point, Hungary stated that, as Czechoslovakia had "remained inflexible" and continued with its implementation of Variant C, "a temporary state of necessity eventually became permanent, justifying termination of the 1977 Treaty".

Slovakia, for its part, denied that a state of necessity existed on the

basis of what it saw as the scientific facts; and argued that even if such a state of necessity had existed, this would not give rise to a right to terminate the Treaty under the Vienna Convention of 1969 on the Law of Treaties.

94. Hungary's second argument relied on the terms of Article 61 of the Vienna Convention, which is worded as follows:

"Article 61

Supervening Impossibility of Performance

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

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

Hungary declared that it could not be "obliged to fulfil a practically impossible task, namely to construct a barrage system on its own territory that would cause irreparable environmental damage". It concluded that

"By May 1992 the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two parties jointly — had permanently disappeared, and the Treaty had thus become impossible to perform."

In Hungary's view, the "object indispensable for the execution of the treaty", whose disappearance or destruction was required by Article 61 of the Vienna Convention, did not have to be a physical object, but could also include, in the words of the International Law Commission, "a legal situation which was the *raison d'être* of the rights and obligations".

Slovakia claimed that Article 61 was the only basis for invoking impossibility of performance as a ground for termination, that paragraph 1 of that Article clearly contemplated physical "disappearance or destruction" of the object in question, and that, in any event, paragraph 2 precluded the invocation of impossibility "if the impossibility is the result of a breach by that party . . . of an obligation under the treaty".

95. As to "fundamental change of circumstances", Hungary relied on Article 62 of the Vienna Convention on the Law of Treaties which states as follows:

"Article 62

Fundamental Change of Circumstances

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

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
 (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

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

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

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

Hungary identified a number of "substantive elements" present at the conclusion of the 1977 Treaty which it said had changed fundamentally by the date of notification of termination. These included the notion of "socialist integration", for which the Treaty had originally been a "vehicle", but which subsequently disappeared; the "single and indivisible operational system", which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been overturned by the sudden emergence of both States into a market economy; the attitude of Czechoslovakia which had turned the "framework treaty" into an "immutable norm"; and, finally, the transformation of a treaty consistent with environmental protection into "a prescription for environmental disaster".

Slovakia, for its part, contended that the changes identified by Hungary had not altered the nature of the obligations under the Treaty from those originally undertaken, so that no entitlement to terminate it arose from them.

96. Hungary further argued that termination of the Treaty was justified by Czechoslovakia's material breaches of the Treaty, and in this regard it invoked Article 60 of the Vienna Convention on the Law of Treaties, which provides:

"Article 60

Termination or Suspension of the Operation of a Treaty as a Consequence of Its Breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or
 (ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

Hungary claimed in particular that Czechoslovakia violated the 1977 Treaty by proceeding to the construction and putting into operation of Variant C, as well as failing to comply with its obligations under Articles 15 and 19 of the Treaty. Hungary further maintained that Czechoslovakia had breached other international conventions (among them the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters) and general international law.

Slovakia denied that there had been, on the part of Czechoslovakia or on its part, any material breach of the obligations to protect water quality and nature, and claimed that Variant C, far from being a breach, was devised as "the best possible approximate application" of the Treaty. It furthermore denied that Czechoslovakia had acted in breach of other international conventions or general international law.

97. Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an *erga omnes* obligation of prevention of damage pursuant to the "precautionary principle". On this basis, Hungary argued, its termination was "forced by the other party's refusal to suspend work on Variant C".

Slovakia argued, in reply, that none of the intervening developments in environmental law gave rise to norms of *ius cogens* that would override the Treaty. Further, it contended that the claim by Hungary to be entitled to take action could not in any event serve as legal justification for termination of the Treaty under the law of treaties, but belonged rather "to the language of self-help or reprisals".

* *

98. The question, as formulated in Article 2, paragraph 1 (c), of the Special Agreement, deals with treaty law since the Court is asked to determine what the legal effects are of the notification of termination of the Treaty. The question is whether Hungary's notification of 19 May 1992 brought the 1977 Treaty to an end, or whether it did not meet the requirements of international law, with the consequence that it did not terminate the Treaty.

99. The Court has referred earlier to the question of the applicability to the present case of the Vienna Convention of 1969 on the Law of Treaties. The Vienna Convention is not directly applicable to the 1977 Treaty inasmuch as both States ratified that Convention only after the Treaty's conclusion. Consequently only those rules which are declaratory of customary law are applicable to the 1977 Treaty. As the Court has already stated above (see paragraph 46), this is the case, in many respects, with Articles 60 to 62 of the Vienna Convention, relating to termination or suspension of the operation of a treaty. On this, the Parties, too, were broadly in agreement.

100. The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable régime of joint investment

and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

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101. The Court will now turn to the first ground advanced by Hungary, that of the state of necessity. In this respect, the Court will merely observe that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but — unless the parties by mutual agreement terminate the Treaty — it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.

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102. Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary's interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention. Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, doc. A/CONF.39/11, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole, pp. 361-365*). Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

103. Hungary contended that the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly — had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term "object" in Article 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it

would have to conclude that in this instance that régime had not definitively ceased to exist. The 1977 Treaty — and in particular its Articles 15, 19 and 20 — actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives. The Court would add that, if the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty: Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party's own breach of an obligation flowing from that treaty.

*

104. Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above).

The Court recalls that, in the *Fisheries Jurisdiction* case, it stated that

"Article 62 of the Vienna Convention on the Law of Treaties, . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances" (*I.C.J. Reports 1973*, p. 63, para. 36).

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of

environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

*

105. The Court will now examine Hungary's argument that it was entitled to terminate the 1977 Treaty on the ground that Czechoslovakia had violated its Articles 15, 19 and 20 (as well as a number of other conventions and rules of general international law); and that the planning, construction and putting into operation of Variant C also amounted to a material breach of the 1977 Treaty.

106. As to that part of Hungary's argument which was based on other treaties and general rules of international law, the Court is of the view that it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.

107. Hungary contended that Czechoslovakia had violated Articles 15, 19 and 20 of the Treaty by refusing to enter into negotiations with Hungary in order to adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment. Articles 15, 19 and 20 oblige the parties jointly to take, on a continuous basis, appropriate measures necessary for the protection of water quality, of nature and of fishing interests.

Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. The failure of the parties to agree on those means cannot, on the basis of the record before the Court, be attributed solely to one party.

The Court has not found sufficient evidence to conclude that Czechoslovakia had consistently refused to consult with Hungary about the desirability or necessity of measures for the preservation of the environment. The record rather shows that, while both parties indicated, in principle, a willingness to undertake further studies, in practice Czechoslovakia refused to countenance a suspension of the works at Dunakiliti and, later, on Variant C, while Hungary required suspension as a prior condition of environmental investigation because it claimed continuation of the work would prejudice the outcome of negotiations. In this regard it cannot be left out of consideration that Hungary itself, by suspending the works at Nagymaros and Dunakiliti, contributed to the creation of a situation which was not conducive to the conduct of fruitful negotiations.

108. Hungary's main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. As the Court has found in paragraph 79 above, Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully.

In the Court's view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

109. In this regard, it should be noted that, according to Hungary's Declaration of 19 May 1992, the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later. Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith. As the Court stated in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (in which case the Vienna Convention did not apply):

"Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith." (*I.C.J. Reports 1980*, p. 96, para. 49.)

The termination of the Treaty by Hungary was to take effect six days

after its notification. On neither of these dates had Hungary suffered injury resulting from acts of Czechoslovakia. The Court must therefore confirm its conclusion that Hungary's termination of the Treaty was premature.

110. Nor can the Court overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior wrongful conduct. As was stated by the Permanent Court of International Justice:

"It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him." (*Fac-tory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 31.*)

Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.

*

111. Finally, the Court will address Hungary's claim that it was entitled to terminate the 1977 Treaty because new requirements of international law for the protection of the environment precluded performance of the Treaty.

112. Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the

Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.

The responsibility to do this was a joint responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.

It is all the more important to do this because as the Court recalled in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" (*I.C.J. Reports 1996*, p. 241, para. 29; see also paragraph 53 above).

The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20.

113. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.

114. Finally, Hungary maintained that by their conduct both parties had repudiated the Treaty and that a bilateral treaty repudiated by both parties cannot survive. The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.

* *

115. In the light of the conclusions it has reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (c), of the Special Agreement (see paragraph 89), finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

* *

116. In Article 2, paragraph 2, of the Special Agreement, the Court is requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions formulated in paragraph 1. In Article 5 of the Special Agreement the Parties agreed to enter into negotiations on the modalities for the execution of the Judgment immediately after the Court has rendered it.

117. The Court must first turn to the question whether Slovakia became a party to the 1977 Treaty as successor to Czechoslovakia. As an alternative argument, Hungary contended that, even if the Treaty survived the notification of termination, in any event it ceased to be in force as a treaty on 31 December 1992, as a result of the "disappearance of one of the parties". On that date Czechoslovakia ceased to exist as a legal entity, and on 1 January 1993 the Czech Republic and the Slovak Republic came into existence.

118. According to Hungary, "There is no rule of international law which provides for automatic succession to bilateral treaties on the disappearance of a party" and such a treaty will not survive unless another State succeeds to it by express agreement between that State and the remaining party. While the second paragraph of the Preamble to the Special Agreement recites that

"the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project",

Hungary sought to distinguish between, on the one hand, rights and obligations such as "continuing property rights" under the 1977 Treaty, and, on the other hand, the treaty itself. It argued that, during the negotiations leading to signature of the Special Agreement, Slovakia had proposed a text in which it would have been expressly recognized "as the successor to the Government of the CSFR" with regard to the 1977 Treaty, but that Hungary had rejected that formulation. It contended that it had never agreed to accept Slovakia as successor to the 1977 Treaty. Hungary referred to diplomatic exchanges in which the two Parties had each submitted to the other lists of those bilateral treaties which they respectively wished should continue in force between them, for negotiation on a case-

International Court of Justice

**Jurisdictional Immunities of the State
(Germany *v.* Italy: Greece Intervening)
Judgment**

I.C.J. Reports 2012, p. 99

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

**IMMUNITÉS JURIDICTIONNELLES
DE L'ÉTAT**

(ALLEMAGNE c. ITALIE; GRÈCE (intervenant))

ARRÊT DU 3 FÉVRIER 2012

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INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

**JURISDICTIONAL IMMUNITIES
OF THE STATE**

(GERMANY v. ITALY; GREECE intervening)

JUDGMENT OF 3 FEBRUARY 2012

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TABLE OF CONTENTS

	<i>Paragraphs</i>
CHRONOLOGY OF THE PROCEDURE	
I. HISTORICAL AND FACTUAL BACKGROUND	
1. The Peace Treaty of 1947	1-19
2. The Federal Compensation Law of 1953	20-36
3. The 1961 Agreements	22
4. Law establishing the “Remembrance, Responsibility and Future” Foundation	23
5. Proceedings before Italian courts	24-25
A. Cases involving Italian nationals	26
B. Cases involving Greek nationals	27-36
C. Proceedings before Italian courts	27-29
D. Cases involving Greek nationals	30-36
II. THE SUBJECT-MATTER OF THE DISPUTE AND THE JURISDICTION OF THE COURT	37-51
III. ALLEGED VIOLATION OF GERMANY’S JURISDICTIONAL IMMUNITY IN THE PROCEEDINGS BROUGHT BY THE ITALIAN CLAIMANTS	52-108
1. The issues before the Court	52-61
2. Italy’s first argument: the territorial tort principle	62-79
3. Italy’s second argument: the subject-matter and circumstances of the claims in the Italian courts	80-106
A. The gravity of the violations	81-91
B. The relationship between <i>ius cogens</i> and the rule of State immunity	92-97
C. The “last resort” argument	98-104
D. The combined effect of the circumstances relied upon by Italy	105-106
4. Conclusions	107-108
IV. THE MEASURES OF CONSTRAINT TAKEN AGAINST PROPERTY BELONGING TO GERMANY LOCATED ON ITALIAN TERRITORY	109-120
V. THE DECISIONS OF THE ITALIAN COURTS DECLARING ENFORCEABLE IN ITALY DECISIONS OF GREEK COURTS UPHOLDING CIVIL CLAIMS AGAINST GERMANY	121-133
VI. GERMANY’S FINAL SUBMISSIONS AND THE REMEDIES SOUGHT	134-138
OPERATIVE CLAUSE	139

INTERNATIONAL COURT OF JUSTICE

YEAR 2012

February
General List
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3 February 2012

JURISDICTIONAL IMMUNITIES
OF THE STATE

(GERMANY v. ITALY: GREECE intervening)

Historical and factual background.

Peace Treaty of 1947 — Federal Compensation Law of 1953 — 1961 Agreements — 2000 Federal Law establishing the “Remembrance, Responsibility and Future” Foundation — Proceedings before Italian courts — Cases involving Italian nationals — Cases involving Greek nationals.

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Subject-matter of dispute and jurisdiction of the Court.

Subject-matter of dispute delimited by claims of Germany and Italy — No objection to jurisdiction of the Court or admissibility of Application raised by Italy — Article 1 of the European Convention for the Peaceful Settlement of Disputes as basis of jurisdiction — Limitation ratione temporis not applicable — The Court has jurisdiction — The Court is not called upon to rule on questions of reparation — Relationship between duty of reparation and State immunity — No other question with regard to the Court’s jurisdiction.

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Alleged violation of Germany’s jurisdictional immunity in proceedings brought by Italian claimants.

Issues before the Court — Origins of proceedings in Italian courts — Existence of customary rule of international law conferring immunity on States — Sources of State practice and opinio juris — State practice and opinio juris generally recognize State immunity — Rule of State immunity derives from principle of sovereign equality of States — Need to distinguish between relevant acts of Germany and those of Italy — Procedural nature of law of immunity — The Court must examine and apply the law on State immunity as it existed at time of Italian proceedings — Acta iure gestionis and acta iure imperii — Acts of armed forces of

German Reich were *acta jure imperii* — *State immunity in respect of acta jure imperii* — *Contention by Italy that Germany not entitled to immunity in respect of cases before Italian courts.*

Italy's first argument: territorial tort principle — *Acts committed on territory of forum State by armed forces of a foreign State in conduct of armed conflict* — *Article 11 of European Convention on State Immunity* — *Article 12 of United Nations Convention on Jurisdictional Immunities of States and Their Property* — *State practice: national legislation and judgments of national courts* — *State immunity for acta jure imperii extends to civil proceedings for acts occasioning death, personal injury or damage to property, committed by armed forces in conduct of armed conflict* — *Opinio juris* — *Absence of contrary jurisprudence or contrary statements by States* — *Decisions of Italian courts cannot be justified on basis of territorial tort principle.*

Italy's second argument: subject-matter and circumstances of claims in Italian courts — *Gravity of violations* — *Contention that international law does not accord immunity to a State for serious violations of law of armed conflict* — *National court is required to determine entitlement to immunity before it can hear merits of case* — *No State practice to support proposition that a State is deprived of immunity in cases of serious violations of international humanitarian law* — *Neither has proposition been accepted by European Court of Human Rights* — *State not deprived of immunity because it is accused of serious violations of international humanitarian law.*

Relationship between jus cogens and rule of State immunity — *Alleged conflict between jus cogens rules and immunity of Germany* — *No conflict exists between jus cogens and immunity of a State* — *Argument about jus cogens displacing State immunity has been rejected by national courts* — *State immunity not affected by violation of jus cogens.*

The "last resort" argument — *Contention that Italian courts were justified in denying Germany immunity because of failure of all other attempts to secure compensation* — *State immunity not dependent upon existence of effective alternative means of redress* — *Italy's argument rejected* — *Further negotiation between Germany and Italy.*

Combined effect of circumstances relied upon by Italy — *None of three strands justify action of Italian courts* — *No effect if taken together* — *State practice* — *Balancing different factors would disregard nature of State immunity* — *Immunity cannot be dependent upon outcome of balancing exercise by national court.*

Action of Italian courts in denying Germany immunity constitutes a breach of obligations owed by Italy to Germany — *No need to consider other questions raised by the Parties.*

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Measures of constraint taken against property belonging to Germany located on Italian territory.

Legal charge against Villa Vigoni — *Charge in question suspended by Italy to take account of proceedings before the Court* — *Distinction between rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity* — *No need to determine whether decisions of Greek courts awarding pecuniary damages against Germany were in breach of that State's jurisdictional immunity* — *Article 19 of United Nations Convention on Jurisdictional Immunities of States and Their Property* — *Property which was subject of measure of constraint being used for non-commercial governmental purposes* — *Germany not having expressly consented to taking of legal charge in question or allocated Villa Vigoni for satisfaction of judicial claims against it* — *Registration of legal charge on Villa Vigoni constitutes a violation by Italy of its obligation to respect immunity owed to Germany.*

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Decisions of Italian courts declaring enforceable in Italy decisions of Greek courts upholding civil claims against Germany.

Germany's contention that its jurisdictional immunity was violated by these decisions — *Request for exequatur* — *Whether Italian courts respected Germany's immunity from jurisdiction in upholding request for exequatur* — *Purpose of exequatur proceedings* — *Exequatur proceedings must be regarded as being directed against State which was subject of foreign judgment* — *Question of immunity precedes consideration of request for exequatur* — *No need to rule on question whether Greek courts violated Germany's immunity* — *Decisions of Florence Court of Appeal constitute violation by Italy of its obligation to respect jurisdictional immunity of Germany.*

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Germany's final submissions and the remedies sought.

Germany's six requests presented to the Court — *First three submissions upheld* — *Violation by Italy of Germany's jurisdictional immunity* — *Fourth submission* — *Request for declaration that Italy's international responsibility is engaged* — *No need for express declaration* — *Responsibility automatically inferred from finding that certain obligations have been violated* — *Fourth submission not upheld* — *Fifth submission* — *Request that Italy be ordered to take, by means of its own choosing, any and all steps to ensure that all decisions of its courts and other judicial authorities infringing Germany's sovereign immunity cease to have effect* — *Fifth submission upheld* — *Result to be achieved by enacting appropriate legislation or by other methods having the same effect* — *Sixth submission* — *Request that Italy be ordered to provide assurances of non-repetition* — *No reason to suppose that a State whose conduct has been declared wrongful by the Court will repeat that conduct in future* — *No circumstances justifying assurances of non-repetition* — *Sixth submission not upheld.*

JUDGMENT

Present: President OWADA; *Vice-President* TOMKA; *Judges* KOROMA, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE; *Judge ad hoc* GAJA; *Registrar* COUVREUR.

In the case concerning jurisdictional immunities of the State,
between

the Federal Republic of Germany,

represented by

H.E. Ms Susanne Wasum-Rainer, Ambassador, Director-General for Legal Affairs and Legal Adviser, Federal Foreign Office,
H.E. Mr. Heinz-Peter Behr, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,
Mr. Christian Tomuschat, former Member and Chairman of the International Law Commission, Professor emeritus of Public International Law at the Humboldt University of Berlin,
as Agents;

Mr. Andrea Gattini, Professor of Public International Law at the University of Padua,
Mr. Robert Kolb, Professor of Public International Law at the University of Geneva,

as Counsel and Advocates;

Mr. Guido Hildner, Head of the Public International Law Division, Federal Foreign Office,
Mr. Götz Schmidt-Bremme, Head of the International Civil, Trade and Tax Law Division, Federal Foreign Office,
Mr. Felix Neumann, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,

Mr. Gregor Schotten, Federal Foreign Office,
Mr. Klaus Keller, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,
Ms Susanne Achilles, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,

Ms Donata Arz von Straussenburg, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,
as Advisers;

Ms Fiona Kaltenborn,
as Assistant,

and

the Italian Republic,
represented by

H.E. Mr. Paolo Pucci di Benisichi, Ambassador and State Counsellor,

as Agent;

Mr. Giacomo Aiello, State Advocate,
H.E. Mr. Franco Giordano, Ambassador of the Italian Republic to the Kingdom of the Netherlands,
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Mr. Pierre-Marie Dupuy, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, and University of Paris II (Panthéon-Assas),
Mr. Paolo Palchetti, Associate Professor of International Law, University of Macerata,

Mr. Salvatore Zappalà, Professor of International Law, University of Catania, Legal Adviser, Permanent Mission of Italy to the United Nations,

as Counsel and Advocates;

Mr. Giorgio Marrapodi, Minister Plenipotentiary, Head of the Service for Legal Affairs, Ministry of Foreign Affairs,

Mr. Guido Cerboni, Minister Plenipotentiary, Co-ordinator for the countries of Central and Western Europe, Directorate-General for the European Union, Ministry of Foreign Affairs,

Mr. Roberto Belleli, Legal Adviser, Embassy of Italy in the Kingdom of the Netherlands,

Ms Sarah Negro, First Secretary, Embassy of Italy in the Kingdom of the Netherlands,

Mr. Mel Marquis, Professor of Law, European University Institute, Florence,

Ms Francesca De Vittor, International Law Researcher, University of Macerata,

as Advisers,

with, as State permitted to intervene in the case,

the Hellenic Republic,
represented by

Mr. Stelios Perrakis, Professor of International and European Institutions, Panteion University of Athens,

as Agent;

H.E. Mr. Ioannis Economides, Ambassador of the Hellenic Republic to the Kingdom of the Netherlands,

as Deputy-Agent;

Mr. Antonis Bredimas, Professor of International Law, National and Kapodistrian University of Athens,

as Counsel and Advocate;

Ms Maria-Daniella Marouda, Lecturer in International Law, Panteion University of Athens,

as Counsel,

THE COURT,

composed as above,
after deliberation,

delivers the following Judgment:

1. On 23 December 2008, the Federal Republic of Germany (hereinafter “Germany”) filed in the Registry of the Court an Application instituting proceedings against the Italian Republic (hereinafter “Italy”) in respect of a dispute originating in “violations of obligations under international law” allegedly committed by Italy through its judicial practice “in that it has failed to respect the jurisdictional immunity which . . . Germany enjoys under international law”.

As a basis for the jurisdiction of the Court, Germany, in its Application, invoked Article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957.

2. Under Article 40, paragraph 2, of the Statute, the Registrar immediately communicated the Application to the Government of Italy; and, pursuant to paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of Italian nationality, Italy exercised its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Giorgio Gaja.

4. By an Order of 29 April 2009, the Court fixed 23 June 2009 as the time-limit for the filing of the Memorial of Germany and 23 December 2009 as the time-limit for the filing of the Counter-Memorial of Italy; those pleadings were duly filed within the time-limits so prescribed. The Counter-Memorial of Italy included a counter-claim “with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich”.

5. By an Order of 6 July 2010, the Court decided that the counter-claim presented by Italy was inadmissible as such under Article 80, paragraph 1, of the Rules of Court. By the same Order, the Court authorized Germany to submit a Reply and Italy to submit a Rejoinder, and fixed 14 October 2010 and 14 January 2011 respectively as the time-limits for the filing of those pleadings; those pleadings were duly filed within the time-limits so prescribed.

6. On 13 January 2011, the Hellenic Republic (hereinafter “Greece”) filed in the Registry an Application for permission to intervene in the case pursuant to Article 62 of the Statute. In its Application, Greece indicated that it “[did] not seek to become a party to the case”.

7. In accordance with Article 83, paragraph 1, of the Rules of Court, the Registrar, by letters dated 13 January 2011, transmitted certified copies of the Application for permission to intervene to the Government of Germany and the Government of Italy, which were informed that the Court had fixed 1 April 2011 as the time-limit for the submission of their written observations on that Application. The Registrar also transmitted, under paragraph 2 of the same Article, a copy of the Application to the Secretary-General of the United Nations.

8. Germany and Italy each submitted written observations on Greece’s Application for permission to intervene within the time-limit thus fixed. The

Registry transmitted to each Party a copy of the other’s observations, and copies of the observations of both Parties to Greece.

9. In light of Article 84, paragraph 2, of the Rules of Court, and taking into account the fact that neither Party filed an objection, the Court decided that it was not necessary to hold hearings on the question whether Greece’s Application for permission to intervene should be granted. The Court nevertheless decided that Greece should be given an opportunity to comment on the observations of the Parties and that the latter should be allowed to submit additional written observations on the question. The Court fixed 6 May 2011 as the time-limit for the submission by Greece of its own written observations on those of the Parties, and 6 June 2011 as the time-limit for the submission by the Parties of additional observations on Greece’s written observations. The observations of Greece and the additional observations of the Parties were submitted within the time-limits thus fixed. The Registry duly transmitted to the Parties a copy of the observations of Greece; it transmitted to each of the Parties a copy of the other’s additional observations and to Greece copies of the additional observations of both Parties.

10. By an Order of 4 July 2011, the Court authorized Greece to intervene in the case as a non-party, in so far as this intervention was limited to the decisions of Greek courts which were declared by Italian courts as enforceable in Italy. The Court further fixed the following time-limits for the filing of the written statement and the written observations referred to in Article 85, paragraph 1, of the Rules of Court: 5 August 2011 for the written statement of Greece and 5 September 2011 for the written observations of Germany and Italy on that statement.

11. The written statement of Greece and the written observations of Germany were duly filed within the time-limits so fixed. By a letter dated 1 September 2011, the Agent of Italy indicated that the Italian Republic would not be presenting observations on the written statement of Greece at that stage of the proceedings, but reserved “its position and right to address certain points raised in the written statement, as necessary, in the course of the oral proceedings”. The Registry duly transmitted to the Parties a copy of the written statement of Greece; it transmitted to Italy and Greece a copy of the written observations of Germany.

12. Under Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings. After consulting the Parties and Greece, the Court decided that the same should apply to the written statement of the intervening State and the written observations of Germany on that statement.

13. Public hearings were held from 12 to 16 September 2011, at which the Court heard the oral arguments and replies of:

For Germany: Ms Susanne Wasum-Rainer,
Mr. Christian Tomuschat,
Mr. Andrea Gattini,
Mr. Robert Kolb.

For Italy: Mr. Giacomo Aiello,
Mr. Luigi Condorelli,
Mr. Salvatore Zappalà,
Mr. Paolo Palchetti,
Mr. Pierre-Marie Dupuy.

For Greece: Mr. Stelios Perrakis,
Mr. Antonis Bredimas.

14. At the hearings, questions were put by Members of the Court to the Parties and to Greece, as intervening State, to which replies were given in writing. The Parties submitted written comments on those written replies.

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15. In its Application, Germany made the following requests:

“Germany prays the Court to adjudge and declare that the Italian Republic:

- (1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;
- (2) by taking measures of constraint against ‘Villa Vigoni’, German State property used for government non-commercial purposes, also committed violations of Germany’s jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany’s jurisdictional immunity.

Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that

- (4) the Italian Republic’s international responsibility is engaged;
- (5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany’s sovereign immunity become unenforceable;
- (6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above.”

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

On behalf of the Government of Germany,

in the Memorial and in the Reply:

“Germany prays the Court to adjudge and declare that the Italian Republic:

- (1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against ‘Villa Vigoni’, German State property used for government non-commercial purposes, also committed violations of Germany’s jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany’s jurisdictional immunity.

Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that

- (4) the Italian Republic’s international responsibility is engaged;
- (5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany’s sovereign immunity become unenforceable;
- (6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above.”

On behalf of the Government of Italy,

in the Counter-Memorial and in the Rejoinder:

“On the basis of the facts and arguments set out [in Italy’s Counter-Memorial and Rejoinder], and reserving its right to supplement or amend these Submissions, Italy respectfully requests that the Court adjudge and declare that all the claims of Germany are rejected.”

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

On behalf of the Government of Germany,

“Germany respectfully requests the Court to adjudge and declare that the Italian Republic:

- (1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II between September 1943 and May 1945 to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against ‘Villa Vigoni’, German State property used for government non-commercial purposes, also committed violations of Germany’s jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany’s jurisdictional immunity.

Accordingly, the Federal Republic of Germany respectfully requests the Court to adjudge and declare that:

- (4) the Italian Republic's international responsibility is engaged;
- (5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable; and
- (6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above."

On behalf of the Government of Italy,

"[F]or the reasons given in [its] written and oral pleadings, [Italy requests] that the Court adjudge and hold the claims of the Applicant to be unfounded. This request is subject to the qualification that . . . Italy has no objection to any decision by the Court obliging Italy to ensure that the mortgage on Villa Vigoni inscribed at the land registry is cancelled."

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18. At the end of the written statement submitted by it in accordance with Article 85, paragraph 1, of the Rules of Court, Greece stated *inter alia*

"that the effect of the judgment that the ICJ will hand down in this case concerning the jurisdictional immunity of the State will be of major importance to the Italian legal order and certainly to the Greek legal order.

Further, an ICJ decision on the effects of the principle of jurisdictional immunity of States when faced with a *jus cogens* rule of international law — such as the prohibition on violation of fundamental rules of humanitarian law — will guide the Greek courts in this regard. It will thus have a significant effect on pending and potential lawsuits brought by individuals before those courts."

19. At the end of the oral observations submitted by it with respect to the subject-matter of the intervention in accordance with Article 85, paragraph 3, of the Rules of Court, Greece stated *inter alia*:

"A decision of the International Court of Justice on the effects of the principle of jurisdictional immunity of States when faced with a *jus cogens* rule of international law — such as the prohibition on violation of fundamental rules of humanitarian law — will guide the Greek courts . . . It will thus have a significant effect on pending and potential lawsuits brought by individuals before those courts.

The Greek Government considers that the effect of the judgment that [the] Court will hand down in this case concerning jurisdictional immunity will be of major importance, primarily to the Italian legal order and certainly to the Greek legal order."

* * *

I. HISTORICAL AND FACTUAL BACKGROUND

20. The Court finds it useful at the outset to describe briefly the historical and factual background of the case which is largely uncontested between the Parties.

21. In June 1940, Italy entered the Second World War as an ally of the German Reich. In September 1943, following the removal of Mussolini from power, Italy surrendered to the Allies and, the following month, declared war on Germany. German forces, however, occupied much of Italian territory and, between October 1943 and the end of the War, perpetrated many atrocities against the population of that territory, including massacres of civilians and the deportation of large numbers of civilians for use as forced labour. In addition, German forces took prisoner, both inside Italy and elsewhere in Europe, several hundred thousand members of the Italian armed forces. Most of these prisoners (hereinafter the "Italian military internees") were denied the status of prisoner of war and deported to Germany and German-occupied territories for use as forced labour.

1. *The Peace Treaty of 1947*

22. On 10 February 1947, in the aftermath of the Second World War, the Allied Powers concluded a Peace Treaty with Italy, regulating, in particular, the legal and economic consequences of the war with Italy. Article 77 of the Peace Treaty reads as follows:

"1. From the coming into force of the present Treaty property in Germany of Italy and of Italian nationals shall no longer be treated as enemy property and all restrictions based on such treatment shall be removed.

2. Identifiable property of Italy and of Italian nationals removed by force or duress from Italian territory to Germany by German forces or authorities after September 3, 1943, shall be eligible for restitution.

3. The restoration and restitution of Italian property in Germany shall be effected in accordance with measures which will be determined by the Powers in occupation of Germany.

4. Without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include debts, all inter-governmental claims in respect of arrangements entered into in the

course of the war, and all claims for loss or damage arising during the war.”

2. *The Federal Compensation Law of 1953*

23. In 1953, the Federal Republic of Germany adopted the Federal Compensation Law concerning Victims of National Socialist Persecution (*Bundesentschädigungsgesetz* (BEG)) in order to compensate certain categories of victims of Nazi persecution. Many claims by Italian nationals under the Federal Compensation Law were unsuccessful, either because the claimants were not considered victims of national Socialist persecution within the definition of the Federal Compensation Law, or because they had no domicile or permanent residence in Germany, as required by that Law. The Federal Compensation Law was amended in 1965 to cover claims by persons persecuted because of their nationality or their membership in a non-German ethnic group, while requiring that the persons in question had refugee status on 1 October 1953. Even after the Law was amended in 1965, many Italian claimants still did not qualify for compensation because they did not have refugee status on 1 October 1953. Because of the specific terms of the Federal Compensation Law as originally adopted and as amended in 1965, claims brought by victims having foreign nationality were generally dismissed by the German courts.

3. *The 1961 Agreements*

24. On 2 June 1961, two Agreements were concluded between the Federal Republic of Germany and Italy. The first Agreement, which entered into force on 16 September 1963, concerned the “settlement of certain property-related, economic and financial questions”. Under Article 1 of that Agreement, Germany paid compensation to Italy for “outstanding questions of an economic nature”. Article 2 of the Agreement provided as follows:

“(1) The Italian Government declares all outstanding claims on the part of the Italian Republic or Italian natural or legal persons against the Federal Republic of Germany or German natural or legal persons to be settled to the extent that they are based on rights and circumstances which arose during the period from 1 September 1939 to 8 May 1945.

(2) The Italian Government shall indemnify the Federal Republic of Germany and German natural or legal persons for any possible judicial proceedings or other legal action by Italian natural or legal persons in relation to the above-mentioned claims.”

25. The second Agreement, which entered into force on 31 July 1963, concerned “compensation for Italian nationals subjected to National-Socialist measures of persecution”. By virtue of this Agreement, the Federal Republic of Germany undertook to pay compensation to Italian nationals affected by those measures. Under Article 1 of that Agreement, Germany agreed to pay Italy forty million Deutsche marks

“for the benefit of Italian nationals who, on grounds of their race, faith or ideology were subjected to National-Socialist measures of persecution and who, as a result of those persecution measures, suffered loss of liberty or damage to their health, and for the benefit of the dependents of those who died in consequence of such measures”.

Article 3 of that Agreement provided as follows:

“Without prejudice to any rights of Italian nationals based on German compensation legislation, the payment provided for in Article 1 shall constitute final settlement between the Federal Republic of Germany and the Italian Republic of all questions governed by the present Treaty.”

4. *Law Establishing the “Remembrance, Responsibility and Future” Foundation*

26. On 2 August 2000, a federal law was adopted in Germany, establishing a “Remembrance, Responsibility and Future” Foundation (hereinafter the “2000 Federal Law”) to make funds available to individuals who had been subjected to forced labour and “other injustices from the National Socialist period” (Sec. 2, para. 1). The Foundation did not provide money directly to eligible individuals under the 2000 Federal Law but instead to “partner organizations”, including the International Organization for Migration in Geneva. Article 11 of the 2000 Federal Law placed certain limits on entitlement to compensation. One effect of this provision was to exclude from the right to compensation those who had the status of prisoner of war, unless they had been detained in concentration camps or came within other specified categories. The reason given in the official commentary to this provision, which accompanied the draft law, was that prisoners of war “may, according to the rules of international law, be put to work by the detaining power” [*translation by the Registry*] (*Bundestagsdrucksache* 14/3206, 13 April 2000).

Thousands of former Italian military internees, who, as noted above, had been denied the status of prisoner of war by the German Reich (see paragraph 21), applied for compensation under the 2000 Federal Law. In 2001, the German authorities took the view that, under the rules of inter-

national law, the German Reich had not been able unilaterally to change the status of the Italian military internees from prisoners of war to that of civilian workers. Therefore, according to the German authorities, the Italian military internees had never lost their prisoner-of-war status, with the result that they were excluded from the benefits provided under the 2000 Federal Law. On this basis, an overwhelming majority of requests for compensation lodged by Italian military internees was rejected. Attempts by former Italian military internees to challenge that decision and seek redress in the German courts were unsuccessful. In a number of decisions, German courts ruled that the individuals in question were not entitled to compensation under the 2000 Federal Law because they had been prisoners of war. On 28 June 2004, a Chamber of the German Constitutional Court (*Bundesverfassungsgericht*) held that Article 11, paragraph 3, of the 2000 Federal Law, which excluded reparation for prisoners of war, did not violate the right to equality before the law guaranteed by the German Constitution, and that public international law did not establish an individual right to compensation for forced labour.

A group of former Italian military internees filed an application against Germany before the European Court of Human Rights on 20 December 2004. On 4 September 2007, a Chamber of that Court declared that the application was “incompatible *ratione materiae*” with the provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms and its protocols and therefore was declared inadmissible (*Associazione Nazionale Reduci and 275 Others v. Germany*, decision of 4 September 2007, application No. 45563/04).

5. Proceedings before Italian Courts

A. Cases involving Italian nationals

27. On 23 September 1998, Mr. Luigi Ferrini, an Italian national who had been arrested in August 1944 and deported to Germany, where he was detained and forced to work in a munitions factory until the end of the war, instituted proceedings against the Federal Republic of Germany in the Court of Arezzo (*Tribunale di Arezzo*) in Italy. On 3 November 2000, the Court of Arezzo decided that Mr. Luigi Ferrini’s claim was inadmissible because Germany, as a sovereign State, was protected by jurisdictional immunity. By a judgment of 16 November 2001, registered on 14 January 2002, the Court of Appeal of Florence (*Corte di Appello di Firenze*) dismissed the appeal of the claimant on the same grounds. On 11 March 2004, the Italian Court of Cassation (*Corte di Cassazione*) held that Italian courts had jurisdiction over the claims for compensation brought against Germany by Mr. Luigi Ferrini on the ground that immunity does not apply in circumstances in which the act complained of constitutes an international crime (*Ferrini v. Federal Republic of Germany*, decision No. 5044/2004 (*Rivista di diritto internazionale*, Vol. 87, 2004, p. 539; *International Law Reports (ILR)*, Vol. 128, p. 658)). The case was

then referred back to the Court of Arezzo, which held in a judgment dated 12 April 2007 that, although it had jurisdiction to entertain the case, the claim to reparation was time-barred. The judgment of the Court of Arezzo was reversed on appeal by the Court of Appeal of Florence, which held in a judgment dated 17 February 2011 that Germany should pay damages to Mr. Luigi Ferrini as well as his case-related legal costs incurred in the course of the judicial proceedings in Italy. In particular, the Court of Appeal of Florence held that jurisdictional immunity is not absolute and cannot be invoked by a State in the face of acts by that State which constitute crimes under international law.

28. Following the *Ferrini* judgment of the Italian Court of Cassation dated 11 March 2004, twelve claimants brought proceedings against Germany in the Court of Turin (*Tribunale di Torino*) on 13 April 2004 in the case concerning *Giovanni Mantelli and Others*. On 28 April 2004, *Libero* Maietta filed a case against Germany before the Court of Sciaccia (*Tribunale di Sciaccia*). In both cases, which relate to acts of deportation, and forced labour in, Germany which took place between 1943 and 1945, an interlocutory appeal requesting a declaration of lack of jurisdiction (“*regolamento preventivo di giurisdizione*”) was filed by Germany before the Italian Court of Cassation. By two orders of 29 May 2008 issued in the *Giovanni Mantelli and Others* and the *Libero Maietta* cases (order No. 14201 (Mantelli), *Foro italiano*, Vol. 134, 2009, I, p. 1568; order No. 14209 (Maietta), *Rivista di diritto internazionale*, Vol. 91, 2008, p. 896), the Italian Court of Cassation confirmed that the Italian courts had jurisdiction over the claims against Germany. A number of similar claims against Germany are currently pending before Italian courts.

29. The Italian Court of Cassation also confirmed the reasoning of the *Ferrini* judgment in a different context in proceedings brought against Mr. Max Josef Milde, a member of the “Hermann Göring” division of the German armed forces, who was charged with participation in massacres committed on 29 June 1944 in Civitella (Val di Chiana), Cornia and San Pancrazio in Italy. The Military Court of La Spezia (*Tribunale Militare di La Spezia*) sentenced Mr. Milde *in absentia* to life imprisonment and ordered Mr. Milde and Germany, jointly and severally, to pay reparation to the successors in title of the victims of the massacre who appeared as civil parties in the proceedings (judgment of 10 October 2006 (registered on 2 February 2007)). Germany appealed to the Military Court of Appeals in Rome (*Corte Militare di Appello di Roma*) against that part of the decision, which condemned it. On 18 December 2007 the Military Court of Appeals dismissed the appeal. In a judgment of 21 October 2008 (registered on 13 January 2009), the Italian Court of Cassation rejected Germany’s argument of lack of jurisdiction and confirmed its reasoning in the *Ferrini* judgment that in cases of crimes under international law, the jurisdictional immunity of States should be set aside (*Rivista di diritto internazionale*, Vol. 92, 2009, p. 618).

B. Cases involving Greek nationals

30. On 10 June 1944, during the German occupation of Greece, German armed forces committed a massacre in the Greek village of Distomo, involving many civilians. In 1995, relatives of the victims of the massacre who claimed compensation for loss of life and property commenced proceedings against Germany. The Greek Court of First Instance (*Protodikēio*) of Livadia rendered a judgment in default on 25 September 1997 (and read out in court on 30 October 1997) against Germany and awarded damages to the successors in title of the victims of the massacre. Germany's appeal of that judgment was dismissed by the Hellenic Supreme Court (*Areios Pagos*) on 4 May 2000 (*Prefecture of Voiotia v. Federal Republic of Germany*, case No. 11/2000 (*ILR*, Vol. 129, p. 513) (the *Distomo* case)). Article 923 of the Greek Code of Civil Procedure requires authorization from the Minister for Justice to enforce a judgment against a foreign State in Greece. That authorization was requested by the claimants in the *Distomo* case but was not granted. As a result, the judgments against Germany have remained unexecuted in Greece.

31. The claimants in the *Distomo* case brought proceedings against Greece and Germany before the European Court of Human Rights alleging that Germany and Greece had violated Article 6, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 1 to that Convention by refusing to comply with the decision of the Court of First Instance of Livadia dated 25 September 1997 (as to Germany) and failing to permit execution of that decision (as to Greece). In its decision of 12 December 2002, the European Court of Human Rights, referring to the rule of State immunity, held that the claimants' application was inadmissible (*Kalogeropoulos and Others v. Greece and Germany*, application No. 59021/00, decision of 12 December 2002, *ECHR Reports* 2002-X, p. 417; *ILR*, Vol. 129, p. 537).

32. The Greek claimants brought proceedings before the German courts in order to enforce in Germany the judgment rendered on 25 September 1997 by the Greek Court of First Instance of Livadia, as confirmed on 4 May 2000 by the Hellenic Supreme Court. In its judgment of 26 June 2003, the German Federal Supreme Court (*Bundesgerichtshof*) held that those Greek judicial decisions could not be recognized within the German legal order because they had been given in breach of Germany's entitlement to State immunity (*Greek Citizens v. Federal Republic of Germany*, case No. III ZR 245/98, *Neue Juristische Wochenschrift* (*NJW*), 2003, p. 3488; *ILR*, Vol. 129, p. 556).

33. The Greek claimants then sought to enforce the judgments of the Greek courts in the *Distomo* case in Italy. The Court of Appeal of Florence held in a decision dated 2 May 2005 (registered on 5 May 2005) that the order contained in the judgment of the Hellenic Supreme Court,

imposing an obligation on Germany to reimburse the legal expenses for the judicial proceedings before that Court, was enforceable in Italy. In a decision dated 6 February 2007 (registered on 22 March 2007), the Court of Appeal of Florence rejected the objection raised by Germany against the decision of 2 May 2005 (*Foro italiano*, Vol. 133, 2008, I, p. 1308). The Italian Court of Cassation, in a judgment dated 6 May 2008 (registered on 29 May 2008), confirmed the ruling of the Court of Appeal of Florence (*Rivista di diritto internazionale*, Vol. 92, 2009, p. 594).

34. Concerning the question of reparations to be paid to Greek claimants by Germany, the Court of Appeal of Florence declared, by a decision dated 13 June 2006 (registered on 16 June 2006), that the judgment of the Court of First Instance of Livadia dated 25 September 1997 was enforceable in Italy. In a judgment dated 21 October 2008 (registered on 25 November 2008), the Court of Appeal of Florence rejected the objection by the German Government against the decision of 13 June 2006. The Italian Court of Cassation, in a judgment dated 12 January 2011 (registered on 20 May 2011), confirmed the ruling of the Court of Appeal of Florence.

35. On 7 June 2007, the Greek claimants, pursuant to the decision by the Court of Appeal of Florence of 13 June 2006, registered with the Como provincial office of the Italian Land Registry (*Agenzia del Territorio*) a legal charge (*ipoteca giudiziale*) over Villa Vigoni, a property of the German State near Lake Como. The State Legal Service for the District of Milan (*Avvocatura Distrettuale dello Stato di Milano*), in a submission dated 6 June 2008 and made before the Court of Como (*Tribunale di Como*), maintained that the charge should be cancelled. Under Decree-Law No. 63 of 28 April 2010, Law No. 98 of 23 June 2010 and Decree-Law No. 216 of 29 December 2011, the legal charge was suspended pending the decision of the International Court of Justice in the present case.

36. Following the institution of proceedings in the *Distomo* case in 1995, another case was brought against Germany by Greek nationals before Greek courts — referred to as the *Margellos* case — involving claims for compensation for acts committed by German forces in the Greek village of Lidoriki in 1944. In 2001, the Hellenic Supreme Court referred that case to the Special Supreme Court (*Anotato Eidiko Dikastirio*), which, in accordance with Article 100 of the Constitution of Greece, has jurisdiction in relation to “the settlement of controversies regarding the determination of generally recognized rules of international law” [*translation by the Registry*], requesting it to decide whether the rules on State immunity covered acts referred to in the *Margellos* case. By a decision of 17 September 2002, the Special Supreme Court found that, in the present state of development of international law, Germany was entitled to State immunity (*Margellos v. Federal Republic of Germany*, case No. 6/2002, *ILR*, Vol. 129, p. 525).

II. THE SUBJECT-MATTER OF THE DISPUTE AND THE JURISDICTION OF THE COURT

37. The submissions presented to the Court by Germany have remained unchanged throughout the proceedings (see paragraphs 15, 16 and 17 above).

Germany requests the Court, in substance, to find that Italy has failed to respect the jurisdictional immunity which Germany enjoys under international law by allowing civil claims to be brought against it in the Italian courts, seeking reparation for injuries caused by violations of international humanitarian law committed by the German Reich during the Second World War; that Italy has also violated Germany's immunity by taking measures of constraint against Villa Vigoni, German State property situated in Italian territory; and that it has further breached Germany's jurisdictional immunity by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those which gave rise to the claims brought before Italian courts. Consequently, the Applicant requests the Court to declare that Italy's international responsibility is engaged and to order the Respondent to take various steps by way of reparation.

38. Italy, for its part, requests the Court to adjudge Germany's claims to be unfounded and therefore to reject them, apart from the submission regarding the measures of constraint taken against Villa Vigoni, on which point the Respondent indicates to the Court that it would have no objection to the latter ordering it to bring the said measures to an end.

In its Counter-Memorial, Italy submitted a counter-claim "with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich"; this claim was dismissed by the Court's Order of 6 July 2010, on the grounds that it did not fall within the jurisdiction of the Court and was consequently inadmissible under Article 80, paragraph 1, of the Rules of Court (see paragraph 5 above).

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39. The subject-matter of a dispute brought before the Court is delimited by the claims submitted to it by the parties. In the present case, since there is no longer any counter-claim before the Court and Italy has requested the Court to "adjudge Germany's claims to be unfounded", it is those claims that delimit the subject-matter of the dispute which the Court is called upon to settle. It is in respect of those claims that the Court must determine whether it has jurisdiction to entertain the case.

40. Italy has raised no objection of any kind regarding the jurisdiction of the Court or the admissibility of the Application.

Nevertheless, according to well-established jurisprudence, the Court "must . . . always be satisfied that it has jurisdiction, and must if necessary go into the matter *proprio motu*" (*Appeal relating to the Jurisdiction of the ICAC Council (India v. Pakistan)*, *Judgment, I.C.J. Reports 1972*, p. 52, para. 13).

41. Germany's Application was filed on the basis of the jurisdiction conferred on the Court by Article 1 of the European Convention for the Peaceful Settlement of Disputes, under the terms of which:

"The High Contracting Parties shall submit to the judgement of the International Court of Justice all international legal disputes which may arise between them including, in particular, those concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation."

42. Article 27, subparagraph (a), of the same Convention limits the scope of that instrument *ratione temporis* by stating that it shall not apply to "disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute". The Convention entered into force as between Germany and Italy on 18 April 1961.

43. The claims submitted to the Court by Germany certainly relate to "international legal disputes" within the meaning of Article 1 as cited above, between two States which, as has just been said, were both parties to the Convention on the date when the Application was filed, and indeed continue to be so.

44. The clause in the above-mentioned Article 27 imposing a limitation *ratione temporis* is not applicable to Germany's claims: the dispute which those claims concern does not "relat[e] to facts or situations prior to the entry into force of th[e] Convention as between the parties to the dispute", i.e., prior to 18 April 1961. The "facts or situations" which have given rise to the dispute before the Court are constituted by Italian judicial decisions that denied Germany the jurisdictional immunity which it claimed, and by measures of constraint applied to property belonging to Germany. Those decisions and measures were adopted between 2004 and 2011, thus well after the European Convention for the Peaceful Settlement of Disputes entered into force as between the Parties. It is true that the subject-matter of the disputes to which the judicial proceedings in question relate is reparation for the injury caused by actions of the German armed forces in 1943-1945. Germany's complaint before the Court, however, is not about the treatment of that subject-matter in the judgments of the Italian courts; its complaint is solely that its immunities from jurisdiction and enforcement have been violated. Defined in such

terms, the dispute undoubtedly relates to “facts or situations” occurring entirely after the entry into force of the Convention as between the Parties. Italy has thus rightly not sought to argue that the dispute brought before the Court by Germany falls wholly or partly within the limitation *ratione temporis* under the above-mentioned Article 27. The Court has jurisdiction to deal with the dispute.

45. The Parties, who have not disagreed on the analysis set out above, have on the other hand debated the extent of the Court’s jurisdiction in a quite different context, that of some of the arguments put forward by Italy in its defence and relating to the alleged non-performance by Germany of its obligation to make reparation to the Italian and Greek victims of the crimes committed by the German Reich in 1943-1945.

According to Italy, a link exists between the question of Germany’s performance of its obligation to make reparation to the victims and that of the jurisdictional immunity which Germany might rely on before the foreign courts to which those victims apply, in the sense that a State which fails to perform its obligation to make reparation to the victims of grave violations of international humanitarian law, and which offers those victims no effective means of claiming the reparation to which they may be entitled, would be deprived of the right to invoke its jurisdictional immunity before the courts of the State of the victims’ nationality.

46. Germany has contended that the Court could not rule on such an argument, on the basis that it concerned the question of reparation claims, which relate to facts prior to 18 April 1961. According to Germany, “facts occurring before the date of the entry into force of the European Convention for the Peaceful Settlement of Disputes as between Italy and Germany clearly lie outside the jurisdiction of the Court”, and “reparation claims do not fall within the subject-matter of the present dispute and do not form part of the present proceedings”. Germany relies in this respect on the Order whereby the Court dismissed Italy’s counter-claim, which precisely asked the Court to find that Germany had violated its obligation of reparation owed to Italian victims of war crimes and crimes against humanity committed by the German Reich (see paragraph 38). Germany points out that this dismissal was based on the fact that the said counter-claim fell outside the jurisdiction of the Court, because of the clause imposing a limitation *ratione temporis* in the above-mentioned Article 27 of the European Convention for the Peaceful Settlement of Disputes, the question of reparation claims resulting directly from the acts committed in 1943-1945.

47. Italy has responded to this objection that, while the Order of 6 July 2010 certainly prevents it from pursuing its counter-claim in the present case, it does not on the other hand prevent it from using the arguments on which it based that counter-claim in its defence against Germany’s

claims; that the question of the lack of appropriate reparation is, in its view, crucial for resolving the dispute over immunity; and that the Court’s jurisdiction to take cognizance of it incidentally is thus indisputable.

48. The Court notes that, since the dismissal of Italy’s counter-claim, it no longer has before it any submissions asking it to rule on the question of whether Germany has a duty of reparation towards the Italian victims of the crimes committed by the German Reich and whether it has complied with that obligation in respect of all those victims, or only some of them. The Court is therefore not called upon to rule on those questions.

49. However, in support of its submission that it has not violated Germany’s jurisdictional immunity, Italy contends that Germany stands deprived of the right to invoke that immunity in Italian courts before which civil actions have been brought by some of the victims, because of the fact that it has not fully complied with its duty of reparation.

50. The Court must determine whether, as Italy maintains, the failure of a State to perform completely a duty of reparation which it allegedly bears is capable of having an effect, in law, on the existence and scope of that State’s jurisdictional immunity before foreign courts. This question is one of law on which the Court must rule in order to determine the customary international law applicable in respect of State immunity for the purposes of the present case.

Should the preceding question be answered in the affirmative, the second question would be whether, in the specific circumstances of the case, taking account in particular of Germany’s conduct on the issue of reparation, the Italian courts had sufficient grounds for setting aside Germany’s immunity. It is not necessary for the Court to satisfy itself that it has jurisdiction to respond to this second question until it has responded to the first.

The Court considers that, at this stage, no other question arises with regard to the existence or scope of its jurisdiction.

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51. The Court will first address the issues raised by Germany’s first submission, namely whether, by exercising jurisdiction over Germany with regard to the claims brought before them by the various Italian claimants, the Italian courts acted in breach of Italy’s obligation to accord jurisdictional immunity to Germany. It will then turn, in Section IV, to the measures of constraint adopted in respect of Villa Vigoni and, in Section V, to the decisions of the Italian courts declaring enforceable in Italy the judgments of the Greek courts.

III. ALLEGED VIOLATION OF GERMANY'S
JURISDICTIONAL IMMUNITY IN THE PROCEEDINGS BROUGHT
BY THE ITALIAN CLAIMANTS

1. *The Issues before the Court*

52. The Court begins by observing that the proceedings in the Italian courts have their origins in acts perpetrated by German armed forces and other organs of the German Reich. Germany has fully acknowledged the “untold suffering inflicted on Italian men and women in particular during massacres, and on former Italian military internees” (Joint Declaration of Germany and Italy, Trieste, 18 November 2008), accepts that these acts were unlawful and stated before this Court that it “is fully aware of [its] responsibility in this regard”. The Court considers that the acts in question can only be described as displaying a complete disregard for the “elementary considerations of humanity” (*Corfu Channel (United Kingdom v. Albania)*, *Merits, Judgment*, I.C.J. Reports 1949, p. 22; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, I.C.J. Reports 1986, p. 112). One category of cases involved the large-scale killing of civilians in occupied territory as part of a policy of reprisals, exemplified by the massacres committed on 29 June 1944 in Civitella (Val di Chiana), Cornia and San Pancrazio by members of the “Hermann Göring” division of the German armed forces involving the killing of 203 civilians taken as hostages after resistance fighters had killed four German soldiers a few days earlier (*Max Josef Milde* case, Military Court of La Spezia, judgment of 10 October 2006 (registered on 2 February 2007)). Another category involved members of the civilian population who, like Mr. Luigi Ferrini, were deported from Italy to what was in substance slave labour in Germany. The third concerned members of the Italian armed forces who were denied the status of prisoner of war, together with the protections which that status entailed, to which they were entitled and who were similarly used as forced labourers. The Court considers that there can be no doubt that this conduct was a serious violation of the international law of armed conflict applicable in 1943-1945. Article 6 (b) of the Charter of the International Military Tribunal, 8 August 1945 (United Nations, *Treaty Series (UNTS)*, Vol. 82, p. 279), convened at Nuremberg included as war crimes “murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory”, as well as “murder or ill-treatment of prisoners of war”. The list of crimes against humanity in Article 6 (c) of the Charter included “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war”. The murder of civilian hostages in Italy was one of the counts on which a number of war crimes defendants were condemned in trials immediately after the Second World War (e.g., *Von Mackensen and Maelzer* (1946), *Annual Digest*, Vol. 13, p. 258; *Kesselring* (1947), *Annual Digest*, Vol. 13, p. 260; and

Kappeler (1948), *Annual Digest*, Vol. 15, p. 471). The principles of the Nuremberg Charter were confirmed by the General Assembly of the United Nations in resolution 95 (I) of 11 December 1946.

53. However, the Court is not called upon to decide whether these acts were illegal, a point which is not contested. The question for the Court is whether or not, in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity. In that context, the Court notes that there is a considerable measure of agreement between the Parties regarding the applicable law. In particular, both Parties agree that immunity is governed by international law and is not a mere matter of comity.

54. As between Germany and Italy, any entitlement to immunity can be derived only from customary international law, rather than treaty. Although Germany is one of the eight States parties to the European Convention on State Immunity of 16 May 1972 (Council of Europe, *European Treaty Series (ETS)*, No. 74; *UNTS*, Vol. 1495, p. 182) (hereinafter the “European Convention”), Italy is not a party and the Convention is accordingly not binding upon it. Neither State is party to the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted on 2 December 2004 (hereinafter the “United Nations Convention”), which is not yet in force in any event. As of 1 February 2012, the United Nations Convention had been signed by twenty-eight States and obtained thirteen instruments of ratification, acceptance, approval or accession. Article 30 of the Convention provides that it will enter into force on the thirtieth day after deposit of the thirtieth such instrument. Neither Germany nor Italy has signed the Convention.

55. It follows that the Court must determine, in accordance with Article 38 (1) (b) of its Statute, the existence of “international custom, as evidence of a general practice accepted as law” conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be “a settled practice” together with *opinio juris* (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, *Judgment*, I.C.J. Reports 1969, p. 44, para. 77). Moreover, as the Court has also observed,

“[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris*

of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them” (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment*, *I.C.J. Reports 1985*, pp. 29–30, para. 27).

In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States. While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court.

56. Although there has been much debate regarding the origins of State immunity and the identification of the principles underlying that immunity in the past, the International Law Commission concluded in 1980 that the rule of State immunity had been “adopted as a general rule of customary international law solidly rooted in the current practice of States” (*Yearbook of the International Law Commission*, 1980, Vol. II (2), p. 147, para. 26). That conclusion was based upon an extensive survey of State practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention. That practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.

57. The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sov-

ereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.

58. The Parties are thus in broad agreement regarding the validity and importance of State immunity as a part of customary international law. They differ, however, as to whether (as Germany contends) the law to be applied is that which determined the scope and extent of State immunity in 1943–1945, i.e., at the time that the events giving rise to the proceedings in the Italian courts took place, or (as Italy maintains) that which applied at the time the proceedings themselves occurred. The Court observes that, in accordance with the principle stated in Article 13 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred. In that context, it is important to distinguish between the relevant acts of Germany and those of Italy. The relevant German acts — which are described in paragraph 52 — occurred in 1943–1945, and it is, therefore, the international law of that time which is applicable to them. The relevant Italian acts — the denial of immunity and exercise of jurisdiction by the Italian courts — did not occur until the proceedings in the Italian courts took place. Since the claim before the Court concerns the actions of the Italian courts, it is the international law in force at the time of those proceedings which the Court has to apply. Moreover, as the Court has stated (in the context of the personal immunities accorded by international law to foreign ministers), the law of immunity is essentially procedural in nature (*Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment*, *I.C.J. Reports 2002*, p. 25, para. 60). It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful. For these reasons, the Court considers that it must examine and apply the law on State immunity as it existed at the time of the Italian proceedings, rather than that which existed in 1943–1945.

59. The Parties also differ as to the scope and extent of the rule of State immunity. In that context, the Court notes that many States (including both Germany and Italy) now distinguish between *acta jure gestionis*, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and *acta jure imperii*. That approach has also been followed in the United Nations Convention and the European Convention (see also the draft Inter-American Convention on Jurisdictional Immunity of States drawn up by the Inter-American

Judicial Committee of the Organization of American States in 1983 (*ILM*, Vol. 22, p. 292)).

60. The Court is not called upon to address the question of how international law treats the issue of State immunity in respect of *acta jure gestionis*. The acts of the German armed forces and other State organs which were the subject of the proceedings in the Italian courts clearly constituted *acta jure imperii*. The Court notes that Italy, in response to a question posed by a Member of the Court, recognized that those acts had to be characterized as *acta jure imperii*, notwithstanding that they were unlawful. The Court considers that the terms "*jure imperii*" and "*jure gestionis*" do not imply that the acts in question are lawful but refer rather to whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power (*jus imperii*) or the law concerning non-sovereign activities of a State, especially private and commercial activities (*jus gestionis*). To the extent that this distinction is significant for determining whether or not a State is entitled to immunity from the jurisdiction of another State's courts in respect of a particular act, it has to be applied before that jurisdiction can be exercised, whereas the legality or illegality of the act is something which can be determined only in the exercise of that jurisdiction. Although the present case is unusual in that the illegality of the acts at issue has been admitted by Germany at all stages of the proceedings, the Court considers that this fact does not alter the characterization of those acts as *acta jure imperii*.

61. Both Parties agree that States are generally entitled to immunity in respect of *acta jure imperii*. That is the approach taken in the United Nations, European and draft Inter-American Conventions, the national legislation in those States which have adopted statutes on the subject and the jurisprudence of national courts. It is against that background that the Court must approach the question raised by the present proceedings, namely whether that immunity is applicable to acts committed by the armed forces of a State (and other organs of that State acting in co-operation with the armed forces) in the course of conducting an armed conflict. Germany maintains that immunity is applicable and that there is no relevant limitation on the immunity to which a State is entitled in respect of *acta jure imperii*. Italy, in its pleadings before the Court, maintains that Germany is not entitled to immunity in respect of the cases before the Italian courts for two reasons: first, that immunity as to *acta jure imperii* does not extend to torts or delicts occasioning death, personal injury or damage to property committed on the territory of the forum State, and, secondly, that, irrespective of where the relevant acts took place, Germany was not entitled to immunity because those acts involved the most serious violations of rules of international law of a peremptory character for which no alternative means of redress was available. The Court will consider each of Italy's arguments in turn.

2. Italy's First Argument: The Territorial Tort Principle

62. The essence of the first Italian argument is that customary international law has developed to the point where a State is no longer entitled to immunity in respect of acts occasioning death, personal injury or damage to property on the territory of the forum State, even if the act in question was performed *jure imperii*. Italy recognizes that this argument is applicable only to those of the claims brought before the Italian courts which concern acts that occurred in Italy and not to the cases of Italian military internees taken prisoner outside Italy and transferred to Germany or other territories outside Italy as forced labour. In support of its argument, Italy points to the adoption of Article 11 of the European Convention and Article 12 of the United Nations Convention and to the fact that nine of the ten States it identified which have adopted legislation specifically dealing with State immunity (the exception being Pakistan) have enacted provisions similar to those in the two Conventions. Italy acknowledges that the European Convention contains a provision to the effect that the Convention is not applicable to the acts of foreign armed forces (Art. 31) but maintains that this provision is merely a saving clause aimed primarily at avoiding conflicts between the Convention and instruments regulating the status of visiting forces present with the consent of the territorial sovereign and that it does not show that States are entitled to immunity in respect of the acts of their armed forces in another State. Italy dismisses the significance of certain statements (discussed in paragraph 69 below) made during the process of adoption of the United Nations Convention suggesting that that Convention did not apply to the acts of armed forces. Italy also notes that two of the national statutes (those of the United Kingdom and Singapore) are not applicable to the acts of foreign armed forces but argues that the other seven (those of Argentina, Australia, Canada, Israel, Japan, South Africa and the United States of America) amount to significant State practice asserting jurisdiction over torts occasioned by foreign armed forces.

63. Germany maintains that, in so far as they deny a State immunity in respect of *acta jure imperii*, neither Article 11 of the European Convention, nor Article 12 of the United Nations Convention reflects customary international law. It contends that, in any event, they are irrelevant to the present proceedings, because neither provision was intended to apply to the acts of armed forces. Germany also points to the fact that, with the exception of the Italian cases and the *Distomo* case in Greece, no national court has ever held that a State was not entitled to immunity in respect of acts of its armed forces, in the context of an armed conflict and that, by

contrast, the courts in several States have expressly declined jurisdiction in such cases on the ground that the respondent State was entitled to immunity.

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64. The Court begins by observing that the notion that State immunity does not extend to civil proceedings in respect of acts committed on the territory of the forum State causing death, personal injury or damage to property originated in cases concerning road traffic accidents and other “insurable risks”. The limitation of immunity recognized by some national courts in such cases was treated as confined to *acta jure gestionis* (see, e.g., the judgment of the Supreme Court of Austria in *Holubek v. Government of the United States of America* (*Juristische Blätter* (Vienna), Vol. 84, 1962, p. 43; *ILR*, Vol. 40, p. 73)). The Court notes, however, that none of the national legislation which provides for a “territorial tort exception” to immunity expressly distinguishes between *acta jure gestionis* and *acta jure imperii*. The Supreme Court of Canada expressly rejected the suggestion that the exception in the Canadian legislation was subject to such a distinction (*Schreiber v. Federal Republic of Germany and the Attorney General of Canada*, [2002] *Supreme Court Reports (SCR)*, Vol. 3, p. 269, paras. 33-36). Nor is such a distinction featured in either Article 11 of the European Convention or Article 12 of the United Nations Convention. The International Law Commission’s commentary on the text of what became Article 12 of the United Nations Convention makes clear that this was a deliberate choice and that the provision was not intended to be restricted to *acta jure gestionis* (*Yearbook of the International Law Commission*, 1991, Vol. II (2), p. 45, para. 8). Germany has not, however, been alone in suggesting that, in so far as it was intended to apply to *acta jure imperii*, Article 12 was not representative of customary international law. In criticizing the International Law Commission’s draft of what became Article 12, China commented in 1990 that “the article had gone even further than the restrictive doctrine, for it made no distinction between sovereign acts and private law acts” (United Nations doc. A/C.6/45/SR.25, p. 2) and the United States, commenting in 2004 on the draft United Nations Convention, stated that Article 12 “must be interpreted and applied consistently with the time-honoured distinction between *acta jure imperii* and *acta jure gestionis*” since to extend jurisdiction without regard to that distinction “would be contrary to the existing principles of international law” (United Nations doc. A/C.6/59/SR.13, p. 10, para. 63).

65. The Court considers that it is not called upon in the present proceedings to resolve the question whether there is in customary interna-

tional law a “tort exception” to State immunity applicable to *acta jure imperii* in general. The issue before the Court is confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict.

66. The Court will first consider whether the adoption of Article 11 of the European Convention or Article 12 of the United Nations Convention affords any support to Italy’s contention that States are no longer entitled to immunity in respect of the type of acts specified in the preceding paragraph. As the Court has already explained (see paragraph 54 above), neither Convention is in force between the Parties to the present case. The provisions of these Conventions are, therefore, relevant only in so far as their provisions and the process of their adoption and implementation shed light on the content of customary international law.

67. Article 11 of the European Convention states the territorial tort principle in broad terms,

“A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.”

That provision must, however, be read in the light of Article 31, which provides,

“Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.”

Although one of the concerns which Article 31 was intended to address was the relationship between the Convention and the various agreements on the status of visiting forces, the language of Article 31 makes clear that it is not confined to that matter and excludes from the scope of the Convention all proceedings relating to acts of foreign armed forces, irrespective of whether those forces are present in the territory of the forum with the consent of the forum State and whether their acts take place in peacetime or in conditions of armed conflict. The Explanatory Report on the Convention, which contains a detailed commentary prepared as part of the negotiating process, states in respect of Article 31,

“The Convention is not intended to govern situations which may arise in the event of armed conflict; *nor* can it be invoked to resolve

problems which may arise between allied States as a result of the stationing of forces. These problems are generally dealt with by special agreements (cf. Art. 33).

[Article 31] prevents the Convention being interpreted as having any influence upon these matters.” (Para. 116; emphasis added.)

68. The Court agrees with Italy that Article 31 takes effect as a “saving clause”, with the result that the immunity of a State for the acts of its armed forces falls entirely outside the Convention and has to be determined by reference to customary international law. The consequence, however, is that the inclusion of the “territorial tort principle” in Article 11 of the Convention cannot be treated as support for the argument that a State is not entitled to immunity for torts committed by its armed forces. As the Explanatory Report states, the effect of Article 31 is that the Convention has no influence upon that question. Courts in Belgium (judgment of the Court of First Instance of Ghent in *Botelberghe v. German State*, 18 February 2000), Ireland (judgment of the Supreme Court in *McElhinney v. Williams*, 15 December 1995, [1995] 3 *Irish Reports* 382; *ILLR*, Vol. 104, p. 691), Slovenia (case No. Up-13/99, Constitutional Court, para. 13), Greece (*Margellos v. Federal Republic of Germany*, case No. 6/2002, *ILLR*, Vol. 129, p. 529) and Poland (judgment of the Supreme Court of Poland, *Natoniowski v. Federal Republic of Germany*, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299) have concluded that Article 31 means that the immunity of a State for torts committed by its armed forces is unaffected by Article 11 of the Convention.

69. Article 12 of the United Nations Convention provides,

“Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.”

Unlike the European Convention, the United Nations Convention contains no express provision excluding the acts of armed forces from its scope. However, the International Law Commission’s commentary on the text of Article 12 states that that provision does not apply to “situations involving armed conflicts” (*Yearbook of the International Law Commis-*

sion, 1991, Vol. II (2), p. 46, para. 10). Moreover, in presenting to the Sixth Committee of the General Assembly the Report of the *Ad Hoc* Committee on Jurisdictional Immunities of States and Their Property (United Nations doc. A/59/22), the Chairman of the *Ad Hoc* Committee stated that the draft Convention had been prepared on the basis of a general understanding that military activities were not covered (United Nations doc. A/C.6/59/SR.13, p. 6, para. 36).

No State questioned this interpretation. Moreover, the Court notes that two of the States which have so far ratified the Convention, Norway and Sweden, made declarations in identical terms stating their understanding that “the Convention does not apply to military activities, including the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, and activities undertaken by military forces of a State in the exercise of their official duties” (United Nations doc. C.N.280.2006.TREATIES-2 and United Nations doc. C.N.912.2009.TREATIES-1). In the light of these various statements, the Court concludes that the inclusion in the Convention of Article 12 cannot be taken as affording any support to the contention that customary international law denies State immunity in tort proceedings relating to acts occasioning death, personal injury or damage to property committed in the territory of the forum State by the armed forces and associated organs of another State in the context of an armed conflict.

70. Turning to State practice in the form of national legislation, the Court notes that nine of the ten States referred to by the Parties which have legislated specifically for the subject of State immunity have adopted provisions to the effect that a State is not entitled to immunity in respect of torts occasioning death, personal injury or damage to property occurring on the territory of the forum State (United States of America Foreign Sovereign Immunities Act 1976, 28 *USC*, Sect. 1605 (a) (5); United Kingdom State Immunity Act 1978, Sect. 5; South Africa Foreign States Immunities Act 1981, Sect. 6; Canada State Immunity Act 1985, Sect. 6; Australia Foreign States Immunities Act 1985, Sect. 13; Singapore State Immunity Act 1985, Sect. 7; Argentina Law No. 24,488 (Statute on the Immunity of Foreign States before Argentine Tribunals) 1995, Art. 2 (e); Israel Foreign State Immunity Law 2008, Sect. 5; and Japan, Act on the Civil Jurisdiction of Japan with respect to a Foreign State, 2009, Art. 10). Only Pakistan’s State Immunity Ordinance 1981 contains no comparable provision.

71. Two of these statutes (the United Kingdom State Immunity Act 1978, Section 16 (2) and the Singapore State Immunity Act 1985, Sec-

tion 19 (2) (a)) contain provisions that exclude proceedings relating to the acts of foreign armed forces from their application. The corresponding provisions in the Canadian, Australian and Israeli statutes exclude only the acts of visiting forces present with the consent of the host State or matters covered by legislation regarding such visiting forces (Canada State Immunity Act 1985, Section 16; Australia Foreign States Immunities Act 1985, Section 6; Israel Foreign State Immunity Law 2008, Section 22). The legislation of South Africa, Argentina and Japan contains no exclusion clause. However, the Japanese statute (in Article 3) states that its provisions “shall not affect the privileges or immunities enjoyed by a foreign State . . . based on treaties or the established international law”.

The United States Foreign Sovereign Immunities Act 1976 contains no provision specifically addressing claims relating to the acts of foreign armed forces but its provision that there is no immunity in respect of claims “in which money damages are sought against a foreign State for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign State” (Sec. 1605 (a) (5)) is subject to an exception for “any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused” (Sec. 1605 (a) (5) (A)). Interpreting this provision, which has no counterpart in the legislation of other States, a court in the United States has held that a foreign State whose agents committed an assassination in the United States was not entitled to immunity (*Letelier v. Republic of Chile* (1980), *Federal Supplement (F. Supp.)*, Vol. 488, p. 665; *ILR*, Vol. 63, p. 378 (United States District Court, District of Columbia)). However, the Court is not aware of any case in the United States where the courts have been called upon to apply this provision to acts performed by the armed forces and associated organs of foreign States in the course of an armed conflict.

Indeed, in none of the seven States in which the legislation contains no general exclusion for the acts of armed forces, have the courts been called upon to apply that legislation in a case involving the armed forces of a foreign State, and associated organs of State, acting in the context of an armed conflict.

72. The Court next turns to State practice in the form of the judgments of national courts regarding State immunity in relation to the acts of armed forces. The question whether a State is entitled to immunity in proceedings concerning torts allegedly committed by its armed forces when stationed on or visiting the territory of another State, with the consent of the latter, has been considered by national courts on a number of occasions. Decisions of the courts of Egypt (*Bassioni Amrane v. John, Gazette des Tribunaux mixtes d’Egypte*, January 1934, p. 108; *Annual Digest*, Vol. 7, p. 187), Belgium (*S.A. Eau, gaz, électricité et applications v.*

Office d’aide mutuelle, Cour d’appel, Brussels, Pasiricise belge, 1957, Vol. 144, 2nd Part, p. 88; *ILR*, Vol. 23, p. 205) and Germany (*Immunity of the United Kingdom*, Court of Appeal of Schleswig, *Jahrbuch für Internationales Recht*, 1957, Vol. 7, p. 400; *ILR*, Vol. 24, p. 207) are earlier examples of national courts according immunity where the acts of foreign armed forces were characterized as *acta jure imperii*. Since then, several national courts have held that a State is immune with respect to damage caused by warships (*United States of America v. Eemshaven Port Authority*, Supreme Court of the Netherlands, *Nederlandse Jurisprudentie*, 2001, No. 567; *ILR*, Vol. 127, p. 225; *Allianz Via Insurance v. United States of America* (1999), *Cour d’appel, Aix-en-Provence*, 2nd Chamber, judgment of 3 September 1999, *ILR*, Vol. 127, p. 148) or military exercises (*FILT-CGIL Trento v. United States of America*, Italian Court of Cassation, *Rivista di diritto internazionale*, Vol. 83, 2000, p. 1155; *ILR*, Vol. 128, p. 644). The United Kingdom courts have held that customary international law required immunity in proceedings for torts committed by foreign armed forces on United Kingdom territory if the acts in question were *acta jure imperii* (*Littrell v. United States of America* (No. 2), Court of Appeal, [1995] 1 *Weekly Law Reports (WLR)* 82; *ILR*, Vol. 100, p. 438; *Holland v. Lampen-Wolfe*, House of Lords, [2000] 1 *WLR* 1573; *ILR*, Vol. 119, p. 367).

The Supreme Court of Ireland held that international law required that a foreign State be accorded immunity in respect of acts *jure imperii* carried out by members of its armed forces even when on the territory of the forum State without the forum State’s permission (*McElhinney v. Williams*, [1995] 3 *Irish Reports* 382; *ILR*, Vol. 104, p. 691). The Grand Chamber of the European Court of Human Rights later held that this decision reflected a widely held view of international law so that the grant of immunity could not be regarded as incompatible with the European Convention on Human Rights (*McElhinney v. Ireland* [GC], application No. 31253/96, judgment of 21 November 2001, *ECHR Reports* 2001-XI, p. 39; *ILR*, Vol. 123, p. 73, para. 38).

While not directly concerned with the specific issue which arises in the present case, these judicial decisions, which do not appear to have been contradicted in any other national court judgments, suggest that a State is entitled to immunity in respect of *acta jure imperii* committed by its armed forces on the territory of another State.

73. The Court considers, however, that for the purposes of the present case the most pertinent State practice is to be found in those national judicial decisions which concerned the question whether a State was entitled to immunity in proceedings concerning acts allegedly committed by its armed forces in the course of an armed conflict. All of those cases, the facts of which are often very similar to those of the cases before the

Italian courts, concern the events of the Second World War. In this context, the *Cour de cassation* in France has consistently held that Germany was entitled to immunity in a series of cases brought by claimants who had been deported from occupied French territory during the Second World War (No. 02-45961, 16 December 2003, *Bull. civ.*, 2003, I, No. 258, p. 206 (the *Bucheron* case); No. 03-41851, 2 June 2004, *Bull. civ.*, 2004, I, No. 158, p. 132 (the *X* case) and No. 04-47504, 3 January 2006 (the *Grosz* case)). The Court also notes that the European Court of Human Rights held in *Grosz v. France* (application No. 14717/06, decision of 16 June 2009) that France had not contravened the European Convention on Human Rights in the proceedings which were the subject of the 2006 *Cour de cassation* judgment (judgment No. 04-47504), because the *Cour de cassation* had given effect to an immunity required by international law.

74. The highest courts in Slovenia and Poland have also held that Germany was entitled to immunity in respect of unlawful acts perpetrated on their territory by its armed forces during the Second World War. In 2001 the Constitutional Court of Slovenia ruled that Germany was entitled to immunity in an action brought by a claimant who had been deported to Germany during the German occupation and that the Supreme Court of Slovenia had not acted arbitrarily in upholding that immunity (case No. Up-13/99, judgment of 8 March 2001). The Supreme Court of Poland held, in *Natoniewski v. Federal Republic of Germany* (judgment of 29 October 2010, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299), that Germany was entitled to immunity in an action brought by a claimant who in 1944 had suffered injuries when German forces burned his village in occupied Poland and murdered several hundred of its inhabitants. The Supreme Court, after an extensive review of the decisions in *Ferrini*, *Distomo* and *Margellos*, as well as the provisions of the European Convention and the United Nations Convention and a range of other materials, concluded that States remained entitled to immunity in respect of torts allegedly committed by their armed forces in the course of an armed conflict. Judgments by lower courts in Belgium (judgment of the Court of First Instance of Ghent in 2000 in *Botelberghe v. German State*), Serbia (judgment of the Court of First Instance of Leskovac, 1 November 2001) and Brazil (*Barreto v. Federal Republic of Germany*, Federal Court, Rio de Janeiro, judgment of 9 July 2008 holding Germany immune in proceedings regarding the sinking of a Brazilian fishing vessel by a German submarine in Brazilian waters) have also held that Germany was immune in actions for acts of war committed on their territory or in their waters.

75. Finally, the Court notes that the German courts have also concluded that the territorial tort principle did not remove a State's entitle-

ment to immunity under international law in respect of acts committed by its armed forces, even where those acts took place on the territory of the forum State (judgment of the Federal Supreme Court of 26 June 2003 (*Greek Citizens v. Federal Republic of Germany*, case No. III ZR 245/98, *NJW*, 2003, p. 3488; *ILR*, Vol. 129, p. 556), declining to give effect in Germany to the Greek judgment in the *Distomo* case on the ground that it had been given in breach of Germany's entitlement to immunity).

76. The only State in which there is any judicial practice which appears to support the Italian argument, apart from the judgments of the Italian courts which are the subject of the present proceedings, is Greece. The judgment of the Hellenic Supreme Court in the *Distomo* case in 2000 contains an extensive discussion of the territorial tort principle without any suggestion that it does not extend to the acts of armed forces during an armed conflict. However, the Greek Special Supreme Court, in its judgment in *Margellos v. Federal Republic of Germany* (case No. 6/2002, *ILR*, Vol. 129, p. 525), repudiated the reasoning of the Supreme Court in *Distomo* and held that Germany was entitled to immunity. In particular, the Special Supreme Court held that the territorial tort principle was not applicable to the acts of the armed forces of a State in the conduct of an armed conflict. While that judgment does not alter the outcome in the *Distomo* case, a matter considered below, Greece has informed the Court that courts and other bodies in Greece faced with the same issue of whether immunity is applicable to torts allegedly committed by foreign armed forces in Greece are required to follow the stance taken by the Special Supreme Court in its decision in *Margellos* unless they consider that customary international law has changed since the *Margellos* judgment. Germany has pointed out that, since the judgment in *Margellos* was given, no Greek court has denied immunity in proceedings brought against Germany in respect of torts allegedly committed by German armed forces during the Second World War and in a 2009 decision (decision No. 853/2009), the Supreme Court, although deciding the case on a different ground, approved the reasoning in *Margellos*. In view of the judgment in *Margellos* and the dictum in the 2009 case, as well as the decision of the Greek Government not to permit enforcement of the *Distomo* judgment in Greece itself and the Government's defence of that decision before the European Court of Human Rights in *Kalogeropoulou and Others v. Greece and Germany* (application No. 59021/00, decision of 12 December 2002, *ECHR Reports* 2002-X, p. 417; *ILR*, Vol. 129, p. 537), the Court concludes that Greek State practice taken as a whole actually contradicts, rather than supports, Italy's argument.

77. In the Court's opinion, State practice in the form of judicial decisions supports the proposition that State immunity for *acta jure imperii*

continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. That practice is accompanied by *opinio juris*, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity. The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States in connection with the work of the International Law Commission regarding State immunity and the adoption of the United Nations Convention or, so far as the Court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases.

78. In light of the foregoing, the Court considers that customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict. That conclusion is confirmed by the judgments of the European Court of Human Rights to which the Court has referred (see paragraphs 72, 73 and 76).

79. The Court therefore concludes that, contrary to what had been argued by Italy in the present proceedings, the decision of the Italian courts to deny immunity to Germany cannot be justified on the basis of the territorial tort principle.

3. *Italy's Second Argument: The Subject-Matter and Circumstances of the Claims in the Italian Courts*

80. Italy's second argument, which, unlike its first argument, applies to all of the claims brought before the Italian courts, is that the denial of immunity was justified on account of the particular nature of the acts forming the subject-matter of the claims before the Italian courts and the circumstances in which those claims were made. There are three strands to this argument. First, Italy contends that the acts which gave rise to the claims constituted serious violations of the principles of international law applicable to the conduct of armed conflict, amounting to war crimes and crimes against humanity. Secondly, Italy maintains that the rules of international law thus contravened were peremptory norms (*ius cogens*). Thirdly, Italy argues that the claimants having been denied all other forms of redress, the exercise of jurisdiction by the Italian courts was necessary as a matter of last resort. The Court will consider each of these strands in turn, while recognizing that, in the oral proceedings, Italy also contended that its courts had been entitled to deny State immunity because of the combined effect of these three strands.

A. *The gravity of the violations*

81. The first strand is based upon the proposition that international law does not accord immunity to a State, or at least restricts its right to immunity, when that State has committed serious violations of the law of armed conflict (international humanitarian law as it is more commonly termed today, although the term was not used in 1943-1945). In the present case, the Court has already made clear (see paragraph 52 above) that the actions of the German armed forces and other organs of the German Reich giving rise to the proceedings before the Italian courts were serious violations of the law of armed conflict which amounted to crimes under international law. The question is whether that fact operates to deprive Germany of an entitlement to immunity.

82. At the outset, however, the Court must observe that the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem. Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.

83. That said, the Court must nevertheless inquire whether customary international law has developed to the point where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict. Apart from the decisions of the Italian courts which are the subject of the present proceedings, there is almost no State practice which might be considered to support the proposition that a State is deprived of its entitlement to immunity in such a case. Although the Hellenic Supreme Court in the *Distomo* case adopted a form of that proposition, the Special Supreme Court in *Margellos* repudiated that approach two years later. As the Court has noted in paragraph 76 above, under Greek law it is the stance adopted in *Margellos* which must be followed in later cases unless the Greek courts find that there has been a change in customary international law since 2002, which they have not done. As with the territorial tort principle, the Court considers that Greek practice, taken as a whole, tends to deny that the proposition advanced by Italy has become part of customary international law.

84. In addition, there is a substantial body of State practice from other countries which demonstrates that customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.

85. That practice is particularly evident in the judgments of national courts. Arguments to the effect that international law no longer required State immunity in cases of allegations of serious violations of international human rights law, war crimes or crimes against humanity have been rejected by the courts in Canada (*Bouzari v. Islamic Republic of Iran*, Court of Appeal of Ontario, [2004] *Dominion Law Reports (DLR)*, 4th Series, Vol. 243, p. 406; *ILR*, Vol. 128, p. 586; allegations of torture), France (judgment of the Court of Appeal of Paris, 9 September 2002, and *Cour de cassation*, No. 02-45961, 16 December 2003, *Bulletin civil de la Cour de cassation (Bull. civ.)*, 2003, I, No. 258, p. 206 (the *Bucheron* case); *Cour de cassation*, No. 03-41851, 2 June 2004, *Bull. civ.*, 2004, I, No. 158, p. 132 (the *X* case) and *Cour de cassation*, No. 04-47504, 3 January 2006 (the *Grosz* case); allegations of crimes against humanity), Slovenia (case No. Up-13/99, Constitutional Court of Slovenia; allegations of war crimes and crimes against humanity), New Zealand (*Fang v. Jiang*, High Court, [2007] *New Zealand Administrative Reports (NZAR)*, p. 420; *ILR*, Vol. 141, p. 702; allegations of torture), Poland (*Natoniewski*, Supreme Court, 2010, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299; allegations of war crimes and crimes against humanity) and the United Kingdom (*Jones v. Saudi Arabia*, House of Lords, [2007] 1 *Appeal Cases (AC)* 270; *ILR*, Vol. 129, p. 629; allegations of torture).

86. The Court notes that, in its response to a question posed by a Member of the Court, Italy itself appeared to demonstrate uncertainty about this aspect of its case. Italy commented,

“Italy is aware of the view according to which war crimes and crimes against humanity could not be considered to be sovereign acts for which the State is entitled to invoke the defence of sovereign immunity . . . While Italy acknowledges that in this area the law of State immunity is undergoing a process of change, it also recognizes that it is not clear at this stage whether this process will result in a new general exception to immunity — namely a rule denying immunity with respect to every claim for compensation arising out [of] international crimes.”

A similar uncertainty is evident in the orders of the Italian Court of Cassation in *Mantelli* and *Maietta* (orders of 29 May 2008).

87. The Court does not consider that the United Kingdom judgment in *Pinochet (No. 3)* ([2000] 1 *AC* 147; *ILR*, Vol. 119, p. 136) is relevant, notwithstanding the reliance placed on that judgment by the Italian Court

of Cassation in *Ferrini*. *Pinochet* concerned the immunity of a former Head of State from the criminal jurisdiction of another State, not the immunity of the State itself in proceedings designed to establish its liability to damages. The distinction between the immunity of the official in the former type of case and that of the State in the latter case was emphasized by several of the judges in *Pinochet* (Lord Hutton at pp. 254 and 264, Lord Millett at p. 278 and Lord Phillips at pp. 280-281). In its later judgment in *Jones v. Saudi Arabia* ([2007] 1 *AC* 270; *ILR*, Vol. 129, p. 629), the House of Lords further clarified this distinction, Lord Bingham describing the distinction between criminal and civil proceedings as “fundamental to the decision” in *Pinochet* (para. 32). Moreover, the rationale for the judgment in *Pinochet* was based upon the specific language of the 1984 United Nations Convention against Torture, which has no bearing on the present case.

88. With reference to national legislation, Italy referred to an amendment to the United States Foreign Sovereign Immunities Act, first adopted in 1996. That amendment withdraws immunity for certain specified acts (for example, torture and extra-judicial killings) if allegedly performed by a State which the United States Government has “designated as a State sponsor of terrorism” (28 *USC* 1605A). The Court notes that this amendment has no counterpart in the legislation of other States. None of the States which has enacted legislation on the subject of State immunity has made provision for the limitation of immunity on the grounds of the gravity of the acts alleged.

89. It is also noticeable that there is no limitation of State immunity by reference to the gravity of the violation or the peremptory character of the rule breached in the European Convention, the United Nations Convention or the draft Inter-American Convention. The absence of any such provision from the United Nations Convention is particularly significant, because the question whether such a provision was necessary was raised at the time that the text of what became the Convention was under consideration. In 1999 the International Law Commission established a Working Group which considered certain developments in practice regarding some issues of State immunity which had been identified by the Sixth Committee of the General Assembly. In an appendix to its report, the Working Group referred, as an additional matter, to developments regarding claims “in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *ius cogens*” and stated that this issue was one which should not be ignored, although it did not recommend any amendment to the text of the International Law Commission Articles (*Yearbook of the International Law Commission*, 1999, Vol. II (2), pp. 171-172). The matter was then considered by the Working Group established by the Sixth Committee of the General Assembly, which reported later in 1999 that it had decided not to take up the matter as “it did not seem to be ripe enough for the Working

Group to engage in a codification exercise over it” and commented that it was for the Sixth Committee to decide what course of action, if any, should be taken (United Nations doc. A/C.6/54/L.12, p. 7, para. 13). During the subsequent debates in the Sixth Committee no State suggested that a *ius cogens* limitation to immunity should be included in the Convention. The Court considers that this history indicates that, at the time of adoption of the United Nations Convention in 2004, States did not consider that customary international law limited immunity in the manner now suggested by Italy.

90. The European Court of Human Rights has not accepted the proposition that States are no longer entitled to immunity in cases regarding serious violations of international humanitarian law or human rights law. In 2001, the Grand Chamber of that Court, by the admittedly narrow majority of nine to eight, concluded that,

“Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.” (*Al-Adsani v. United Kingdom* [GC], application No. 35763/97, judgment of 21 November 2001, *ECHR Reports* 2001-XI, p. 101, para. 61; *ILR*, Vol. 123, p. 24.)

The following year, in *Kalogeropoulou and Others v. Greece and Germany*, the European Court of Human Rights rejected an application relating to the refusal of the Greek Government to permit enforcement of the *Dis-tomo* judgment and said that,

“The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity.” (Application No. 59021/00, decision of 12 December 2002, *ECHR Reports* 2002-X, p. 417; *ILR*, Vol. 129, p. 537.)

91. The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.

B. *The relationship between jus cogens and the rule of State immunity*

92. The Court now turns to the second strand in Italy’s argument, which emphasizes the *ius cogens* status of the rules which were violated by Germany during the period 1943-1945. This strand of the argument rests on the premise that there is a conflict between *ius cogens* rules forming part of the law of armed conflict and according immunity to Germany. Since *ius cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, so the argument runs, and since the rule which accords one State immunity before the courts of another does not have the status of *ius cogens*, the rule of immunity must give way.

93. This argument therefore depends upon the existence of a conflict between a rule, or rules, of *ius cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *ius cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility (as the Court has explained in paragraph 58 above). For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *ius cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission’s Articles on State Responsibility.

94. In the present case, the violation of the rules prohibiting murder, deportation and slave labour took place in the period 1943-1945. The illegality of these acts is openly acknowledged by all concerned. The application of rules of State immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated. Nor is the argument strengthened by focusing upon the duty of the wrongdoing State to make reparation, rather than upon the original wrongful act. The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected. The law of

State immunity concerns only the latter; a decision that a foreign State is immune no more conflicts with the duty to make reparation than it does with the rule prohibiting the original wrongful act. Moreover, against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.

95. To the extent that it is argued that no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens* rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application. The Court has taken that approach in two cases, notwithstanding that the effect was that a means by which a *jus cogens* rule might be enforced was rendered unavailable. In *Armed Activities*, it held that the fact that a rule has the status of *jus cogens* does not confer upon the Court a jurisdiction which it would not otherwise possess (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 64, and p. 52, para. 125). In *Arrest Warrant*, the Court held, albeit without express reference to the concept of *jus cogens*, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of *jus cogens* did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment, I.C.J. Reports 2002*, p. 24, para. 58, and p. 33, para. 78). The Court considers that the same reasoning is applicable to the application of the customary international law regarding the immunity of one State from proceedings in the courts of another.

96. In addition, this argument about the effect of *jus cogens* displacing the law of State immunity has been rejected by the national courts of the United Kingdom (*Jones v. Saudi Arabia*, House of Lords, [2007] 1 AC 270; *ILR*, Vol. 129, p. 629), Canada (*Bouzari v. Islamic Republic of Iran*, Court of Appeal of Ontario, *DLR*, 4th Series, Vol. 243, p. 406; *ILR*, Vol. 128, p. 586), Poland (*Natoniewski*, Supreme Court, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299), Slovenia (case No. Up-13/99, Constitutional Court of Slovenia), New Zealand (*Fang v. Jiang*, High Court, [2007] NZAR, p. 420; *ILR*, Vol. 141, p. 702) and Greece (*Margel-*

los, Special Supreme Court, *ILR*, Vol. 129, p. 525), as well as by the European Court of Human Rights in *Al-Adsani v. United Kingdom* and *Kalogeropoulou and Others v. Greece and Germany* (which are discussed in paragraph 90 above), in each case after careful consideration. The Court does not consider the judgment of the French *Cour de cassation* of 9 March 2011 in *La Réunion aérienne v. Libyan Arab Jamahiriya* (case No. 09-14743, 9 March 2011, *Bull. civ.*, March 2011, No. 49, p. 49) as supporting a different conclusion. The *Cour de cassation* in that case stated only that, even if a *jus cogens* norm could constitute a legitimate restriction on State immunity, such a restriction could not be justified on the facts of that case. It follows, therefore, that the judgments of the Italian courts which are the subject of the present proceedings are the only decisions of national courts to have accepted the reasoning on which this part of Italy's second argument is based. Moreover, none of the national legislation on State immunity considered in paragraphs 70-71 above, has limited immunity in cases where violations of *jus cogens* are alleged.

97. Accordingly, the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on State immunity was not affected.

C. The "last resort" argument

98. The third and final strand of the Italian argument is that the Italian courts were justified in denying Germany the immunity to which it would otherwise have been entitled, because all other attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed. Germany's response is that in the aftermath of the Second World War it made considerable financial and other sacrifices by way of reparation in the context of a complex series of inter-State arrangements under which, reflecting the economic realities of the time, no Allied State received compensation for the full extent of the losses which its people had suffered. It also points to the payments which it made to Italy under the terms of the two 1961 Agreements and to the payments made more recently under the 2000 Federal Law to various Italians who had been unlawfully deported to forced labour in Germany. Italy maintains, however, that large numbers of Italian victims were nevertheless left without any compensation.

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99. The Court notes that Germany has taken significant steps to ensure

that a measure of reparation was made to Italian victims of war crimes and crimes against humanity. Nevertheless, Germany decided to exclude from the scope of its national compensation scheme most of the claims by Italian military internees on the ground that prisoners of war were not entitled to compensation for forced labour (see paragraph 26 above). The overwhelming majority of Italian military internees were, in fact, denied treatment as prisoners of war by the Nazi authorities. Notwithstanding that history, in 2001 the German Government determined that those internees were ineligible for compensation because they had had a legal entitlement to prisoner-of-war status. The Court considers that it is a matter of surprise — and regret — that Germany decided to deny compensation to a group of victims on the ground that they had been entitled to a status which, at the relevant time, Germany had refused to recognize, particularly since those victims had thereby been denied the legal protection to which that status entitled them.

100. Moreover, as the Court has said, albeit in the different context of the immunity of State officials from criminal proceedings, the fact that immunity may bar the exercise of jurisdiction in a particular case does not alter the applicability of the substantive rules of international law (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment*, *I.C.J. Reports 2002*, p. 25, para. 60; see also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *Judgment*, *I.C.J. Reports 2008*, p. 244, para. 196). In that context, the Court would point out that whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation.

101. That notwithstanding, the Court cannot accept Italy's contention that the alleged shortcomings in Germany's provisions for reparation to Italian victims entitled the Italian courts to deprive Germany of jurisdictional immunity. The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation on the subject, nor in the jurisprudence of the national courts which have been faced with objections based on immunity, is there any evidence that entitlement to immunity is subjected to such a precondition. States also did not include any such condition in either the European Convention or the United Nations Convention.

102. Moreover, the Court cannot fail to observe that the application of any such condition, if it indeed existed, would be exceptionally difficult in practice, particularly in a context such as that of the present case, when claims have been the subject of extensive intergovernmental discussion. If one follows the Italian argument, while such discussions were still ongoing

and had a prospect of achieving a successful outcome, then it seems that immunity would still prevail, whereas, again according to this argument, immunity would presumably cease to apply at some point when prospects for an inter-State settlement were considered to have disappeared. Yet national courts in one of the countries concerned are unlikely to be well placed to determine when that point has been reached. Moreover, if a lump sum settlement has been made — which has been the normal practice in the aftermath of war, as Italy recognizes — then the determination of whether a particular claimant continued to have an entitlement to compensation would entail an investigation by the court of the details of that settlement and the manner in which the State which had received funds (in this case the State in which the court in question is located) has distributed those funds. Where the State receiving funds as part of what was intended as a comprehensive settlement in the aftermath of an armed conflict has elected to use those funds to rebuild its national economy and infrastructure, rather than distributing them to individual victims amongst its nationals, it is difficult to see why the fact that those individuals had not received a share in the money should be a reason for entitling them to claim against the State that had transferred money to their State of nationality.

103. The Court therefore rejects Italy's argument that Germany could be refused immunity on this basis.

104. In coming to this conclusion, the Court is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned.

It considers however that the claims arising from the treatment of the Italian military internees referred to in paragraph 99, together with other claims of Italian nationals which have allegedly not been settled — and which formed the basis for the Italian proceedings — could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue.

D. The combined effect of the circumstances relied upon by Italy

105. In the course of the oral proceedings, counsel for Italy maintained that the three strands of Italy's second argument had to be viewed together; it was because of the cumulative effect of the gravity of the violations, the status of the rules violated and the absence of alternative means of redress that the Italian courts had been justified in refusing to accord immunity to Germany.

106. The Court has already held that none of the three strands of the second Italian argument would, of itself, justify the action of the Italian courts. It is not persuaded that they would have that effect if taken together. Nothing in the examination of State practice lends support to the proposition that the concurrent presence of two, or even all three, of these elements would justify the refusal by a national court to accord to a respondent State the immunity to which it would otherwise be entitled.

In so far as the argument based on the combined effect of the circumstances is to be understood as meaning that the national court should balance the different factors, assessing the respective weight, on the one hand, of the various circumstances that might justify the exercise of its jurisdiction, and, on the other hand, of the interests attaching to the protection of immunity, such an approach would disregard the very nature of State immunity. As explained in paragraph 56 above, according to international law, State immunity, where it exists, is a right of the foreign State. In addition, as explained in paragraph 82 of this Judgment, national courts have to determine questions of immunity at the outset of the proceedings, before consideration of the merits. Immunity cannot, therefore, be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed.

4. Conclusions

107. The Court therefore holds that the action of the Italian courts in denying Germany the immunity to which the Court has held it was entitled under customary international law constitutes a breach of the obligations owed by the Italian State to Germany.

108. It is, therefore, unnecessary for the Court to consider a number of questions which were discussed at some length by the Parties. In particular, the Court need not rule on whether, as Italy contends, international law confers upon the individual victim of a violation of the law of armed conflict a directly enforceable right to claim compensation. Nor need it rule on whether, as Germany maintains, Article 77, paragraph 4, of the Treaty of Peace or the provisions of the 1961 Agreements amounted to a binding waiver of the claims which are the subject of the Italian proceedings. That is not to say, of course, that these are unimportant questions, only that they are not ones which fall for decision within the limits of the present case. The question whether Germany still has a responsibility towards Italy, or individual Italians, in respect of war crimes and crimes against humanity committed by it during the Second World War does not affect Germany's entitlement to immunity. Similarly, the Court's ruling on the issue of immunity can have no effect on whatever responsibility Germany may have.

IV. THE MEASURES OF CONSTRAINT TAKEN AGAINST PROPERTY BELONGING TO GERMANY LOCATED ON ITALIAN TERRITORY

109. On 7 June 2007, certain Greek claimants, in reliance on a decision of the Florence Court of Appeal of 13 June 2006, declaring enforceable in

Italy the judgment rendered by the Court of First Instance of Livadia, in Greece, which had ordered Germany to pay them compensation, entered in the Land Registry of the Province of Como a legal charge against Villa Vigoni, a property of the German State located near Lake Como (see above, paragraph 35).

110. Germany argued before the Court that such a measure of constraint violates the immunity from enforcement to which it is entitled under international law. Italy has not sought to justify that measure; on the contrary, it indicated to the Court that it "has no objection to any decision by the Court obliging Italy to ensure that the mortgage on Villa Vigoni inscribed at the land registry is cancelled".

111. As a result of Decree-Law No. 63 of 28 April 2010, Law No. 98 of 23 June 2010 and Decree-Law No. 216 of 29 December 2011, the charge in question was suspended in order to take account of the pending proceedings before the Court in the present case. It has not, however, been cancelled.

112. The Court considers that, notwithstanding the above-mentioned suspension, and the absence of any argument by Italy seeking to establish the international legality of the measures of constraint in question, a dispute still exists between the Parties on this issue, the subject of which has not disappeared. Italy has not formally admitted that the legal charge on Villa Vigoni constituted a measure contrary to its international obligations. Nor, as just stated, has it put an end to the effects of that measure, but has merely suspended them. It has told the Court, through its Agent, that the decisions of the Italian courts rendered against Germany have been suspended by legislation pending the decision of this Court, and that execution of those decisions "will only occur should the Court decide that Italy has not committed the wrongful acts complained of by Germany". That implies that the charge on Villa Vigoni might be reactivated, should the Court conclude that it is not contrary to international law. Without asking the Court to reach such a conclusion, Italy does not exclude it, and awaits the Court's ruling before taking the appropriate action thereon.

It follows that the Court should rule, as both Parties wish it to do, on the second of Germany's submissions, which concerns the dispute over the measure of constraint taken against Villa Vigoni.

113. Before considering whether the claims of the Applicant on this point are well-founded, the Court observes that the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts. Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow *ipso facto* that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question. Similarly, any waiver by a State of its jurisdictional immunity before a

foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory.

The rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity (understood *stricto sensu* as the right of a State not to be the subject of judicial proceedings in the courts of another State) are distinct, and must be applied separately.

114. In the present case, this means that the Court may rule on the issue of whether the charge on Villa Vigoni constitutes a measure of constraint in violation of Germany's immunity from enforcement, without needing to determine whether the decisions of the Greek courts awarding pecuniary damages against Germany, for purposes of whose enforcement that measure was taken, were themselves in breach of that State's jurisdictional immunity.

Likewise, the issue of the international legality of the measure of constraint in question, in light of the rules applicable to immunity from enforcement, is separate — and may therefore be considered separately — from that of the international legality, under the rules applicable to jurisdictional immunity, of the decisions of the Italian courts which declared enforceable on Italian territory the Greek judgments against Germany. This latter question, which is the subject of the third of the submissions presented to the Court by Germany (see above paragraph 17), will be addressed in the following section of this Judgment.

115. In support of its claim on the point under discussion here, Germany cited the rules set out in Article 19 of the United Nations Convention. That Convention has not entered into force, but in Germany's view it codified, in relation to the issue of immunity from enforcement, the existing rules under general international law. Its terms are therefore said to be binding, inasmuch as they reflect customary law on the matter.

116. Article 19, entitled "State immunity from post-judgment measures of constraint", reads as follows:

"No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

- (i) by international agreement;
- (ii) by an arbitration agreement or in a written contract; or
- (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed."

117. When the United Nations Convention was being drafted, these provisions gave rise to long and difficult discussions. The Court considers that it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 reflect current customary international law.

118. Indeed, it suffices for the Court to find that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim (an illustration of this well-established practice is provided by the decision of the German Constitutional Court (*Bundesverfassungsgericht*) of 14 December 1977 (*BVerfGE*, Vol. 46, p. 342; *ILLR*, Vol. 65, p. 146), by the judgment of the Swiss Federal Tribunal of 30 April 1986 in *Kingdom of Spain v. Société X* (*Annuaire suisse de droit international*, Vol. 43, 1987, p. 158; *ILLR*, Vol. 82, p. 44), as well as the judgment of the House of Lords of 12 April 1984 in *Alcom Ltd. v. Republic of Colombia* ([1984] 1 *AC* 580; *ILLR*, Vol. 74, p. 170) and the judgment of the Spanish Constitutional Court of 1 July 1992 in *Abbott v. Republic of South Africa* (*Revista española de derecho internacional*, Vol. 44, 1992, p. 565; *ILLR*, Vol. 113, p. 414)).

119. It is clear in the present case that the property which was the subject of the measure of constraint at issue is being used for governmental purposes that are entirely non-commercial, and hence for purposes falling within Germany's sovereign functions. Villa Vigoni is in fact the seat of a cultural centre intended to promote cultural exchanges between Germany and Italy. This cultural centre is organized and administered on the basis of an agreement between the two Governments concluded in the form of an exchange of notes dated 21 April 1986. Before the Court, Italy described the activities in question as a "centre of excellence for the Italian-German co-operation in the fields of research, culture and education", and recognized that Italy was directly involved in "its peculiar bi-national . . . managing structure". Nor has Germany in any way expressly consented to the taking of a measure such as the legal charge in question, or allocated Villa Vigoni for the satisfaction of the judicial claims against it.

120. In these circumstances, the Court finds that the registration of a legal charge on Villa Vigoni constitutes a violation by Italy of its obligation to respect the immunity owed to Germany.

V. THE DECISIONS OF THE ITALIAN COURTS DECLARING ENFORCEABLE
IN ITALY DECISIONS OF GREEK COURTS UPHOLDING
CIVIL CLAIMS AGAINST GERMANY

121. In its third submission, Germany complains that its jurisdictional immunity was also violated by decisions of the Italian courts declaring enforceable in Italy judgments rendered by Greek courts against Germans in proceedings arising out of the Distomo massacre. In 1995, successors in title of the victims of that massacre, committed by the German armed forces in a Greek village in June 1944, brought proceedings for compensation against Germany before the Greek courts. By a judgment of 25 September 1997, the Court of First Instance of Livadia, which had territorial jurisdiction, ordered Germany to pay compensation to the claimants. The appeal by Germany against that judgment was dismissed by a decision of the Hellenic Supreme Court of 4 May 2000, which rendered final the judgment of the Court of First Instance, and at the same time ordered Germany to pay the costs of the appeal proceedings. The successful Greek claimants under the first-instance and Supreme Court judgments applied to the Italian courts for *exequatur* of those judgments, so as to be able to have them enforced in Italy, since it was impossible to enforce them in Greece or in Germany (see above, paragraphs 30 and 32). It was on those applications that the Florence Court of Appeal ruled, allowing them by a decision of 13 June 2006, which was confirmed, following an objection by Germany, on 21 October 2008 as regards the pecuniary damages awarded by the Court of First Instance of Livadia, and by a decision of 2 May 2005, confirmed, following an objection by Germany, on 6 February 2007 as regards the award of costs made by the Hellenic Supreme Court. This latter decision was confirmed by the Italian Court of Cassation on 6 May 2008. As regards the decision confirming the *exequatur* granted in respect of the judgment of the Court of First Instance of Livadia, it has also been appealed to the Italian Court of Cassation, which dismissed that appeal on 12 January 2011.

122. According to Germany, the decisions of the Florence Court of Appeal declaring enforceable the judgments of the Livadia court and the Hellenic Supreme Court constitute violations of its jurisdictional immunity, since, for the same reasons as those invoked by Germany in relation to the Italian proceedings concerning war crimes committed in Italy between 1943 and 1945, the decisions of the Greek courts were themselves rendered in violation of that jurisdictional immunity.

123. According to Italy, on the contrary, and for the same reasons as those set out and discussed in Section III of the present Judgment, there was no violation of Germany's jurisdictional immunity, either by the decisions of the Greek courts or by those of the Italian courts which declared them enforceable in Italy.

124. It should first be noted that the claim in Germany's third submission is entirely separate and distinct from that set out in the preceding

one, which has been discussed in Section IV above (paragraphs 109 to 120). The Court is no longer concerned here to determine whether a measure of constraint — such as the legal charge on Villa Vigoni — violated Germany's immunity from enforcement, but to decide whether the Italian judgments declaring enforceable in Italy the pecuniary awards pronounced in Greece did themselves — independently of any subsequent measure of enforcement — constitute a violation of the Applicant's immunity from jurisdiction. While there is a link between these two aspects — since the measure of constraint against Villa Vigoni could only have been imposed on the basis of the judgment of the Florence Court of Appeal according to *exequatur* in respect of the judgment of the Greek court in Livadia — the two issues nonetheless remain clearly distinct. That discussed in the preceding section related to immunity from enforcement; that which the Court will now consider addresses immunity from jurisdiction. As recalled above, these two forms of immunity are governed by different sets of rules.

125. The Court will then explain how it views the issue of jurisdictional immunity in relation to a judgment which rules not on the merits of a claim brought against a foreign State, but on an application to have a judgment rendered by a foreign court against a third State declared enforceable on the territory of the State of the court where that application is brought (a request for *exequatur*). The difficulty arises from the fact that, in such cases, the court is not being asked to give judgment directly against a foreign State invoking jurisdictional immunity, but to enforce a decision already rendered by a court of another State, which is deemed to have itself examined and applied the rules governing the jurisdictional immunity of the respondent State.

126. In the present case, the two Parties appear to have argued on the basis that, in such a situation, the question whether the court seized of the application for *exequatur* had respected the jurisdictional immunity of the third State depended simply on whether that immunity had been respected by the foreign court having rendered the judgment on the merits against the third State. In other words, both Parties appeared to make the question whether or not the Florence Court of Appeal had violated Germany's jurisdictional immunity in declaring enforceable the Livadia and Hellenic Supreme Court decisions dependent on whether those decisions had themselves violated the jurisdictional immunity on which Germany had relied in its defence against the proceedings brought against it in Greece.

127. There is nothing to prevent national courts from ascertaining, before granting *exequatur*, that the foreign judgment was not rendered in breach of the immunity of the respondent State. However, for the purposes of the present case, the Court considers that it must address the issue from a significantly different viewpoint. In its view, it is unnecessary, in order to determine whether the Florence Court of Appeal violated Germany's jurisdictional immunity, to rule on the question of whether the decisions of the Greek courts did themselves violate that immunity — something, more-

over, which it could not do, since that would be to rule on the rights and obligations of a State, Greece, which does not have the status of party to the present proceedings (see *Monetary Gold Removed from Rome in 1943 (Italy v. France; United Kingdom and United States of America)*, *Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32; *East Timor (Portugal v. Australia)*, *Judgment, I.C.J. Reports 1995*, p. 105, para. 34).

The relevant question, from the Court's point of view and for the purposes of the present case, is whether the Italian courts did themselves respect Germany's immunity from jurisdiction in allowing the application for *exequatur*, and not whether the Greek court having rendered the judgment of which *exequatur* is sought had respected Germany's jurisdictional immunity. In a situation of this kind, the replies to these two questions may not necessarily be the same; it is only the first question which the Court needs to address here.

128. Where a court is seized, as in the present case, of an application for *exequatur* of a foreign judgment against a third State, it is itself being called upon to exercise its jurisdiction in respect of the third State in question. It is true that the purpose of *exequatur* proceedings is not to decide on the merits of a dispute, but simply to render an existing judgment enforceable on the territory of a State other than that of the court which ruled on the merits. It is thus not the role of the *exequatur* court to re-examine in all its aspects the substance of the case which has been decided. The fact nonetheless remains that, in granting or refusing *exequatur*, the court exercises a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment rendered on the merits in the requested State. The proceedings brought before that court must therefore be regarded as being conducted against the third State which was the subject of the foreign judgment.

129. In this regard, the Court notes that, under the terms of Article 6, paragraph 2, of the United Nations Convention:

“A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:

(a) is named as a party to that proceeding; or

(b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.”

When applied to *exequatur* proceedings, that definition means that such proceedings must be regarded as being directed against the State which was the subject of the foreign judgment. That is indeed why Germany was entitled to object to the decisions of the Florence Court of Appeal granting *exequatur* — although it did so without success — and to appeal to the Italian Court of Cassation against the judgments confirming those decisions.

130. It follows from the foregoing that the court seized of an application for *exequatur* of a foreign judgment rendered against a third State has to ask itself whether the respondent State enjoys immunity from jurisdiction — having regard to the nature of the case in which that judgment was

given — before the courts of the State in which *exequatur* proceedings have been instituted. In other words, it has to ask itself whether, in the event that it had itself been seized of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent State (see to this effect the judgment of the Supreme Court of Canada in *Kinwait Airways Corp. v. Iraq* ([2010] *SCR*, Vol. 2, p. 571), and the judgment of the United Kingdom Supreme Court in *NML Capital Limited v. Republic of Argentina* ([2011] *UKSC* 31).

131. In light of this reasoning, it follows that the Italian courts which declared enforceable in Italy the decisions of Greek courts rendered against Germany have violated the latter's immunity. For the reasons set out in Section III above of the present Judgment, the Italian courts would have been obliged to grant immunity to Germany if they had been seized of the merits of a case identical to that which was the subject of the decisions of the Greek courts which it was sought to declare enforceable (namely, the case of the Distomo massacre). Accordingly, they could not grant *exequatur* without thereby violating Germany's jurisdictional immunity.

132. In order to reach such a decision, it is unnecessary to rule on the question whether the Greek courts did themselves violate Germany's immunity, a question which is not before the Court, and on which, moreover, it cannot rule, for the reasons recalled earlier. The Court will confine itself to noting, in general terms, that it may perfectly well happen, in certain circumstances, that the judgment rendered on the merits did not violate the jurisdictional immunity of the respondent State, for example because the latter had waived its immunity before the courts hearing the case on the merits, but that the *exequatur* proceedings instituted in another State are barred by the respondent's immunity. That is why the two issues are distinct, and why it is not for this Judgment to rule on the legality of the decisions of the Greek courts.

133. The Court accordingly concludes that the above-mentioned decisions of the Florence Court of Appeal constitute a violation by Italy of its obligation to respect the jurisdictional immunity of Germany.

VI. GERMANY'S FINAL SUBMISSIONS AND THE REMEDIES SOUGHT

134. In its final submissions at the close of the oral proceedings, Germany presented six requests to the Court, of which the first three were declaratory and the final three sought to draw the consequences, in terms of reparation, of the established violations (see paragraph 17 above). It is on those requests that the Court is required to rule in the operative part of this Judgment.

135. For the reasons set out in Sections III, IV and V above, the Court will uphold Germany's first three requests, which ask it to declare, in

turn, that Italy has violated the jurisdictional immunity which Germany enjoys under international law by allowing civil claims based on violations of international humanitarian law by the German Reich between 1943 and 1945; that Italy has also committed violations of the immunity owed to Germany by taking enforcement measures against Villa Vigoni; and, lastly, that Italy has violated Germany's immunity by declaring enforceable in Italy Greek judgments based on occurrences similar to those referred to above.

136. In its fourth submission, Germany asks the Court to adjudge and declare that, in view of the above, Italy's international responsibility is engaged.

There is no doubt that the violation by Italy of certain of its international legal obligations entails its international responsibility and places upon it, by virtue of general international law, an obligation to make full reparation for the injury caused by the wrongful acts committed. The substance, in the present case, of that obligation to make reparation will be considered below, in connection with Germany's fifth and sixth submissions. The Court's ruling thereon will be set out in the operative clause. On the other hand, the Court does not consider it necessary to include an express declaration in the operative clause that Italy's international responsibility is engaged; to do so would be entirely redundant, since that responsibility is automatically inferred from the finding that certain obligations have been violated.

137. In its fifth submission, Germany asks the Court to order Italy to take, by means of its own choosing, any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable. This is to be understood as implying that the relevant decisions should cease to have effect.

According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 (a) of the International Law Commission's Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Furthermore, even if the act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission's Articles.

It follows accordingly that the Court must uphold Germany's fifth submission. The decisions and measures infringing Germany's jurisdictional immunities which are still in force must cease to have effect, and the

effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established. It has not been alleged or demonstrated that restitution would be materially impossible in this case, or that it would involve a burden for Italy out of all proportion to the benefit deriving from it. In particular, the fact that some of the violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution. On the other hand, the Respondent has the right to choose the means it considers best suited to achieve the required result. Thus, the Respondent is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect.

138. Finally, in its sixth submission, Germany asks the Court to order Italy to take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in its first submission (namely violations of international humanitarian law committed by the German Reich between 1943 and 1945).

As the Court has stated in previous cases (see, in particular, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, *Judgment, I.C.J. Reports 2009*, p. 267, para. 150), as a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed. Accordingly, while the Court may order the State responsible for an internationally wrongful act to offer assurances of non-repetition to the injured State, or to take specific measures to ensure that the wrongful act is not repeated, it may only do so when there are special circumstances which justify this, which the Court must assess on a case-by-case basis.

In the present case, the Court has no reason to believe that such circumstances exist. Therefore, it will not uphold the last of Germany's final submissions.

* * *

139. For these reasons,

THE COURT,

(1) By twelve votes to three,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under interna-

tional law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945;

IN FAVOUR: *President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Greenwood, Xue, Donoghue;*

AGAINST: *Judge Cançado Trindade, Yusuf; Judge ad hoc Gaja;*

(2) By fourteen votes to one,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by taking measures of constraint against Villa Vigoni;

IN FAVOUR: *President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; Judge ad hoc Gaja;*

AGAINST: *Judge Cançado Trindade;*

(3) By fourteen votes to one,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by declaring enforceable in Italy decisions of Greek courts based on violations of international humanitarian law committed in Greece by the German Reich;

IN FAVOUR: *President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; Judge ad hoc Gaja;*

AGAINST: *Judge Cançado Trindade;*

(4) By fourteen votes to one,

Finds that the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect;

IN FAVOUR: *President Owada; Vice-President Tomka; Judges Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; Judge ad hoc Gaja;*

AGAINST: *Judge Cançado Trindade;*

(5) Unanimously,

Rejects all other submissions made by the Federal Republic of Germany.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this third day of February, two thousand

and twelve, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany, the Government of the Italian Republic and the Government of the Hellenic Republic, respectively.

(*Signed*) Hisashi OWADA,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Judges KOROMA, KEITH and BENNOUNA append separate opinions to the Judgment of the Court; Judges CANÇADO TRINDADE and YUSUF append dissenting opinions to the Judgment of the Court; Judge *ad hoc* GAJA appends a dissenting opinion to the Judgment of the Court.

(*Initialed*) H.O.

(*Initialed*) Ph.C.

International Court of Justice

**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, p. 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 Belgium’s argument that it had in fact exercised no extraterritorial criminal jurisdiction.

The immunities of an incumbent Minister for Foreign Affairs and their role in society — Rejection of assimilation with Head of State immunities — Trend to preclude immunity when charged with international crimes — Immunity not precluded in the particular circumstances of this case — Role of international law to balance values it seeks to protect — Narrow interpretation to be given to “official acts” when immunities of an ex-Minister for Foreign Affairs under review.

No basis in international law for Court’s order to withdraw warrant.

1. We generally agree with what the Court has to say on the issues of jurisdiction and admissibility and also with the conclusions it reaches. There are, however, reservations that we find it necessary to make, both on what the Court has said and what it has chosen not to say when it deals with the merits. Moreover, we consider that the Court erred in ordering Belgium to cancel the outstanding arrest warrant.

* * *

2. In its Judgment the Court says nothing on the question of whether — quite apart from the status of Mr. Yerodia at the relevant time — the Belgian magistracy was entitled under international law to issue an arrest warrant for someone not at that time within its territory and pass it to Interpol. It has, in effect, acceded to the common wish of the Parties that

the Court should not pronounce upon the key issue of jurisdiction that divided them, but should rather pass immediately to the question of immunity as it applied to the facts of this case.

3. In our opinion it was not only desirable, but indeed necessary, that the Court should have stated its position on this issue of jurisdiction. The reasons are various. “Immunity” is the common shorthand phrase for “immunity from jurisdiction”. If there is no jurisdiction *en principe*, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise. The Court, in passing over the question of jurisdiction, has given the impression that “immunity” is a free-standing topic of international law. It is not. “Immunity” and “jurisdiction” are inextricably linked. Whether there is “immunity” in any given instance will depend not only upon the status of Mr. Yerodia but also upon what type of jurisdiction, and on what basis, the Belgian authorities were seeking to assert it.

4. While the notion of “immunity” depends, conceptually, upon a pre-existing jurisdiction, there is a distinct corpus of law that applies to each. What can be cited to support an argument about the one is not always relevant to an understanding of the other. In by-passing the issue of jurisdiction the Court has encouraged a regrettable current tendency (which the oral and written pleadings in this case have not wholly avoided) to conflate the two issues.

5. Only if it is fully appreciated that there are two distinct norms of international law in play (albeit that the one — immunity — can arise only if the other — jurisdiction — exists) can the larger picture be seen. One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights. The difficult task that international law today faces is to provide that stability in international relations by a means other than the impunity of those responsible for major human rights violations. This challenge is reflected in the present dispute and the Court should surely be engaged in this task, even as it 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 conveys 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 Rosenne who said: “It does not confer jurisdiction on the Court or detract jurisdiction from it. It limits the extent to which the Court may go in its decision.” (Counter-Memorial of Belgium, para. 2.77.)

12. Close reading of these quotations shows that Belgium is wrong if it wishes to convey to the Court that the *non ultra petita* rule would bar it from addressing matters not included in the submissions. It only precludes the Court from deciding upon such matters in the operative part of the Judgment since that is the place where the submissions are dealt with. But it certainly does not prevent the Court from considering in its reasoning issues which it deems relevant for its conclusions. As Sir Gerald Fitzmaurice said:

"unless certain distinctions are drawn, there is a danger that [the *non ultra petita* rule] might hamper the tribunal in coming to a correct decision, and might even cause it to arrive at a legally incorrect one, by compelling it to neglect juridically relevant factors" (*The Law and Procedure of the International Court of Justice*, 1986, Vol. II, pp. 529-530).

13. Thus the *ultra petita* rule can operate to preclude a finding of the Court, in the *dispositif*, on a question not asked in the final submissions by a party. But the Court should not, because one or more of the parties finds it more comfortable for its position, forfeit necessary steps on the way to the finding it *does* make in the *dispositif*. The Court has acknowledged this in paragraph 43 of the present Judgment. But having reserved the right to deal with aspects of universal jurisdiction in its reasoning, "should it deem this necessary or desirable", the Court says nothing more on the matter.

14. This may be contrasted with the approach of the Court in the Advisory Opinion request put to it in *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (I.C.J. Reports 1962, pp. 156-157). (The Court was constrained by the request put to it, rather than by the final submissions of the Applicant, but the point of principle remains the same.) The Court was asked by the General Assembly whether the expenditures incurred in connection with UNEF and ONUC constituted "expenses of the organization" for purposes of Article 17, paragraph 2, of the Charter.

15. France had in fact proposed an amendment to this request, whereby the Court would have been asked to consider whether the expenditures in question were made in conformity with the provisions of the Charter, before proceeding to the question asked. This proposal was rejected. The Court stated

"The rejection of the French amendment does not constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were 'decided on in conformity with the Charter', if the Court finds such consideration appropriate. It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion." (*Ibid.*, p. 157.)

The Court further stated that it

"has been asked to answer a specific question related to certain identified expenditures which have actually been made, but the Court would not adequately discharge the obligation incumbent on it unless it examined in some detail various problems raised by the question which the General Assembly has asked" (*ibid.*, p. 158).

16. For all the reasons expounded above, the Court should have "found it appropriate" to deal with the question of whether the issue and international circulation of a warrant based on universal jurisdiction in the absence of Mr. Yerodia's presence on Belgian territory was unlawful. This should have been done before making a finding on immunity from jurisdiction, and the Court should indeed have "examined in some detail various problems raised" by the request as formulated by the Congo in its final submissions.

17. In agreeing to pronounce upon the question of immunity without addressing the question of a jurisdiction from which there could be immunity, the Court has allowed itself to be manoeuvred into answering a hypothetical question. During the course of the oral pleadings Belgium drew attention to the fact that Mr. Yerodia had ceased to hold any ministerial office in the Government of the Democratic Republic of the Congo. In Belgium's view, this meant that the Court should declare the request to pronounce upon immunity to be inadmissible. In Belgium's view the case had become one "about legal principle and the speculative consequences for the immunities of Foreign Ministers from the possible action of a Belgian judge" (CR 2001/8, p. 26, para. 43). The dispute was "a difference of opinion of an abstract nature" (CR 2001/8, p. 36, para. 71). The Court should not "enter into a debate which it may well come to see as essentially an academic exercise" (CR 2001/9, p. 7, para. 4 (*translation by the Registry*)).

18. In its Judgment the Court rightly rejects those contentions (see Judgment, paras. 30-32). But nothing is more academic, or abstract, or speculative, than pronouncing on an immunity from a jurisdiction that may, or may not, exist. It is regrettable that the Court has not followed the logic of its own findings in the *Certain Expenses* case, and in this Judgment addressed in the necessary depth the question of whether the Belgian authorities could legitimately have invoked universal jurisdiction in issuing and circulating the arrest warrant for the charges contained therein, and for a person outside the territorial jurisdiction at the moment of the issue of the warrant. Only if the answer to these is in the affirmative does the question arise: "Nevertheless, was Mr. Yerodia immune from such exercise of jurisdiction, and by reference to what moment of time is that question to be answered?"

* * *

19. We therefore turn to the question whether States are entitled to exercise jurisdiction over persons having no connection with the forum State when the accused is not present in the State's territory. The necessary point of departure must be the sources of international law identified in Article 38, paragraph 1 (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 1988, provides for the prosecution in Australia of crimes committed between 1 September 1939 and 8 May 1945 by persons who were Australian citizens or residents at the times of being charged with the offences (Arts. 9 and 11). The United Kingdom War Crimes Act of 1991 enables proceedings to be brought for murder, manslaughter or culpable homicide, committed between 1 September 1935 and 5 June 1945, in a place that was part of Germany or under German occupation, and in circumstances where the accused was at the time, or has become, a British citizen or resident of the United Kingdom. The statutory jurisdiction provided for by France, Germany and (in even broader terms) the Netherlands, refer for their jurisdictional basis to the jurisdictional provisions in those international treaties to which the legislation was intended to give effect. It should be noted, however, that the German Government on 16 January 2002 has submitted a legislative proposal to the German Parliament, section 1 of which provides:

“This Code governs all the punishable acts listed herein violating public international law, [and] in the case of felonies listed herein [this Code governs] even if the act was committed abroad and does not show any link to [Germany].”

The Criminal Code of Canada 1985 allows the execution of jurisdiction when at the time of the act or omission the accused was a Canadian citizen or “employed by Canada in a civilian or military capacity”; or the “victim is a Canadian citizen or a citizen of a State that is allied with Canada in an armed conflict”, or when “at the time of the act or omission Canada could, in conformity with international law, exercise jurisdiction over the person on the basis of the person’s presence in Canada” (Art. 7).

21. All of these illustrate the trend to provide for the trial and punishment under international law of certain crimes that have been committed extraterritorially. But none of them, nor the many others that have been studied by the Court, represent a classical assertion of a universal jurisdiction over particular offences committed elsewhere by persons having no relationship or connection with the forum State.

22. The case law under these provisions has largely been cautious so

far as reliance on universal jurisdiction is concerned. In the *Pinochet* case in the English courts, the jurisdictional basis was clearly treaty based, with the double criminality rule required for extradition being met by English legislation in September 1988, after which date torture committed abroad was a crime in the United Kingdom as it already was in Spain. In Australia the Federal Court referred to a group of crimes over which international law granted universal jurisdiction, even though national enabling legislation would also be needed (*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 (*Cvijetkovic*, 1994). In France it has been held by a *juge d’instruction* that the Genocide Convention does not provide for universal jurisdiction (*in re Javor*, reversed in the Cour d’Appel on other grounds. The Cour de Cassation ruling equally does not suggest universal jurisdiction). The *Munyeshyaka* finding by the Cour d’Appel (1998) relies for a finding — at first sight inconsistent — upon cross-reference into the Statute of the International Tribunal for Rwanda as the jurisdictional basis. In the *Qaddafi* case the Cour d’Appel relied on passive personality and not on universal jurisdiction (in the Cour de Cassation it was immunity that assumed central importance).

23. In the *Bouterse* case the Amsterdam Court of Appeal concluded that torture was a crime against humanity, and as such an “extraterritorial jurisdiction” could be exercised over a non-national. However, in the Hoge Raad, the Dutch Supreme Court attached conditions to this exercise of extraterritorial jurisdiction (nationality, or presence within the Netherlands at the moment of arrest) on the basis of national legislation.

24. By contrast, a universal jurisdiction has been asserted by the Bavarian Higher Regional Court in respect of a prosecution for genocide (the accused in this case being arrested in Germany). And the case law of the United States has been somewhat more ready to invoke “universal jurisdiction”, though considerations of passive personality have also been of key importance (*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-

diction Principle: Nature and Scope”, *Anuario Mexicano de Derecho Internacional*, Vol. 1, p. 58 (2001). This is doubtful.

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 prosequi* 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 Henzlin, *Le principe de l’universalité en droit pénal international: droit et obligation pour les Etats 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 (E/CN.7/AC.3/9, 11 September 1958, p. 17, fn. 43; cf. E/CN.7/AC.3/9 and Add.1, E/CONF.34/1/Add.1, 6 January 1961, p. 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 prosequi*, 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 préparatoires* show States for whom mere presence was an insufficient ground for jurisdiction beginning reluctantly to support this particular type of formula *because of the gravity of the offence*. Thus the representative of the United Kingdom stated that his country "would see great difficulty in assuming jurisdiction merely on the ground that an aircraft carrying a hijacker had landed in United Kingdom territory". Further,

"normally his country did not accept the principle that the mere presence of an alleged offender within the jurisdiction of a State entitled that State to try him. In view, however, of the gravity of the offence . . . he was prepared to support . . . [the proposal on mandatory jurisdiction on the part of the State where a hijacker is found]." (Hague Conference, p. 75, para. 18.)

36. It is also to be noted that Article 4, paragraphs 1 and 2, provides for the mandatory exercise of jurisdiction in the absence of extradition; but does not preclude criminal jurisdiction exercised on alternative grounds of jurisdiction in accordance with national law (though those possibilities are not made compulsory under the Convention).

37. Comparable jurisdictional provisions are to be found in Articles 5 and 8 of the International Convention against the Taking of Hostages of 17 December 1979. The obligation enunciated in Article 8 whereby a State party shall "without exception whatsoever and whether or not the offence was committed in its territory" submit the case for prosecution if

it does not extradite the alleged offender, was again regarded as necessary by the majority, given the nature of the crimes (Summary Record, *Ad Hoc* Committee on the Drafting of an International Convention against the Taking of Hostages (A/AC.188/SR.5, 7, 8, 11, 14, 15, 16, 17, 23, 24 and 35)). The United Kingdom cautioned against moving to universal criminal jurisdiction (*ibid.*, A/AC.188/SR.24, para. 27) while others (Poland, A/AC.188/SR.23, para. 18; Mexico, A/AC.188/SR.16, para. 11) felt the introduction of the principle of universal jurisdiction to be essential. The USSR observed that no State could exercise jurisdiction over crimes committed in another State by nationals of that State without contravening Article 2, paragraph 7, of the Charter. The Convention provisions were in its view to apply only to hostage taking that was a manifestation of international terrorism — another example of initial and understandable positions on jurisdiction being modified in the face of the exceptional gravity of the offence.

38. The Convention against Torture, of 10 December 1984, establishes in Article 5 an obligation to establish jurisdiction

- "(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is a national of that State;
- (c) When the victim is a national of that State if that State considers it appropriate."

If the person alleged to have committed the offence is found in the territory of a State party and is not extradited, submission of the case to the prosecuting authorities shall follow (Art. 7). Other grounds of criminal jurisdiction exercised in accordance with the relevant national law are not excluded (Art. 5, para. 3), making clear that Article 5, paragraphs 1 and 2, must not be interpreted *a contrario*. (See J. H. Burgers and H. Danelius, *The United Nations Convention against Torture*, 1988, p. 133.)

39. The passage of time changes perceptions. The jurisdictional ground that in 1961 had been referred to as the principle of "primary universal repression" came now to be widely referred to by delegates as "universal jurisdiction" — moreover, a universal jurisdiction thought appropriate, since torture, like piracy, could be considered an "offence against the law of nations" (United States: E/CN.4/1367, 1980). Australia, France, the Netherlands and the United Kingdom eventually dropped their objection that "universal jurisdiction" over torture would create problems under their domestic legal systems. (See E/CN.4/1984/72.)

- 40. This short historical survey may be summarized as follows.
- 41. The parties to these treaties agreed both to grounds of jurisdiction

and as to the obligation to take the measures necessary to establish such jurisdiction. The specified grounds relied on links of nationality of the offender, or the ship or aircraft concerned, or of the victim. See, for example, Article 4 (1), Hague Convention; Article 3 (1), Tokyo Convention; Article 5, Hostages Convention; Article 5, Torture Convention. These may properly be described as treaty-based broad extraterritorial jurisdiction. But in addition to these were the parallel provisions whereby a State party in whose jurisdiction the alleged perpetrator of such offences is found shall prosecute him or extradite him. By the loose use of language the latter has come to be referred to as "universal jurisdiction", though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.

* * *

42. Whether this obligation (whether described as the duty to establish universal jurisdiction, or, more accurately, the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events) is an obligation only of treaty law, *inter partes*, or whether it is now, *at least as regards the offences articulated in the treaties*, an obligation of customary international law was pleaded by the Parties in this case but not addressed in any great detail.

43. Nor was the question of whether any such general obligation applies to crimes against humanity, given that those too are regarded everywhere as comparably heinous crimes. Accordingly, we offer no view on these aspects.

44. However, we note that the inaccurately termed "universal jurisdiction principle" in these treaties is a principle of *obligation*, while the question in this case is whether Belgium had the right to issue and circulate the arrest warrant if it so chose.

If a dispassionate analysis of State practice and Court decisions suggests that no such jurisdiction is presently being exercised, the writings of eminent jurists are much more mixed. The large literature contains vigorous exchanges of views (which have been duly studied by the Court) suggesting profound differences of opinion. But these writings, important and stimulating as they may be, cannot of themselves and without reference to the other sources of international law, evidence the existence of a jurisdictional norm. The assertion that certain treaties and court decisions rely on universal jurisdiction, which in fact they do not, does not evidence an international practice recognized as custom. And the policy arguments advanced in some of the writings can certainly suggest why a practice or a court decision should be regarded as desirable, or indeed

lawful; but contrary arguments are advanced, too, and in any event these also cannot serve to substantiate an international practice where virtually none exists.

45. That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable. As we have seen, virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction. This does not necessarily indicate, however, that such an exercise would be unlawful. In the first place, national legislation reflects the circumstances in which a State provides in its own law the ability to exercise jurisdiction. But a State is not required to legislate up to the full scope of the jurisdiction allowed by international law. The war crimes legislation of Australia and the United Kingdom afford examples of countries making more confined choices for the exercise of jurisdiction. Further, many countries have no national legislation for the exercise of well recognized forms of extraterritorial jurisdiction, sometimes notwithstanding treaty obligations to enable themselves so to act. National legislation may be illuminating as to the issue of universal jurisdiction, but not conclusive as to its legality. Moreover, while none of the national case law to which we have referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an *opinio juris* on the illegality of such a jurisdiction. In short, national legislation and case law — that is, State practice — is neutral as to exercise of universal jurisdiction.

46. There are, moreover, certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful. The duty to prosecute under those treaties which contain the *aut dedere aut prosequi* provisions opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality (whether as perpetrator or victim). The 1949 Geneva Conventions lend support to this possibility, and are widely regarded as today reflecting customary international law. (See, for example, Cherif Bassiouni, *International Criminal Law*, Vol. III: *Enforcement*, 2nd ed., 1999, p. 228; Theodor Meron, "International Criminalization of Internal Atrocities", 89 *AJIL* (1995), p. 576.)

47. The contemporary trends, reflecting international relations as they stand at the beginning of the new century, are striking. The movement is towards bases of jurisdiction other than territoriality. "Effects" or "impact" jurisdiction is embraced both by the United States and, with certain qualifications, by the European Union. Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in

the legislation of various countries (the United States, Ch. 113A, 1986 Omnibus Diplomatic and Antiterrorism Act; France, Art. 689, Code of Criminal Procedure, 1975), and today meets with relatively little 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 torture committed in a variety of countries (Paraguay, Chile, Argentina, Guatemala), and with respect to other major human rights violations in yet other countries. While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.

49. Belgium — and also many writers on this subject — find support for the exercise of a universal criminal jurisdiction *in absentia* in the “*Lotus*” case. Although the case was clearly decided on the basis of jurisdiction over damage to a vessel of the Turkish navy and to Turkish nationals, it is the famous dictum of the Permanent Court which has attracted particular attention. The Court stated that:

“[T]he first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the 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 Shahabuddeen’s dissenting opinion in the case concerning *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 394-396.) Nevertheless, it represents a continuing potential in the context of jurisdiction over international crimes.

51. That being said, the dictum represents the high water mark of *laissez-faire* in international relations, and an era that has been 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 prosequi* 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, narco-tics and torture are built around the concept of *aut dedere aut prosequi*. *Definitionally, this envisages presence on the territory*. There cannot be an obligation to extradite someone you choose not to try unless that person is within your reach. National legislation, enacted to give effect to these treaties, quite naturally also may make mention of the necessity of the presence of the accused. These sensible realities are critical for the obligatory exercise of *aut dedere aut prosequi* jurisdiction, but cannot be interpreted *a contrario* so as to exclude a voluntary exercise of a universal jurisdiction.

58. If the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the *aut dedere* principle) which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction.

* * *

59. If, as we believe to be the case, a State may choose to exercise a universal criminal jurisdiction *in absentia*, it must also ensure that certain safeguards are in place. They are absolutely essential to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations between States.

No exercise of criminal jurisdiction may occur which fails to respect the inviolability or infringes the immunities of the person concerned. We return below to certain aspects of this facet, but will say at this juncture that commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate those principles. The function served by the international law of immunities does not require that States fail to keep themselves informed.

A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned. The Court makes reference to these elements in the context of this case at paragraph 16 of its Judgment.

Further, such charges may only be laid by a prosecutor or judge 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 international 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 judge 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 48th session, provides that crimes against humanity

“means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or any organization or group:

- (a) Murder;
- (b) Extermination;
- (c) Torture;
- (d) Enslavement;
- (e) Persecution on political, racial, religious or ethnic grounds;
- (f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
- (g) Arbitrary deportation or forcible transfer of population;
- (h) Arbitrary imprisonment;
- (i) Forced disappearance of persons;
- (j) Rape, enforced prostitution and other forms of sexual abuse;
- (k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm”.

63. The Belgian legislation of 1999 asserts a universal jurisdiction over acts broadly defined as “grave breaches of international humanitarian law”, and the list is a compendium of war crimes and the Draft Codes of Offences listing of crimes against humanity, with genocide being added. Genocide is also included as a listed “crime against humanity” in the 1968 Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity, as well as being included in the ICTY, ICTR and ICC Statutes.

64. The arrest warrant issued against Mr. Yerodia accuses him both of war crimes and of crimes against humanity. As regards the latter, charges of incitement to racial hatred, which are said to have led to murders and lynchings, were specified. Fitting of this charge within the generally understood substantive context of crimes against humanity is not without its problems. “Racial hatred” would need to be assimilated to “persecution on racial grounds”, or, on the particular facts, to mass murder and extermination. Incitement to perform any of these acts is not in terms listed in the usual definitions of crimes against humanity, nor is it explicitly mentioned in the Statutes of the ICTY or the ICTR, nor in the Rome

Statute for the ICC. However, Article 7 (1) of the ICTY and Article 6 (1) of the ICTR do stipulate that

“any person who planned, instigated, ordered, committed or otherwise aided or abetted in the planning, preparation or execution of a crime referred to [in the relevant articles: crimes against humanity being among them] shall be individually responsible for the crime”.

In the *Akayesu* Judgment (96-4-T) a Chamber of the ICTR has held that liability for a crime against humanity includes liability through incitement to commit the crime concerned (paras. 481-482). The matter is dealt with in a comparable way in Article 25 (3) of the Rome Statute.

65. It would seem (without in any way pronouncing upon whether Mr. Yerodia did or did not perform the acts with which he is charged in the warrant) that the acts alleged do fall within the concept of “crimes against humanity” and would be within that small category in respect of which an exercise of universal jurisdiction is not precluded under international law.

* * *

66. A related point can usefully be dealt with at this juncture. Belgium contended that, regardless of how international law stood on the matter of universal jurisdiction, it had in fact exercised no such jurisdiction. Thus, according to Belgium, there was neither a violation of any immunities that Mr. Yerodia might have, nor any infringement of the sovereignty of the Congo. To this end, Belgium, in its Counter-Memorial, observed that immunity from enforcement of the warrant was carefully provided for “representatives of foreign States who visit Belgium on the basis of any official invitation. In such circumstances, the warrant makes clear that the person concerned would be immune from enforcement in Belgium” (Counter-Memorial of Belgium, para. 1.12). Belgium further observed that the arrest warrant

“has no legal effect at all either in or as regards the DRC. Although the warrant was circulated internationally for information by Interpol in June 2000, it was not the subject of a Red Notice. Even had it been, the legal effect of Red Notices is such that, for the DRC, it would not have amounted to a request for provisional arrest, let alone a formal request for extradition.” (Counter-Memorial of Belgium, para. 3.1.12.) [*Translation by the Registry.*]

67. It was explained to the Court that a primary purpose in issuing an international warrant was to learn the whereabouts of a person. Mr. Yerodia’s whereabouts were known at all times.

68. We have not found persuasive the answers offered by Belgium to a question put to it by Judge Koroma, as to what the *purpose* of the warrant was, if it was indeed so carefully formulated as to render it unenforceable.

69. We do not feel it can be said that, given these explanations by Belgium, there was no exercise of jurisdiction as such that could attract immunity or infringe the Congo’s sovereignty. If a State issues an arrest warrant against the national of another State, that other State is entitled to treat it as such — certainly unless the issuing State draws to the attention of the national State the clauses and provisions said to vacate the warrant of all efficacy. Belgium has conceded that the purpose of the international circulation of the warrant was “to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium”. An international arrest warrant, even though a Red Notice has not yet been linked, is analogous to the locking-on of radar to an aircraft: it is already a statement of willingness and ability to act and as such may be perceived as a threat so to do at a moment of Belgium’s choosing. Even if the action of a third State is required, the ground has been prepared.

* * *

70. We now turn to the findings of the Court on the impact of the issue of circulation of the warrant on the inviolability and immunity of Mr. Yerodia.

71. As to the matter of immunity, although we agree in general with what has been said in the Court’s Judgment with regard to the specific issue put before it, we nevertheless feel that the approach chosen by the Court has to a certain extent transformed the character of the case before it. By focusing exclusively on the immunity issue, while at the same time bypassing the question of jurisdiction, the impression is created that immunity has value *per se*, whereas in reality it is an exception to a normative rule which would otherwise apply. It reflects, therefore, an interest which in certain circumstances prevails over an otherwise predominant interest, it is an exception to a jurisdiction which normally can be exercised and it can only be invoked when the latter exists. It represents an interest of its own that must always be balanced, however, against the interest of that norm to which it is an exception.

72. An example is the evolution of 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 extraterritorial 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 than sanguine about examples given by the Court of such circumstances. The chance that a Minister for Foreign Affairs will be tried in his own country in accordance with the relevant rules of domestic law or that his immunity will be waived by his own State is not high as long as there has been no change of power, whereas the existence of a competent international criminal court to initiate criminal proceedings is rare; moreover, it is quite risky to expect too much of a future international criminal court in this respect. The only credible alternative therefore seems to be the possibility of starting proceedings in a foreign court after the suspected person ceases to hold the office of Foreign Minister. This alternative, however, can also be easily forestalled by an unco-operative government that keeps the Minister in office for an as yet indeterminate period.

79. We wish to point out, however, that the frequently expressed conviction of the international community that perpetrators of grave and inhuman international crimes should not go unpunished does not *ipso facto* mean that immunities are unavailable whenever impunity would be the outcome. The nature of such crimes and the circumstances under which they are committed, usually by making use of the State apparatus, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him or her immunity from criminal process. But immunities serve other purposes which have their own intrinsic value and to which we referred in paragraph 77 above. International law

seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other. A State may exercise the criminal jurisdiction which it has under international law, but in doing so it is subject to other legal obligations, whether they pertain to the non-exercise of power in the territory of another State or to the required respect for the law of diplomatic relations or, as in the present case, to the procedural immunities of State officials. In view of the worldwide aversion to these crimes, such immunities have to be recognized with restraint, in particular when there is reason to believe that crimes have been committed which have been universally condemned in international conventions. It is, therefore, necessary to analyse carefully the immunities which under customary international law are due to high State officials and, in particular, to Ministers for Foreign Affairs.

80. Under traditional customary law the Head of State was seen as personifying the sovereign State. The immunity to which he was entitled was therefore predicated on status, just like the State he or she symbolized. Whereas State practice in this regard is extremely scarce, the immunities to which other high State officials (like Heads of Government and Ministers for Foreign Affairs) are entitled have generally been considered in the literature as merely functional. (Cf. Arthur Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des cours de l'Académie de droit international de La Haye*, 1994, Vol. 247, pp. 102-103.)

81. We have found no basis for the argument that Ministers for Foreign Affairs are entitled to the same immunities as Heads of State. In this 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 *J. 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 the event 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.